

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES B. SCOTT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44836

JAMES B. SCOTT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44837

JAMES B. SCOTT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44838

**FILED**

AUG 02 2005

ORDER OF AFFIRMANCE

ANDREW M. BLOOM  
CLERK OF THE SUPREME COURT  
BY *J. Richards*  
DEPUTY CLERK

These are consolidated appeals from an order of the district court dismissing appellant James B. Scott's post-conviction petitions for writs of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On November 5, 1999, Scott was separately convicted, pursuant to guilty pleas, of two counts of grand larceny (district court case nos. CR99-1677 and CR99-1695) and one count of burglary (district court case no. CR99-1678). The district court sentenced Scott to serve three consecutive prison terms of 40-120 months and ordered him to pay

\$125.00 in restitution. This court dismissed Scott's direct appeals.<sup>1</sup> The remittiturs issued on April 25, 2000.

On April 25, 2000, Scott filed a proper person post-conviction petition for a writ of habeas corpus in all three cases in the district court. The State filed a motion to dismiss Scott's petition, and Scott filed a proper person opposition to the State's motion to dismiss. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Scott or conduct an evidentiary hearing. On September 12, 2000, the district court granted the State's motion and dismissed Scott's petition. This court affirmed the district court's order on appeal.<sup>2</sup>

On August 27, 2003, Scott filed another proper person post-conviction petition for a writ of habeas corpus in all three cases in the district court. The State filed a motion to dismiss Scott's successive habeas petition based on the procedural bar. The district court appointed counsel to represent Scott, and counsel filed a supplement to the petition and an opposition to the State's motion to dismiss. The district court conducted a hearing, and on November 24, 2004, entered an order granting the State's motion and dismissing Scott's petition. This timely appeal followed.

Application of the procedural default rules to post-conviction petitions for writs of habeas corpus is mandatory.<sup>3</sup> The Nevada Legislature "never intended for petitioners to have multiple opportunities

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<sup>1</sup>Scott v. State, Docket Nos. 35139, 35140, 35145 (Order Dismissing Appeals, March 30, 2000).

<sup>2</sup>Scott v. State, Docket Nos. 36812, 36813, 36827 (Order of Affirmance, April 20, 2001).

<sup>3</sup>State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).

to obtain post-conviction relief absent extraordinary circumstances.”<sup>4</sup> In this case, the district court found that Scott’s petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.<sup>5</sup> Further, we note that Scott filed the instant petition more than three years after this court issued the remittiturs from his direct appeals, and thus, Scott’s petition was untimely filed.<sup>6</sup> Therefore, Scott’s petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup> Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition.<sup>8</sup> Without good cause for the delay and prejudice, this court will excuse the procedural bar only if the petitioner can demonstrate that a failure to consider his claims would result in a fundamental miscarriage of justice.<sup>9</sup> A colorable showing of actual innocence may excuse a failure to demonstrate cause to excuse procedural bars under the fundamental miscarriage of justice standard.<sup>10</sup> “To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no

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<sup>4</sup>Pellegrini v. State, 117 Nev. 860, 876, 34 P.3d 519, 530 (2001).

<sup>5</sup>See NRS 34.810(2).

<sup>6</sup>See NRS 34.726(1).

<sup>7</sup>See id.; NRS 34.810(3).

<sup>8</sup>See Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998), clarified by Hathaway v. State 119 Nev. 248, 71 P.3d 503 (2003); see also Murray v. Carrier, 477 U.S. 478, 488 (1986).

<sup>9</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. NRS 34.800(1).

<sup>10</sup>Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

reasonable juror would have convicted him absent a constitutional violation.”<sup>11</sup>

In the proceedings below, Scott conceded that his second petition was untimely and successive, but argued that the procedural bars should be excused because: (1) the delay was caused by “a Federal Court Order, granting leave to return to the state courts to exhaust sub-parts”;<sup>12</sup> (2) he received ineffective assistance of counsel; and (3) he was actually innocent. At the hearing on the State’s motion to dismiss, the only argument forwarded by counsel as good cause to excuse the procedural defects was Scott’s alleged innocence on one of the grand larceny counts (district court case no. CR99-1695). The district court determined that Scott “failed to meet his burden” of alleging facts sufficient to demonstrate his innocence.

On appeal, Scott contends that the district court erred in determining that his petition was procedurally barred. Scott argues that he is innocent of one of the grand larceny counts and that he could prove his innocence at an evidentiary hearing by presenting a videotape of the crime and the testimony of his codefendants. We disagree with Scott’s contention and conclude that a fundamental miscarriage of justice would not occur through application of the procedural bars. Scott claimed that he was not present at the time of the purse-snatching at the Boomtown

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<sup>11</sup>Id. (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

<sup>12</sup>This court has repeatedly stated that failure to exhaust state court remedies for purpose of federal review does not provide good cause sufficient to excuse the procedural bars that apply to all petitions challenging a judgment of conviction pursuant to NRS chapter 34. See generally Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).



cc: Second Judicial District Court Dept. 9, District Judge  
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