

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

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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.¹ 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.²

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.³ The Nevada Legislature "never intended for petitioners to have multiple opportunities

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

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

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

to obtain post-conviction relief absent extraordinary circumstances.”⁴ 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.⁵ 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.⁶ Therefore, Scott’s petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition.⁸ 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.⁹ A colorable showing of actual innocence may excuse a failure to demonstrate cause to excuse procedural bars under the fundamental miscarriage of justice standard.¹⁰ “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

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

⁵See NRS 34.810(2).

⁶See NRS 34.726(1).

⁷See id.; NRS 34.810(3).

⁸See 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).

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

¹⁰Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

reasonable juror would have convicted him absent a constitutional violation.”¹¹

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”;¹² (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


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


¹²This 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).

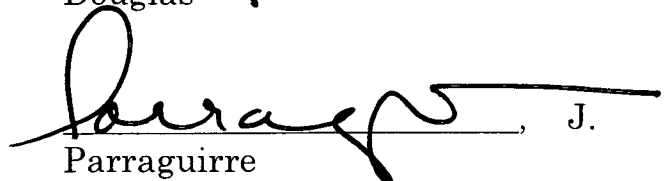
Casino, however, one of his codefendants testified at the preliminary hearing that Scott was driving the getaway car. At his arraignment, the district court found a sufficient factual basis to accept Scott's guilty pleas. In the district court's order dismissing Scott's successive petition, the district court referred to a written statement made by Scott that was attached to the presentence investigation report where he stated that he "did not actually commit the physical crime but I was an assessory [sic] I really did not realize that driving the vehical [sic] was the actual crime." In his statement, Scott admitted that the State could have proceeded against him on both aiding and abetting and conspiracy theories. Therefore, our review of the record reveals that Scott's argument that he is innocent of one of the grand larceny charges is not credible and belied by the record. Accordingly, we conclude that the district court did not err in dismissing Scott's petition.

Having considered Scott's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk