

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45634

FILED

FEB 10 2006

ORDER OF AFFIRMANCE

JANET M. GLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On August 20, 1996, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's direct appeal.¹ The remittitur issued on July 7, 1999.

On May 5, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On the

¹Rodriguez v. State, Docket No. 29730 (Order Dismissing Appeal, June 8, 1999).

same date, appellant also requested the appointment of counsel. On August 16, 2000, the district court denied the petition. On February 27, 2002, this court affirmed the district court's denial of the petition.²

On April 5, 2005, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition as being successive. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 2, 2005, the district court denied appellant's petition as untimely and successive. This appeal followed.

Appellant filed his petition approximately five years after the remittitur was issued in his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ A petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a

²Rodriguez v. State, Docket No. 36657 (Order of Affirmance, February 27, 2002).

³See NRS 34.726(1).

⁴See NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(3).

fundamental miscarriage of justice.⁶ A reviewing court must reach a claim if failure to consider it would result in a fundamental miscarriage of justice, i.e., where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.⁷ This requires a petitioner to show "that it is more likely than not that no reasonable juror would have convicted him."⁸ "[A]ctual innocence' means factual innocence, not mere legal insufficiency."⁹

Appellant did not attempt to demonstrate good cause or prejudice to excuse the procedural defects. Rather, appellant argued that a failure to review his claims would result in a fundamental miscarriage of justice. Specifically, appellant argued that he is actually innocent of the murders for which he was convicted.¹⁰ Appellant contended that he was

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁷See Bousley v. U.S., 523 U.S. 614, 622 (1998); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

⁸Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

⁹Bousley, 523 U.S. at 623-624 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

¹⁰Appellant raised several issues previously raised and decided by this court in his direct appeal and his earlier petition for writ of habeas corpus. The doctrine of the law of the case prevents further litigation of these issues. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). To the extent that appellant raised any of the following issues independently
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actually innocent because the witnesses that testified at his trial were not credible, there was evidence presented of other possible defendants, the lack of scientific evidence did not identify appellant as the perpetrator, and he had an alibi for the time of the murders.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was actually innocent. It is for the jury to determine the degree of weight and credibility to give testimony, and their decision will not be disturbed on appeal where there is substantial evidence to support the verdict.¹¹ All of the evidence that appellant contended proved his innocence was presented to the jury and the jury could reasonably infer from the substantial evidence presented that appellant committed two murders with a deadly weapon. Therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred.

... continued

from his innocence claim, we conclude that they are waived; they should have been raised on direct appeal or in his prior petition for writ of habeas corpus and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

¹¹Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³

Douglas J.
Douglas

Becker J.
Becker

Parraguirre J.
Parraguirre

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Sally L. Loehrer, District Judge
Fernando Rodriguez
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk