

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT NATHANIEL LEE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46164

**FILED**

FEB 24 2006

ORDER OF AFFIRMANCE

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

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

On July 13, 1990, the district court convicted appellant, pursuant to a jury verdict, of burglary, attempted murder with the use of a deadly weapon, two counts of sexual assault with the use of a deadly weapon, and robbery 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, and consecutive terms totaling 80 years.<sup>1</sup> This court affirmed appellant's judgment of conviction on direct appeal.<sup>2</sup> The remittitur issued on August 6, 1991.

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<sup>1</sup>An amended judgment of conviction was filed on December 6, 1990.

<sup>2</sup>Lee v. State, Docket No. 21387 (Affirmance, July 21, 1991).

On January 9, 1992, appellant filed a post-conviction petition for a writ of habeas corpus in the district court, with the assistance of counsel. The district court held an evidentiary hearing on July 17, 1992. On September 24, 1992, the district court denied the petition. On August 26, 1993, this court dismissed appellant's appeal from the district court's denial of the petition.<sup>3</sup>

On July 20, 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 procedurally barred and specifically pleaded laches. 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 procedurally barred. This appeal followed.

Appellant filed his petition approximately fourteen years after the remittitur was issued in his direct appeal. Thus, appellant's petition was untimely filed.<sup>4</sup> Moreover, appellant's petition was successive because he had previously raised some of his claims in his direct appeal and a previously filed a post-conviction petition for a writ of habeas corpus; the petition was also an abuse of the writ because appellant raised new claims

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<sup>3</sup>Lee v. State, Docket No. 24230 (Order Dismissing Appeal, August 26, 1993).

<sup>4</sup>See NRS 34.726(1).

for relief.<sup>5</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>6</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>7</sup>

A petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>8</sup> 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.<sup>9</sup> This requires a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him."<sup>10</sup> "[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>11</sup>

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<sup>5</sup>See NRS 34.810(2); NRS 34.810(1)(b).

<sup>6</sup>See NRS 34.726(1); NRS 34.810(3).

<sup>7</sup>See NRS 34.800(2).

<sup>8</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>9</sup>See Bousley v. U.S., 523 U.S. 614, 623 (1998); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

<sup>10</sup>Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

<sup>11</sup>Bousley, 523 U.S. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

In an attempt to demonstrate good cause, appellant claimed newly discovered evidence had emerged. Further, appellant claimed 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 crimes for which he was convicted.<sup>12</sup> Appellant contended that he was actually innocent because DNA testing demonstrated that the original criminologist tampered with the biological evidence and because the State tampered and falsified preliminary hearing transcripts.

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.<sup>13</sup> Recent DNA testing of the biological evidence in appellant's case did not exonerate appellant. Furthermore, appellant failed to present evidence that the criminologist or

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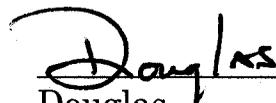
<sup>12</sup>Appellant raised several issues previously raised and decided by this court in his direct appeal and his earlier petition for a writ of habeas corpus. The doctrine of the law of the case prevents further litigation of these issues. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). To the extent that appellant raised any of the following issues independently from his innocence claim, we conclude that they are waived; they should have been raised on direct appeal or in his prior petition for a writ of habeas corpus and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

<sup>13</sup>Bolden 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).

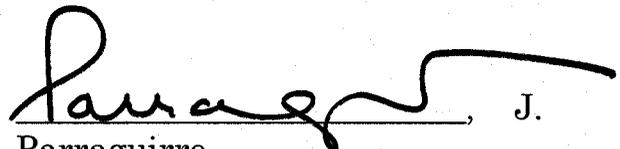
the State tampered with the evidence or falsified transcripts. Appellant failed to demonstrate that no reasonable juror would have convicted him. Therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred.

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.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Jennifer Togliatti, District Judge  
Albert Nathaniel Lee  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).