

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN D. BARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46170

FILED

MAY 05 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant Alvin D. Barner's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On March 6, 1986, the district court convicted Barner, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced Barner to serve a term of life in the Nevada State Prison with the possibility of parole. This court dismissed Barner's appeal from his judgment of conviction and sentence.¹ The remittitur issued on July 14, 1987. Thereafter, Barner unsuccessfully sought post-conviction relief.²

On June 23, 2003, Barner filed a proper person post-conviction petition for a writ of habeas corpus in the district court, claiming newly discovered evidence. Specifically, Barner claimed that a letter from the victim to Barner's stepdaughter established that he was actually innocent.

¹Barner v. State, Docket No. 17401 (Order Dismissing Appeal, June 25, 1987).

²Barner v. State, Docket No. 21829 (Order Dismissing Appeal, March 25, 1992); Barner v. Warden, Docket No. 31877 (Order Dismissing Appeal, February 16, 2000); Barner v. State, Docket No. 36597 (Order of Affirmance, October 8, 2001).

The district court appointed counsel to represent Barner.³ On October 29, 2003, the district court entered an order striking Barner's unverified petition and granting him leave to re-file a verified petition. On December 15, 2003, Barner filed a verified copy of his petition. The State filed a motion to dismiss Barner's petition, arguing that it was untimely and successive. Further, the State specifically pleaded laches. Barner's counsel notified the district court that she was having witness problems, but otherwise failed to respond to the State's motion to dismiss. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing, and on April 21, 2004, the district court dismissed Barner's petition. On appeal from that dismissal, this court reversed the district court and remanded the case back to the district court for an evidentiary hearing to determine the authenticity of the victim's letters and whether Barner was entitled to a new trial.⁴

The district court held an evidentiary hearing on August 11, 2005, and continued the hearing on October 6, 2005. The victim testified on the first day of the hearing, and claimed she had not written the letter, that Barner had sexually assaulted her, and that she had never lied about Barner sexually assaulting her. On the second day of the hearing, Barner produced the original letter, as well as three additional letters the victim had written to him after he filed the instant petition. The original letter was marked exhibit 7, with the remaining letters marked exhibits 9, 10, and 13.

³See NRS 34.750.

⁴Barner v. State, Docket No 43291 (Order of Reversal and Remand, December 22, 2004).

Barner moved for all the letters to be admitted for their content, arguing that the three additional letters corroborated exhibit 7. The State argued only exhibit 7 could be admitted for its content. The district court admitted exhibit 7 for its content and exhibits 9 and 10 as handwriting comparators but not for their content. The district court did not admit exhibit 13. On appeal, Barner claims the district court abused its discretion in not admitting all the letters and their accompanying envelopes for their content.

This court reviews a district court's admissibility of evidence determinations for an abuse of discretion.⁵ We conclude that, even if the district court did err in its admissibility rulings, the error was harmless. The district court ruled that the letters were authentic, but found that the letters, cards, and envelopes, read together or separately, did not contain a clear recantation by the victim of her trial testimony. We agree. Further, when provided the opportunity to recant her trial testimony at the evidentiary hearing, the victim refused, instead testifying that she had never lied about the sexual assault.

Barner also claims on appeal that the district court erred when it ruled he was not entitled to a new trial. In Callier v. Warden,⁶ we set out a four-part test for this inquiry, and held that a new trial should be ordered only if:

- (1) the court is satisfied that the trial testimony of material witnesses was false; (2) the evidence showing that false testimony was introduced at trial is newly discovered; (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) it

⁵Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000).


⁶111 Nev. 976, 901 P.2d 619 (1995).


is probable that had the false testimony not been admitted, a different result would have occurred at trial.⁷


The district court ruled that the victim was a material witness. However, the district court further ruled that because the victim did not clearly recant her trial testimony, either in writing or orally at the evidentiary hearing, it was not satisfied that her trial testimony was false. Our review of the record on appeal reveals there was evidence to support this determination, and thus, we conclude the district court did not err in ruling Barner was not entitled to a new trial.

Having considered Barner's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁷Id. at 990, 901 P.2d at 627-28.