

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RAY HOGAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46293

**FILED**

**NOV 15 2006**

ORDER OF AFFIRMANCE

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

This is an 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; Jackie Glass, Judge.

Appellant Michael Ray Hogan was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The jury returned a verdict of death for the murder and two consecutive sentences of 20 years in prison for the attempted murder. This court affirmed Hogan's conviction and sentence on direct appeal.<sup>1</sup> Hogan filed a petition for post-conviction relief and a petition for a writ of habeas corpus, each without success.<sup>2</sup> He then filed the instant petition, which the district court denied after a limited evidentiary hearing. This appeal followed.

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<sup>1</sup>Hogan v. State (Hogan I), 103 Nev. 21, 732 P.2d 422 (1987).

<sup>2</sup>Hogan v. State, Docket No. 18994 (Order Dismissing Appeal, December 21, 1988); Hogan v. State (Hogan II), 109 Nev. 952, 860 P.2d 710 (1993).

Hogan filed his petition approximately 20 years after his conviction became final. Thus, his petition was untimely.<sup>3</sup> The petition was also successive.<sup>4</sup> Hogan's petition is barred absent a showing of good cause and prejudice.<sup>5</sup>

Hogan argues that ineffective assistance by his post-conviction counsel establishes good cause. We disagree. Hogan filed his petition for post-conviction relief pursuant to NRS 177.315 on November 9, 1987. Effective October 1, 1987, that statute was amended so that appointment of counsel was discretionary, not mandatory. Hogan therefore did not have a statutory right to counsel in that proceeding, and his counsel was thus not required to be effective.<sup>6</sup> Hogan filed his first petition for a writ of habeas corpus before NRS 34.820 was amended in 1991 to require the appointment of counsel for a death penalty defendant's first petition challenging his conviction and sentence.<sup>7</sup> Because Hogan fails to demonstrate that he had a statutory right to counsel in either proceeding, earlier post-conviction counsel's alleged ineffectiveness cannot establish good cause for filing the instant petition. Nor, even if Hogan had enjoyed such a right, has he shown good cause for failing to file his instant petition in a timely manner.

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

<sup>4</sup>See NRS 34.810(2).

<sup>5</sup>See NRS 34.726(1); NRS 34.800(1)(b); NRS 34.810(1), (3). Because we conclude Hogan fails to demonstrate good cause and prejudice, we need not discuss the application of laches as set out at NRS 34.800.

<sup>6</sup>See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

<sup>7</sup>See 1991 Nev. Stat., ch. 44, § 20, at 87.

Even when a petitioner cannot demonstrate good cause, a court must hear the claims "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."<sup>8</sup> Such a conviction would be a "fundamental miscarriage of justice." "[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>9</sup> "[A] petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation."<sup>10</sup>

Hogan argues that he is actually innocent of the death-penalty aggravator of a previous conviction for a felony involving the use or threat of violence.<sup>11</sup> Although this court has twice affirmed the jury's finding that Hogan was guilty of this aggravator based on a conviction in Iowa of manslaughter,<sup>12</sup> Hogan claims he is actually innocent pursuant to Redeker v. District Court.<sup>13</sup> Redeker sets forth a procedural rule establishing what evidence may be relied upon to determine whether a prior felony involved the use or threat of violence. Hogan's instant murder conviction was final when Redeker was decided, and Hogan fails to demonstrate that he is

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<sup>8</sup>Murray v. Carrier, 477 U.S. 478, 496 (1986); see also Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>9</sup>Bousley v. United States, 523 U.S. 614, 623-24 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

<sup>10</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

<sup>11</sup>See NRS 200.033(2)(b).

<sup>12</sup>Hogan I, 103 Nev. at 24, 732 P.2d 423-24; Hogan II, 109 Nev. at 956-57, 860 P.2d at 713-14.

<sup>13</sup>122 Nev. \_\_\_, 127 P.3d 520 (2006).

entitled to retroactive application of Redeker. Even if Redeker were applied retroactively, it would not establish that Hogan was actually innocent of the aggravator. Hogan fails to demonstrate that the admissible evidence listed in Redeker—the statutory definition of the offense, charging document, written plea agreement, transcript of the plea canvass, and any explicit factual finding by the Iowa court to which Hogan assented—did not establish that the manslaughter involved violence or the threat of violence. In fact, the plea canvass, which was discussed by the district court and the parties before the penalty hearing but not submitted to the jury, reveals that Hogan's Iowa counsel affirmed on Hogan's behalf that Hogan had struck the victim's head against a car and caused her death, which occurred later that day after she fell from a moving vehicle. Thus, even under Redeker, it was shown that Hogan committed a prior violent felony.

Hogan next argues that, pursuant to Lane v. State,<sup>14</sup> he is actually innocent of the death-penalty aggravator of knowingly creating a great risk of death to more than one person by means of a weapon, device, or course of action which would normally be hazardous to the lives of more than one person.<sup>15</sup> This court has also twice affirmed the jury's finding that Hogan was guilty of this aggravator.<sup>16</sup> Hogan fails to demonstrate that Lane applies to him. Lane was decided after Hogan's conviction became final, and Lane simply applied established law without creating

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<sup>14</sup>114 Nev. 299, 956 P.2d 88 (1998).

<sup>15</sup>See NRS 200.033(3).

<sup>16</sup>Hogan I, 103 Nev. at 24-25, 732 P.2d at 424; Hogan II, 109 Nev. at 957-59, 860 P.2d at 714-15.

new rules. Thus, Hogan is not entitled to the application of Lane. Further, Lane would not entitle Hogan to relief if it was applied to him. In Lane, we noted that this aggravator was appropriate "where a defendant threatened a person's life because of the proximity between that person and the victim at the time of the murder."<sup>17</sup> We rejected the aggravator in Lane because the defendant killed three victims in three separate incidents, each of which occurred at half-hour intervals at different locations.<sup>18</sup> This is factually distinct from Hogan's case, in which Hogan shot his girlfriend Heidi Hinckley in the living room of their house, went to Hinckley's daughter Shelly Brown in a nearby room and shot her several times, left the room, and then found and shot Brown again after she had gone to another room and called the police. The facts in Hogan's case are more analogous to those of Evans v. State, in which we quoted Hogan II.<sup>19</sup> We cited Evans with approval in Lane.<sup>20</sup>

Hogan also argues that this court should extend the reasoning of McConnell v. State<sup>21</sup> and hold that the "great risk of death to more than one person" aggravator does not narrow the class of death-eligible defendants when it is based on separate conduct for which the defendant is tried and convicted and will be separately punished, as Hogan was for the attempted murder of Shelly Brown. We are not persuaded by this

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<sup>17</sup>114 Nev. at 304, 956 P.2d at 92.

<sup>18</sup>Id. at 305, 956 P.2d at 92.

<sup>19</sup>112 Nev. 1172, 1195, 926 P.2d 265, 280 (1996).

<sup>20</sup>114 Nev. at 304-305, 956 P.2d at 92.

<sup>21</sup>120 Nev. 1043, 102 P.3d 606 (2004).

argument. McConnell barred the State from "selecting among multiple felonies occurring during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance."<sup>22</sup> That is not what occurred in this case. Hogan was not charged with felony murder, and the attempted murder of Brown did not function as an aggravator; rather, the aggravator was based on Hogan's use of a firearm in a home where he knew more than one person was present.<sup>23</sup> Thus, McConnell does not entitle Hogan to relief.

Hogan also claims good cause excuses his procedural default because there was "no reasonable basis" for him to argue actual innocence pursuant to Redeker, Lane, or McConnell until the instant petition.<sup>24</sup> As stated above, Hogan fails to demonstrate that he is entitled to application of any of these cases.<sup>25</sup>

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<sup>22</sup>Id. at 1069-70, 102 P.3d at 625-25.

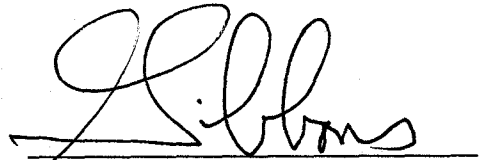
<sup>23</sup>See Evans, 112 Nev. 1172, 926 P.2d 265; see also Flanagan v. State, 112 Nev. 1409, 1420-21, 930 P.2d 691, 698-99 (1996).

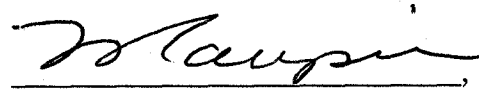
<sup>24</sup>See Reed v. Ross, 468 U.S. 1 (1984); see also Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

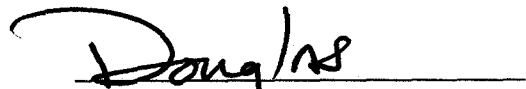
<sup>25</sup>See generally Boyer v. United States, 55 F.3d 296, 299 (7th Cir. 1995) (holding that a petitioner asserting that the lack of a reasonable basis to bring a claim previously establishes good cause must also demonstrate that he is entitled to retroactive application of the case he now relies on).

Hogan fails to demonstrate good cause or actual innocence sufficient to overcome the procedural bars to this petition.<sup>26</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Gibbons J.

  
Maupin J.

  
Douglas J.

cc: Honorable Jackie Glass, District Judge  
Glynn B. Cartledge  
Richard F. Cornell  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>26</sup>Hogan contends the district court denied the petition in part on the merits and in part on procedural bars. While this may be true, we conclude the entire petition is procedurally barred.