

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LENVILLE DUNCAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46344

**FILED**

FEB 17 2006

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying an untimely post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On February 2, 1996, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault and one count of first degree kidnapping. The district court sentenced appellant to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole.

On December 19, 1996, appellant filed a proper person motion in the district court entitled, "motion for relief from judgment under FRCP 60(b)(1)(3)." The district court clerk transmitted the motion to this court, and this court docketed the motion as a notice of appeal. Thereafter, this court dismissed the appeal concluding that, to the extent the document

could be considered an appeal from the judgment of conviction, it was untimely.<sup>1</sup>

On April 6, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 17, 1998, the district court denied appellant's petition, ruling that it was procedurally barred. This court affirmed the order of the district court on appeal.<sup>2</sup>

On February 15, 2002, appellant filed a motion to withdraw the guilty plea. The State opposed the motion. On March 21, 2002, the district court denied appellant's motion to withdraw his guilty plea. This court affirmed the order of the district court on appeal.<sup>3</sup>

On July 1, 2005, appellant filed a second, untimely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

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<sup>1</sup>Duncan v. State, Docket No. 29753 (Order Dismissing Appeal, March 14, 1997).

<sup>2</sup>Duncan v. State, Docket No. 32800 (Order of Affirmance, October 31, 2000).

<sup>3</sup>Duncan v. State, Docket No. 39714 (Order of Affirmance, March 5, 2003).

appellant or to conduct an evidentiary hearing. On October 4, 2005, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than nine years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.<sup>5</sup> A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>6</sup>

Appellant first claimed that he had developed new evidence that should excuse his filing of a second, untimely petition. It appears that appellant claimed that he just recently learned from the federal court that the State misrepresented that it had performed DNA tests of the semen found in the bra of appellant's January 1995 victim when the documents submitted to the federal court revealed no such testing had occurred. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant had failed to demonstrate good cause. First, the alleged misrepresentation by the State is not new as it was raised and considered in appellant's motion to withdraw a guilty plea. The doctrine of the law of case prevents further litigation of this issue and cannot be avoided by a more detailed and

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

<sup>5</sup>See *id.*

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

precisely focused argument.<sup>7</sup> Moreover, language in the federal court's order did not excuse this late petition.<sup>8</sup> Appellant did not demonstrate that the State withheld any material or exculpatory evidence.<sup>9</sup> Thus, the district court did not err in denying this good cause argument.

Next, appellant claimed that the procedural bar should not apply because he was raising an issue of fraud on the court pursuant to NRCP 60(b). Appellant claimed that the fraud occurred when the State misrepresented the DNA test results relating to the July 1995 victim. First, the doctrine of the law of the case prevents litigation of the issue of misrepresentation as this court previously concluded that the State did not misrepresent the contents of the DNA report relating to the July 1995 victim. Further, the use of NRCP 60(b) is inconsistent with the statutory deadline setting forth the timely filing of a post-conviction petition for a writ of habeas corpus in NRS 34.726. Consequently, the rules of civil procedure will not apply to excuse the untimely filing of appellant's

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<sup>7</sup>See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>8</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense).

<sup>9</sup>See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (recognizing that the cause and prejudice elements of NRS chapter 34 parallel two of the three requirements necessary to establish a violation pursuant to Brady v. Maryland, 373 U.S. 83 (1963)—the defendant must prove that the State withheld evidence in order to demonstrate cause and that the withheld evidence was material in order to demonstrate prejudice).

petition.<sup>10</sup> Therefore, the district court did not err in denying this good cause argument.

Finally, appellant claimed that he was actually innocent of the sexual offenses committed against both victims. Based upon our review of the record on appeal, we conclude that the district court did not err in rejecting appellant's claim of actual innocence. Appellant's arguments of actual innocence were nearly identical to those presented in the motion to withdraw a guilty plea, and this court specifically considered and rejected appellant's prior claims of actual innocence. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a more detailed or precisely focused argument.<sup>11</sup> To the extent that appellant included any new arguments of actual innocence, appellant failed to demonstrate that he was actually innocent.<sup>12</sup> Thus, the district

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<sup>10</sup>See NRS 34.780(1).

<sup>11</sup>See Hall, 91 Nev. 314, 535 P.2d 797.

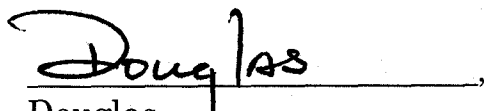
<sup>12</sup>See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614 (1998) (recognizing that actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges foregone by the State in the course of plea bargaining). Appellant did a poor job in specifically identifying which claims had been previously raised and which claims were new. It appears that appellant made a new claim of actual innocence based upon the affidavit of Elizabeth Ellingham and the potential testimony of an unidentified witness who would testify that appellant's car

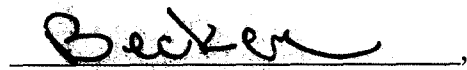
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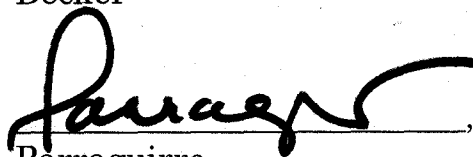
court did not err in determining that appellant's petition was procedurally time barred.

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>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Douglas

 J.  
Becker

 J.  
Parraguirre

cc: Hon. Donald M. Mosley, District Judge  
Tommy Lenville Duncan  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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was broken down the day the July 1995 victim was sexually assaulted and appellant was working on his car that day.

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).