

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN EARL STARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46833

FILED

MAR 08 2007

ORDER OF REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

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

On December 11, 1992, the State charged appellant John Stark, along with his co-defendants Donald Towne, William Rohweder, and Brian DeBarr, with the murder of Rory Sharp with the use of a deadly weapon and with conspiracy to commit the murder. On January 5, 1994, pursuant to a package plea arrangement involving all of the defendants, Stark pleaded guilty to first-degree murder. In exchange for his plea, the State agreed not to seek the death penalty, to dismiss the deadly weapon enhancement, and to dismiss the conspiracy count.

The district court conducted a thorough plea canvass, inquiring into Stark's understanding of the elements of the crime and the voluntariness of the plea. During the canvass, Stark answered in the affirmative when the district court asked if he was pleading guilty because he was guilty "in truth and in fact." Stark also acknowledged that he had discussed the elements of the crime and any defenses with his attorney, and that he understood the constitutional rights he was waiving by

entering his plea. When the district court asked him to state what he did that caused him to plead guilty, Stark's counsel replied:

Yes, your Honor. We explained to him as set forth in the plea agreement [and] the information it is alleged that he aided and abetted in the killing of Rory Sharp by transporting the defendants and Rory Sharp to the desert and by assisting in the concealment of the crime and transporting people from the crime scene.

Stark confirmed that his counsel's statement was correct.

Prior to sentencing, however, Stark moved to withdraw his plea. He asserted that he was coerced by counsel to plead guilty and that he had persistently requested to go to trial because he was innocent. Specifically, the motion stated that "Mr. Stark repeatedly advised his attorneys that he was not guilty of the death of the victim in the instant action" and that he "repeatedly advised his attorneys that he did not desire to plead guilty to any crime that he did not commit." The district court denied the motion.¹ The district court subsequently sentenced Stark to serve a term of life in the Nevada State Prison without the possibility of parole. The written judgment of conviction was entered on February 6, 1995. Stark filed an untimely direct appeal, which this court dismissed for lack of jurisdiction.²

¹The record on appeal does not contain transcripts of Stark's hearing regarding his motion to withdraw his plea, or his sentencing hearing. The sentencing hearing transcript for Towne, Rohweder and DeBarr, which was held separately, was included in the record on appeal.

²Stark v. State, Docket No. 31664 (Order Dismissing Appeal, February 6, 1998).

On May 28, 1998, Stark filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Stark or to conduct an evidentiary hearing. On October 2, 1998, the district court denied Stark's petition as procedurally barred. This court affirmed the district court's denial of Stark's petition as procedurally barred.³

On October 4, 2005, Stark filed another proper person post-conviction petition for a writ of habeas corpus in the district court, alleging that his plea was involuntary, and that counsel was ineffective for coercing his plea when he was actually innocent, for failing to file a direct appeal when asked to do so, for failing to advise him that a guilty plea could not be withdrawn, and failing to investigate mitigating evidence and prepare for the sentencing phase. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Stark, or to conduct an evidentiary hearing. On March 21, 2006, the district court dismissed Stark's petition. This appeal followed.

Stark filed his petition more than ten years after the entry of his judgment of conviction. Thus, Stark's petition was untimely filed and procedurally barred absent a demonstration of good cause and prejudice.⁴

³Stark v. State, Docket No. 33116 (Order of Affirmance, October 10, 2000).

⁴See NRS 34.726(1).

Further, because the State specifically pleaded laches, Stark was required to overcome the presumption of prejudice to the State.⁵

Stark did not attempt to demonstrate good cause or prejudice to excuse the procedural defects. Rather, he argued that a failure to review his claims of ineffective counsel and the voluntariness of plea will result in a fundamental miscarriage of justice because he is actually innocent of murder in the first degree. In support of this claim, he presented two affidavits from his co-defendants, Rohweder and DeBarr, who aver that Stark was not present during the murder and did not have prior knowledge that a murder would occur.⁶

A petitioner may be entitled to a review of procedurally defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁷ A reviewing court must consider such a claim where a constitutional violation "has probably resulted in the conviction of one who is actually innocent."⁸ In other words, Stark may obtain review of his procedurally defaulted constitutional claims of ineffective assistance of counsel and the voluntariness of plea only if his case falls within the "narrow class of cases . . . implicating a fundamental

⁵See NRS 34.800(2).

⁶We note that Debarr's and Rohweder's claims in their affidavits are consistent with Towne's testimony during his, Debarr's, and Roweder's sentencing hearing.

⁷Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁸See Bousley v. United States, 523 U.S. 614, 623 (1998) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

miscarriage of justice."⁹ Stark's "claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'"¹⁰

To pass through this gateway Stark must show that "in light of all the evidence," "it is more likely than not that no reasonable juror would have convicted him."¹¹ "[A]ctual innocence' means factual innocence, not mere legal insufficiency."¹² "In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges."¹³

From our review of the record, it appears that the district court denied Stark's petition primarily because the court discounted the credibility of the affidavits of Rohweder and DeBarr. At a hearing on Stark's petition, the district court noted that Rohweder and DeBarr had provided their affidavits thirteen years after they had committed the

⁹Schlup v. Delo, 513 U.S. 298, 314-15 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

¹⁰Schulp, 513 U.S. at 315 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

¹¹Bousley, 523 U.S. at 623 (quoting Schlup, 513 U.S. at 327-28).

¹²Id. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

¹³Id. at 624.

crime and had been convicted.¹⁴ The district court concluded that the affidavits were "not very persuasive," that Stark's co-defendants did not have "anything to lose by lying," and that Stark would "need to come up with some better evidence."

While the district court's point is not without force, we have consistently held that "[a] petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."¹⁵ As noted above, Stark's claim and the supporting affidavits of Rohweder and DeBarr are to some extent consistent with statements made by their co-defendant Towne during Towne's sentencing hearing. Under these circumstances, the district court may have been in a better position to assess the credibility of Rohweder and DeBarr if they had appeared and testified at an evidentiary hearing on the narrow issue of whether Stark could establish a credible and colorable gateway claim of actual innocence.

The district court's written order denying the petition also cites to this court's holding in Lobato v. State.¹⁶ We are not persuaded that Lobato squarely supports the district court's ruling in this case. Lobato involved the issue of the admissibility of collateral evidence offered

¹⁴Notably, this was not an evidentiary hearing; rather the district court simply entertained brief argument from Stark and the State and announced its decision to deny the petition.

¹⁵Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

¹⁶120 Nev. 512, 96 P.3d 765 (2004).

by Lobato to demonstrate bias of a jailhouse informant who testified against her. The district court refused to permit Lobato to offer evidence to demonstrate that the jailhouse informant was motivated to lie in order to gain early release. Under the circumstances of that case, this court stated that where issues of guilt are close, as they were in Lobato, "the testimony of a jailhouse informant should be regarded with particular scrutiny."¹⁷ In the instant case, the issue is whether Stark has sufficiently established a colorable gateway claim of actual innocence, not belied by the record, to warrant an evidentiary hearing on the narrow question of whether his claim of actual innocence can excuse the procedural defaulted constitutional claims presented in his habeas petition.

Based on the record before us, we are unable to conclude that Stark's claim of actual innocence is sufficiently belied by the record to preclude an evidentiary hearing on that claim. We note in this respect that, although Stark was thoroughly canvassed by the district court when he entered his guilty plea, he raised his claim of actual innocence shortly thereafter in a presentence motion to withdraw his plea. The record before us does not contain a transcript of the hearing on that motion or of Stark's subsequent sentencing proceeding and the record contains no written order of the district court denying Stark's motion to withdraw. We also note that Stark's attempts to challenge his conviction on appeal have heretofore all been denied on jurisdictional and procedural grounds. As noted, Stark's direct appeal was dismissed as untimely and his subsequent habeas petition was denied as procedurally barred.

¹⁷Id. at 522, 96 P.3d at 772.

Therefore, on balance, we have concluded that Stark is entitled to an evidentiary hearing on the narrow question of whether he can establish a credible and colorable gateway claim of actual innocence sufficient to excuse his procedurally defaulted constitutional claims. If the district court finds that Stark has established such a claim, he will then be entitled to have the defaulted constitutional claims presented in his petition considered on the merits.¹⁸

Accordingly, we remand this case to the district court for an evidentiary hearing on his claim of actual innocence. Because of the complexity of the factual and legal issues alleged, the district court may exercise its discretion and appoint counsel if it so chooses.¹⁹ Further, on remand:

the [State] is not limited to the existing record to rebut any showing that [Stark] may make. Rather, on remand, the [State] should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy.²⁰

Additionally, Stark's showing of actual innocence must also extend to any charges that the State dismissed in the course of the plea negotiations, *i.e.*, the charge of conspiracy to commit murder.²¹

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Stark is only entitled to the relief granted

¹⁸See Bousley, 523 U.S. at 624.


¹⁹NRS 34.750.

²⁰Bousley, 523 U.S. at 624.

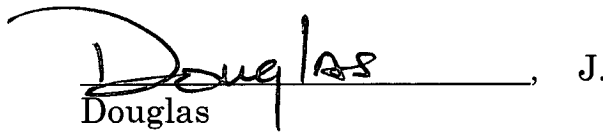
²¹See id.

herein, and that briefing and oral argument are unwarranted.²²
Accordingly, we

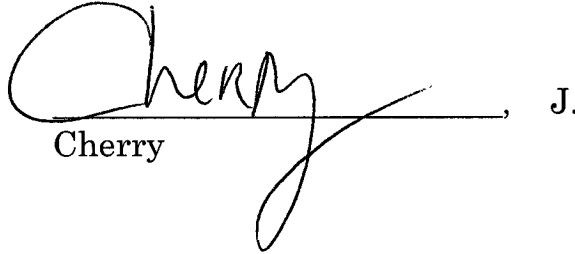
ORDER this matter REMANDED to the district court for an
evidentiary hearing.²³



Gibbons



Douglas



Cherry

cc: Hon. Lee A. Gates, District Judge
John Earl Stark
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²³We have reviewed all documents that Stark has submitted in proper person to the clerk of this court in this matter, and we conclude that Stark is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.