

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HODGE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47342

**FILED**

SEP 11 2007

DIANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On April 12, 2001, appellant James Hodge was convicted, pursuant to a plea of guilty but mentally ill, of one count each of robbery with the use of a deadly weapon and failure to stop on the signal of a police officer. The district court sentenced Hodge to serve two consecutive prison terms of 24 to 156 months for the robbery count and a concurrent prison term of 13 to 60 months for the failure to stop count. Hodge did not file a direct appeal.

On January 18, 2006, Hodge filed a proper person post-conviction petition for a writ of habeas corpus. The State filed a response and a motion to dismiss the petition, and Hodge filed a proper person opposition to the motion to dismiss. The district court summarily denied the petition. Hodge, with the assistance of counsel, appealed. This court remanded the matter to the district court for the limited purpose of entering specific findings of fact and conclusions of law as required by

NRS 34.830(1).<sup>1</sup> On August 14, 2006, the district court entered an order denying the petition with specific findings of fact and conclusions of law. Hodge filed this timely appeal.

Hodge contends that the district court erred in ruling that his untimely petition was procedurally barred. Hodge alleges that he has demonstrated good cause to overcome the procedural default because his plea of guilty but mentally ill is unconstitutional and unenforceable, and the legal basis for his claim was not reasonably available until this court issued Finger v. State.<sup>2</sup> We conclude that Hodge's contention lacks merit.

Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition.<sup>3</sup> An impediment external to the defense may be demonstrated by a showing "that the factual or legal basis for a claim was not reasonably available to counsel."<sup>4</sup> Here, Hodge filed his petition more than five years after this court issued its opinion in Finger. Hodge concedes in his appellate brief that the claim was available to him "prior to the time" that he filed his petition, and he failed to explain why he waited five years after the issuance of Finger to challenge the validity of his plea of guilty but mentally ill. Accordingly, the district court did not err in ruling that Hodge failed to demonstrate good cause.

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<sup>1</sup>Hodge v. State, Docket No. 47342 (Order of Limited Remand and Denying Motion to Reverse, July 28, 2006).

<sup>2</sup>117 Nev. 548, 27 P.3d 66 (2001); see also O'Guinn v. State, 118 Nev. 849, 59 P.3d 488 (2002).

<sup>3</sup>See Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

<sup>4</sup>Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

Hodge also contends that the failure to consider the merits of his claims would result in a fundamental miscarriage of justice because he made a colorable showing of actual innocence. More specifically, Hodge alleges that he is actually innocent because he was legally insane at the time of the commission of his crimes, and therefore, could not form the necessary criminal intent. Hodge notes that: (1) he suffers from bipolar/manic depression; (2) in accepting the guilty plea, the district court found that Hodge was "mentally ill" at the time of the commission of the crimes; and (3) the presentence investigation report indicates that Hodge told a representative of the Division of Parole and Probation that at the time of the crimes he was experiencing a psychotic episode and believed he was in Kentucky at the start of the Civil War.

If a petitioner does not demonstrate good cause and prejudice, the merits of the claims will not be considered unless the petitioner can demonstrate that a failure to consider his claims would result in a fundamental miscarriage of justice.<sup>5</sup> A fundamental miscarriage of justice occurs "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."<sup>6</sup> "[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>7</sup> "[A] petitioner claiming actual innocence must show that it is more likely than not that no

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<sup>5</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. NRS 34.800(1).

<sup>6</sup>Murray, 477 U.S. at 496; see also Mazzan, 112 Nev. at 842, 921 P.2d at 922.

<sup>7</sup>Bousley v. United States, 523 U.S. 614, 623 (1998).

reasonable juror would have convicted him absent a constitutional violation."<sup>8</sup>

Even assuming without deciding that a claim of legal insanity satisfies the fundamental miscarriage of justice standard, Hodge has failed to demonstrate that he was legally insane at the time of the commission of the crimes. A judicial finding that a criminal defendant is mentally ill is not tantamount to a finding of legal insanity.<sup>9</sup> Legal insanity requires that the defendant labor "under a delusion so great at the time of his crimes that he was robbed of the ability to understand what he was doing or deprived of the ability to appreciate his actions were wrong or unlawful."<sup>10</sup>

Hodge failed to allege sufficient facts in his petition in support of a finding of legal insanity. He did not allege that his delusion was so great that he did not understand the unlawful nature of his actions. And, in fact, the record indicates that Hodge understood he was placing the victim in fear and that he had engaged in unlawful activity. During the commission of the robbery, Hodge assured the victim that he was not going to hurt her, informing her that he would "drop [her] off somewhere that's safe and where [she] can get to the phone."<sup>11</sup> After the robbery, Hodge fled from police leading them on a high-speed pursuit and, after he was arrested, he told officers that he "would be out in six months and

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<sup>8</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>9</sup>Id. at 891, 34 P.3d at 539-40.

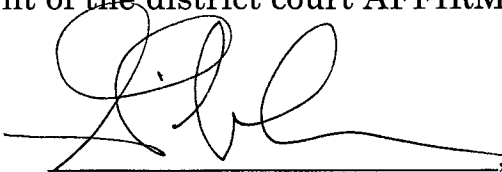
<sup>10</sup>Id.

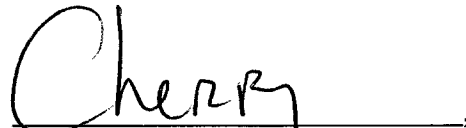
<sup>11</sup>Hodge robbed a taxi cab driver at gunpoint.

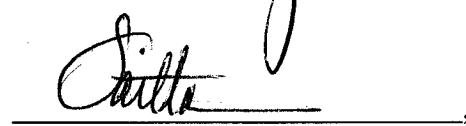
packing a gun next time.” Under these circumstances, Hodge has failed to demonstrate that he was legally insane at the time of the commission of the crimes, and therefore, the district court did not err in ruling that the untimely petition was procedurally barred.

Having considered Hodge’s contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

cc: Eighth Judicial District Court, Dept. 6, District Judge  
Patricia Erickson  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk