

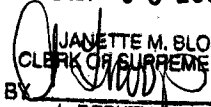
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROME RICHARD CHACON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47444

FILED

SEP 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On December 9, 1992, the district court convicted appellant Rome Richard Chacon of burglary and first-degree murder, each with the use of a deadly weapon. The district court sentenced Chacon to serve concurrent and consecutive terms totaling life in prison without the possibility of parole. This court dismissed Chacon's direct appeal from the judgment of conviction and sentence.¹ This court also affirmed the denial of Chacon's timely postconviction petition for a writ of habeas corpus.²

On January 3, 2006, Chacon filed a second postconviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. The district court granted the State's motion and dismissed the petition, ruling that the petition was untimely, successive,

¹Chacon v. State, Docket No. 24085 (Order Dismissing Appeal, January 20, 1994).

²Chacon v. State, Docket No. 39384 (Order of Affirmance, February 27, 2003).

and barred by laches, and that Chacon had failed to establish good cause to overcome the procedural bars.³ This appeal followed.

Chacon's petition was filed more than one year after this court issued its remittitur in his direct appeal. Thus, it was untimely.⁴ Because Chacon had previously filed a postconviction petition for a writ of habeas corpus, the petition was also successive.⁵ The petition was therefore barred absent a showing of good cause and prejudice.⁶

Chacon first argues that ineffective assistance by his appellate counsel establishes good cause. Specifically, he contends that appellate counsel failed to present his claims as federal constitutional issues. We conclude the district court did not err in rejecting this argument. Chacon failed to establish a reasonable probability that this court would have decided his direct appeal claims differently had counsel argued them in the manner Chacon now suggests was appropriate.⁷

Chacon also argues that "excessive delay" in resolving his first postconviction petition constitutes good cause. He further argues that the

³The order so ruling was issued in response to a remand by this court pursuant to NRS 34.830(1). We note that, despite our specific directive, the district court's new order fails to address Chacon's claim that a fundamental miscarriage of justice will result if the petition is dismissed because it is barred.

⁴See NRS 34.726(1).

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(3).

⁷See *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); see generally *Strickland v. Washington*, 466 U.S. 668 (1984).

denial of his statutory rights to the discretionary appointment of counsel, to supplement his first and second petitions, to an evidentiary hearing on both petitions, and to be present during proceedings on both petitions establish good cause. We disagree. These contentions, even if true, did not impede Chacon from raising his present claims in a timely first postconviction petition.⁸

This court may excuse the failure to show good cause where the prejudice from a failure to consider the claim amounts to a fundamental miscarriage of justice, *i.e.*, where petitioner can demonstrate he is actually innocent.⁹ "[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."¹⁰ Chacon claims that "the evidence presented that implicated [him] in this crime included only questionable identifications by store employees, and testimony of acquaintances who testified against him to save another friend." Chacon does not argue that the jury was improperly denied the opportunity to hear evidence that the identifications were "questionable" and witnesses were biased; in fact, his briefs suggest that the jury did hear such evidence, and he provides no citations to the trial transcript that suggest

⁸See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) ("To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated.").

⁹See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹⁰Id.

otherwise. Accordingly, we conclude that Chacon failed to establish that he is actually innocent.

Chacon also argues that the district court erred in dismissing the petition without conducting an evidentiary hearing on his claims of good cause and fundamental miscarriage of justice.¹¹ Chacon notes that he was not represented by counsel and was not present for proceedings related to the motion to dismiss, but he fails to explain why his absence and the lack of counsel produced an erroneous ruling by the district court. We therefore reject this argument.

Chacon next argues that this court does not consistently apply procedural rules in postconviction cases. Citing Pellegrini v. State,¹² Chacon concedes that we have previously rejected this argument. Chacon fails to persuade us to reconsider our previous conclusions on this issue.

Finally, Chacon argues the district court erred in concluding his petition was barred by laches.¹³ Because we conclude the petition is untimely and successive,¹⁴ the issue is moot. But we note that the lapse of "thirteen (13) years" of which the State complained in its motion to dismiss is not entirely attributable to Chacon, as Chacon's timely first postconviction petition for a writ of habeas corpus was not properly resolved by the district court for almost six years.

¹¹See 34.770.

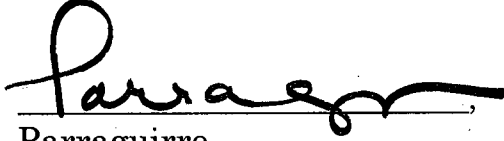
¹²117 Nev. 860, 34 P.3d 519.

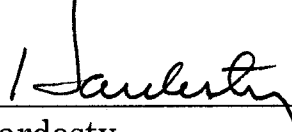
¹³See NRS 34.800(2).


¹⁴See NRS 34.726(1); NRS 34.810(2), (3).

Having reviewed Chacon's arguments and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre J.


Hardesty J.


Saitta J.

cc: Hon. Jennifer Togliatti, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk