IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LAMAR BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48114

FILED

SEP 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant's postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Brian Lamar Brown was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon and attempted murder. He was sentenced to serve two consecutive terms of life in prison with the possibility of parole after ten years for murder with the use of a deadly weapon and a consecutive term of 48 to 240 months for attempted murder. This court dismissed Brown's appeal from the judgment of conviction and sentence.[1]

Brown filed a timely postconviction petition for a writ of habeas corpus, which was denied by the district court. This court affirmed the denial of the petition.[2]

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[1]Brown v. State, Docket No. 29803 (Order Dismissing Appeal, July 19, 1999).

[2]Brown v. State, Docket No. 37981 (Order of Affirmance, March 28, 2002).

Brown then filed a petition for a writ of habeas corpus in the federal district court. The petition was stayed so Brown could return to state court to pursue unexhausted claims. Accordingly, Brown filed in the district court a second postconviction petition for a writ of habeas corpus. The State filed a motion to dismiss, which the district court granted after hearing argument from Brown's counsel and testimony from Brown. This appeal followed.

The district court determined, and Brown concedes, that Brown's petition was untimely and successive.[3] The district court also determined that Brown failed to demonstrate good cause and prejudice[4] or that he was actually innocent[5] sufficient to overcome these procedural bars. We conclude the district court did not err.

Brown argues that his first postconviction counsel was ineffective for abandoning the now unexhausted claims and that counsel's ineffectiveness constitutes good cause. Brown did not have the right to counsel in his postconviction proceedings. We have previously held that ineffective assistance of postconviction counsel does not constitute good cause for filing a successive petition where there is no right to counsel or the effective assistance of counsel.[6] Accordingly, postconviction counsel's

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[3]See NRS 34.810(1)(b)(2).

[4]See NRS 34.810(3).

[5]See Bousley v. U.S., 523 U.S. 614, 622 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[6]See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 257-58 (1996)

alleged ineffectiveness does not establish good cause for Brown's filing an untimely and successive petition.

Brown also argues that the district court erred in rejecting his claim of actual innocence. A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice,[7] i.e., where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.[8] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency,"[9] and requires a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him."[10] "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[11]

Brown argued self-defense at trial. For this petition, the only evidence Brown presented regarding his actual innocence claim was his own testimony at the hearing on his petition, in which he stated that at the time of the killing he was suffering from emotional and cognitive disturbances caused by hypoglycemia due to his diabetes. This does not constitute new evidence, since it was available to Brown during trial.

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[7]Mazzan, 112 Nev. at 842, 921 P.2d at 922.

[8]Bousley, 523 U.S. at 622.

[9]Id. at 623-24.

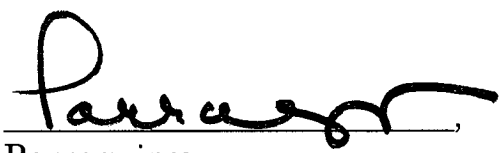
[10]Id. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

[11]Schlup, 513 U.S. at 324.

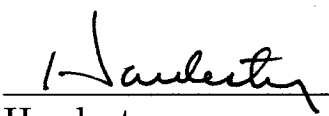
Brown admits in his testimony that he discussed this issue with his trial counsel. Brown also admits that, on his trial counsel's advice, he decided not to testify at trial. He further advises this court that evidence about diabetes and how it affects a person was presented through expert and other testimony at trial. We conclude the district court did not err in concluding that this evidence does not establish that it is it more likely than not that no reasonable juror would have convicted him had the evidence been presented.

Having reviewed Brown's contentions and determined he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Hardesty

_____, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk