

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS W. STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48275

**FILED**

MAR 08 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell and Joseph Bonaventure, Judges.

On January 19, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of burglary, one count of first degree kidnapping of a victim over the age of 65 years, one count of battery with substantial bodily injury of a victim over the age of 65 years, and one count of robbery of a victim over the age of 65 years. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and two consecutive terms totaling four to ten years. The remaining terms were imposed to run concurrently. This court affirmed appellant's judgment of conviction.<sup>1</sup> The remittitur issued on January 12, 2001.

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<sup>1</sup>Stewart v. State, Docket No. 35545 (Order of Affirmance, December 18, 2000).

On October 16, 2001, 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 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 28, 2002, the district court denied appellant's petition. This court affirmed the district court's decision on appeal.<sup>2</sup>

On July 24, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition, in which the State argued that the petition was untimely and successive. Moreover, the State specifically pleaded laches. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 19, 2006, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that the kidnapping offense was incidental to the robbery, and thus, he should not have been convicted of kidnapping in the instant case. Appellant claimed that jury instruction number 18 was flawed in light of this court's recent holding in Mendoza v. State as instruction number 18 suggested that physical restraint alone was sufficient to justify a dual conviction for robbery and kidnapping.<sup>3</sup> The holding in Mendoza clarified that to sustain convictions for both

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<sup>2</sup>Stewart v. State, Docket No. 39020 (Order of Affirmance, November 6, 2002).

<sup>3</sup>122 Nev. 267, 130 P.3d 176 (2006).

robbery and kidnapping arising from the same course of conduct that: (1) any movement or restraint must substantially increase the risk of danger to the victim over and above that necessarily present in the associated crime or the movement or restraint must substantially exceed that required to commit the associated crime; or (2) the act of kidnapping stands alone with independent significance from the associated crime.<sup>4</sup> Mendoza announced that it retreated somewhat from the statement in Hutchins v. State<sup>5</sup> that physical restraint per se satisfied the requirement for establishing dual convictions of robbery and kidnapping.<sup>6</sup>

Appellant filed his petition more than five years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>7</sup> Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and appellant's claim for relief relating to the dual convictions of robbery and kidnapping was previously litigated on direct appeal and in the first post-conviction proceedings under the auspices of ineffective assistance of counsel.<sup>8</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>9</sup> Further,

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<sup>4</sup>Id. at 274-75, 130 P.3d at 180-81.

<sup>5</sup>110 Nev. 103, 867 P.2d 1136 (1994).

<sup>6</sup>Mendoza, 122 Nev. at 275, 130 P.3d at 181.

<sup>7</sup>See NRS 34.726(1).

<sup>8</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>9</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>10</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—the conviction of one who is actually innocent.<sup>11</sup> To demonstrate actual innocence a petitioner must demonstrate in light of all the evidence, it is more likely than not that no reasonable juror would have convicted petitioner absent a constitutional violation.<sup>12</sup> The United States Supreme Court has noted that actual innocence means factual innocence and not mere legal insufficiency.<sup>13</sup>

In an attempt to excuse his procedural defects, appellant argued that he had good cause to raise his claim relating to the dual convictions of robbery and kidnapping because the legal basis for his claim, the clarification of law announced in 2006 in Mendoza, was not reasonably available at the time of his direct appeal or first petition. Appellant further claimed that he was actually innocent of the crime of kidnapping for the reasons set forth above.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred as untimely and successive and barred by laches. Even assuming without deciding that the holding in Mendoza was applicable to appellant and would thus provide cause for raising his dual

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<sup>10</sup>See NRS 34.800(2).

<sup>11</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>12</sup>See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>13</sup>See Bousley v. United States, 523 U.S. 614, 623-24 (1998).

conviction claim again in 2006, appellant failed to demonstrate prejudice. Appellant failed to demonstrate that any error relating to the dual convictions worked to his actual and substantial disadvantage because the outcome would not change under the holding in Mendoza.<sup>14</sup>

Even assuming that instruction number 18 was flawed, the error was harmless as a review of the record indicates that it is clear beyond a reasonable doubt that a rational jury would have found appellant guilty absent the error.<sup>15</sup> The evidence presented at trial established that appellant and a co-defendant, disguised as a cable employee, planned to gain access to the victim's home for the purpose of stealing jewelry and money. In her bedroom, the victim, a 78-year old woman, was told by appellant's co-defendant that she was being robbed, and appellant's co-defendant proceeded to spray her with pepper spray. Appellant was in the hallway at this time. The victim sat down on the bed and attempted to grab a gun near her bed. Appellant warned his co-defendant that the victim had a gun. The gun was taken from the victim, and appellant and his co-defendant started "clobbering" her. Appellant beat her, hitting her dozens of times, and bound her ankles. Appellant's co-defendant tried to put tape and a pillow case over her mouth. The victim was ultimately

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<sup>14</sup>See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

<sup>15</sup>See Santana v. State, 122 Nev. \_\_\_, 148 P.3d 741 (2006) (holding that the giving of an erroneous jury instruction is reviewed under harmless error and that an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error); see also Neder v. United States, 527 U.S. 1 (1999) (applying harmless error analysis to a jury instruction that omitted an element of the offense).

bound around the ankles and wrists. The beating and restraint occurred after the victim had the gun taken from her and after she had been sprayed with pepper spray. The victim further testified at trial that she had lost consciousness during the beating and was left for dead on her bed. Under these facts, the physical restraint of the victim substantially increased the risk of harm and exceeded the amount of restraint necessary to commit the robbery.

Notably, the robbery as charged, the forcible taking of the gun, had already been accomplished before the victim was restrained. The sequence of events further demonstrates that the act of kidnapping stood alone from the robbery. On direct appeal, in rejecting appellant's claim that the kidnapping was incidental to the robbery, this court specifically determined that there was sufficient evidence to support the jury's verdict that the defendant substantially increased the risk of harm to this victim and that the restraint of the victim had an independent significance of facilitating escape as the gun was already in the possession of an accomplice.<sup>16</sup>

Appellant failed to demonstrate that he was actually innocent in the instant case as his argument relating to dual convictions involved mere legal insufficiency. Further, for the reasons discussed above, appellant failed to demonstrate that in light of all of the evidence, it was more likely than not that no reasonable juror would have convicted

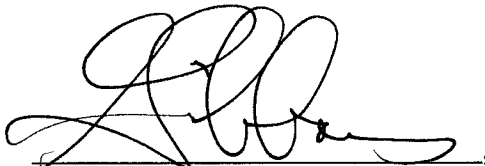
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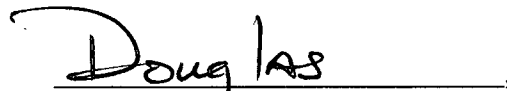
<sup>16</sup>This court's suggestion in a footnote that the physical restraint would likewise have been sufficient to establish kidnapping was in error, but as this suggestion was not the primary basis for this court's determination, any such suggestion was harmless and did not prejudice appellant.

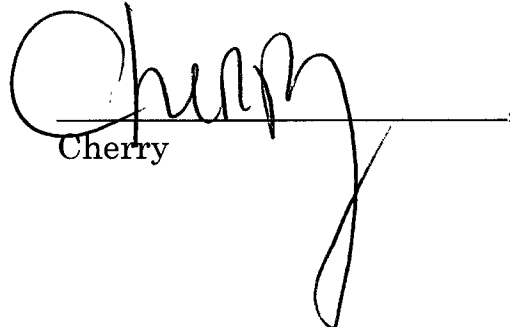
appellant under these circumstances. Finally, appellant failed to overcome the presumption of prejudice to the State. Thus, we affirm the district court's order dismissing appellant's petition as time-barred, successive and barred by laches.

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>17</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>18</sup>

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

  
\_\_\_\_\_, J.  
Douglas

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

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<sup>17</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>18</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Stewart L. Bell, District Judge  
Hon. Joseph Bonaventure, District Judge  
Lewis W. Stewart  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk