

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES EDWARD PROCTOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48393

FILED

MAY 16 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 denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On January 19, 1977, the district court convicted appellant, pursuant to an Alford¹ plea, of second-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison. Appellant appealed, and this court dismissed his appeal as untimely.²

On May 20, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On June 18, 1998, appellant filed a supplement to his petition for a writ of habeas corpus. The district court denied his petition as moot and dismissed the supplemental petition as untimely. Appellant appealed the

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²Proctor v. State, Docket No. 11343 (Order Dismissing Appeal, December 27, 1978).

district court's orders, and this court affirmed the orders of the district court.³

On August 21, 2000, appellant filed a second proper person petition for a writ of habeas corpus in the district court. The State responded that it was untimely, barred by laches, and successive. On November 27, 2000, the district court denied the petition as time barred and barred by laches. The appellant appealed, and this court affirmed the order of the district court.⁴

On June 28, 2006, appellant filed a third proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and moved to dismiss arguing that it was untimely as it had been filed over 13 years after the effective date of NRS 34.726(1). Moreover, the State specifically pleaded laches. 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 4, 2006, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition approximately 29 years after entry of the judgment of conviction. Thus, appellant's petition was untimely.⁵

³Proctor v. State, Docket No. 33318 (Order of Affirmance, May 16, 2001).

⁴Proctor v. State, Docket No. 37278 (Order of Affirmance, July 3, 2001).

⁵See NRS 34.726(1). Even assuming that the deadline for filing a habeas corpus petition commenced on January 1, 1993, the date of the amendments to NRS chapter 34, appellant's petition was filed more than 13 years after the effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44 § 5, at 75; Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.⁶ Claims that were reasonably available during the statutory period for filing a petition do not constitute good cause for an untimely petition.⁷ In addition, as the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸

In an attempt to demonstrate cause for the delay, appellant argued that his trial counsel's ineffectiveness excused his untimely filing. In particular, he asserted that both his trial counsel and the district court failed to advise him of his right to appeal and the specific time limitations for his appeal, and that his counsel failed to file his appeal. Moreover, he had to rely on both the court and counsel because he was only a substandard high school student at the time. Appellant's claims regarding notice of his right to file an appeal and his attorney's failure to file an appeal were reasonably available during the statutory period, and thus are not cause for his delay in filing.⁹ Appellant's limited intelligence is not good cause.¹⁰

Regarding the applicability of laches, appellant claimed that the State would not be prejudiced by the delay because the key evidence

⁶See id.

⁷Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003).

⁸See NRS 34.800(2).

⁹Hathaway, 119 Nev. 248, 71 P.3d 503; Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998).

¹⁰Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

against him was a videotaped confession. However, appellant pleaded guilty, thus, the State did not have the opportunity to present its evidence in a trial. Accordingly, as appellant only presented his estimation of what the State may have presented at trial, he did not meet his burden of rebutting the presumption of prejudice to the State.

Appellant has further argued that he was actually innocent. A reviewing court must reach a claim if failure to consider it would result in a fundamental miscarriage of justice, *i.e.*, where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.¹¹ This requires a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him."¹² "[A]ctual innocence' means factual innocence, not mere legal insufficiency."¹³ In his petition, appellant asserted that he was innocent of felony murder and that the State was only able to prove attempted burglary. However, appellant did not plead guilty to felony murder but instead pleaded guilty to second-degree murder. Moreover, during the plea canvass, appellant admitted that he intended to commit a burglary and that the victim was killed during the course of that burglary. Appellant merely attacked the sufficiency of the evidence and failed to demonstrate that he was actually

¹¹See Bousley v. U.S., 523 U.S. 614, 623 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

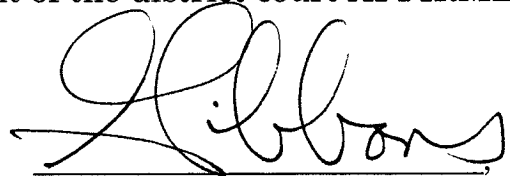
¹²Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

¹³Bousley, 523 U.S. at 623-624 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

innocent, and therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred.

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Valorie Vega, District Judge
James Edward Proctor
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁴See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).