

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK MILLER A/K/A MARK ANDREW
MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48890

FILED

JUL 24 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Donald M. Mosley, Judge.

On December 15, 1994, the district court convicted appellant, pursuant to an Alford plea,¹ of one count of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.²

On August 6, 1998, 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

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

²Miller v. State, Docket No. 30983 (Order Dismissing Appeal, November 12, 1997).

conduct an evidentiary hearing. The district court denied appellant's petition as untimely. On appeal, this court affirmed the district court's decision because appellant's petition was untimely and appellant failed to demonstrate cause for the delay.³

On January 13, 1999, appellant filed a motion to withdraw a guilty plea in the district court. The State opposed the motion. The district court denied the motion because the Alford plea was authorized by Nevada law and appellant's plea was knowing and voluntary. On appeal, this court affirmed the district court's decision.⁴

On October 23, 2006, 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 December 29, 2006, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition almost 12 years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁵ Moreover, appellant's petition was an abuse of the writ because he had previously filed a proper person post-conviction petition for a writ of

³Miller v. State, Docket Nos. 33327 and 34038 (Order of Affirmance, November 29, 2000).

⁴Id.

⁵See NRS 34.726(1).

habeas corpus in the district court and presented a new factual basis challenging his conviction in the instant petition.⁶

Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Pursuant to Nevada law, good cause must be an impediment external to the defense.⁸ In addition, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁹ In the event that good cause is not shown, a petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.¹⁰ A petitioner may meet this standard upon a colorable showing that he or she is actually innocent of the crime or is ineligible for the death penalty.¹¹

In an attempt to excuse his procedural defects, appellant argued that he had good cause for the delay because he was "indigent and the ineffective assistance of his trial counsel prevented him from obtaining the assistance of a psychiatrist that he needed for his defense." Appellant argued further that the district court's failure to consider the claim that he

⁶NRS 34.810(2).

⁷See NRS 34.726(1); NRS 34.810(3).

⁸Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁹See NRS 34.800(2).

¹⁰Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹¹Id.

was insane at the time of the offense constituted a fundamental miscarriage of justice.

We conclude that the district court did not err in determining that petitioner failed to demonstrate cause for his untimely petition. Appellant failed to set forth any facts to demonstrate how his indigence prevented him from filing a timely habeas corpus petition.¹² Further, appellant failed to demonstrate that ineffective assistance of counsel excused his delay.¹³ Moreover, appellant did not rebut the presumption that the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. Finally, we conclude that appellant failed to demonstrate a fundamental miscarriage of justice based upon his claim of actual innocence.¹⁴ This court noted in Pellegrini that, "reasonable jurists have disagreed on whether proof of legal insanity satisfies the actual innocence benchmark of the fundamental miscarriage of justice exception."¹⁵ In the instant case, we conclude that the two declarations appellant submitted by psychologists over ten years after his conviction are insufficient to show that it is more likely than not that no reasonable juror would have convicted him in light of this "new evidence." Therefore, we conclude that the district court did not err in determining that appellant's petition was procedurally time-barred.

¹²See Hathaway v. State, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003).

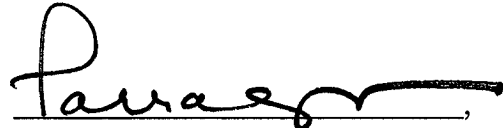
¹³Id. at 253, 71 P.3d at 506-07.

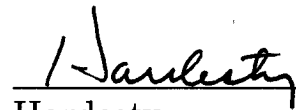
¹⁴Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

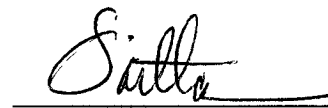
¹⁵Pellegrini, 117 Nev. at 890, 34 P.2d at 539.

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.¹⁶ Accordingly, we affirm the orders of the district court, and

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Donald M. Mosley, District Judge
Mark Miller
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We 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.