

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK RONALD PRAY A/K/A MARK R.
PRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48918

FILED

MAY 16 2008

TRAZIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Mark Ronald Pray's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On April 25, 1996, the district court convicted Pray, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Pray to serve a life term in prison with the possibility of parole, plus an equal and consecutive term for the use of a deadly weapon. This court dismissed Pray's appeal from his judgment of conviction.¹ The remittitur issued on June 22, 1998.

On August 3, 1998, Pray filed a timely post-conviction petition for writ of habeas corpus which the district court denied on June 2, 1999. This court remanded the matter for an evidentiary hearing on a claim

¹Pray v. State, 114 Nev. 455, 959 P.2d 530 (1998).

concerning jury misconduct and dismissed Pray's remaining claims.² After conducting an evidentiary hearing on the jury misconduct issue, the district court denied the claim. This court affirmed the district court order denying Pray's claim that counsel was ineffective for failing to move for a mistrial based on juror misconduct.³

Pray filed a second post-conviction petition for a writ of habeas corpus in the district court on September 1, 2006. The State opposed the petition on the grounds that the petition was untimely, successive, and barred by laches. Without conducting an evidentiary hearing, the district court denied Pray's petition on January 11, 2007. This appeal followed.

Pray filed his petition more than eight years after this court issued the remittitur from his direct appeal. Thus, his petition was untimely filed.⁴ Moreover, Pray's petition was successive because he had previously filed a post-conviction habeas petition in the district court.⁵ Pray's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ Further, because the State specifically pleaded

²Pray v. State, Docket No. 34359 (Order of Remand and Dismissing Appeal, July 7, 2000).

³Pray v. State, Docket No. 39909 (Order of Affirmance, August 20, 2003).

⁴See NRS 34.726(1).

⁵See NRS 34.810(1)(b), (2).

⁶See NRS 34.726(1); NRS 34.810(3).

laches, he was required to overcome the presumption of prejudice to the State.⁷

“[T]he good cause necessary to overcome a procedural bar must be some impediment external to the defense.”⁸ Pray argues that his procedural defaults should be excused due to the district court’s application of an inappropriate standard of review in denying Pray’s motion for a new trial, ineffective assistance of counsel at trial, and because the State withheld exculpatory evidence at trial.

In addition, “[t]he law of the first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings.”⁹

On direct appeal, this court considered Pray’s argument that the district court did not use the totality of the circumstances standard when considering Pray’s motion for a new trial. This court concluded that Pray did not demonstrate that the district court used an inappropriate standard of review. The facts in this appeal are the same as those in the direct appeal. Pray’s claim is successive and he failed to demonstrate good cause and prejudice to overcome applicable procedural bars. Moreover, further consideration of this claim is precluded by the doctrine of the law of the case. Therefore, we conclude that the district court did not err in denying this claim.

⁷See NRS 34.800(2).

⁸Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

⁹State v. Haberstroh, 119 Nev. 173, 188-89, 69 P.3d 676, 686 (2003).

Pray also argues that the ineffective assistance of his trial counsel is sufficient to overcome applicable procedural bars. Specifically, Pray contends that his trial counsel was ineffective for failing to: call Pray to testify; call favorable witnesses; establish the victim's character for violence; object to prosecutorial misconduct; and seek a mistrial due to the State's contact with jurors. However, the district court considered and rejected these claims in Pray's first post-conviction habeas petition. On direct appeal, this court concluded that the district court did not err in denying Pray's habeas petition. These claims are successive and Pray failed to establish good cause and prejudice to overcome the procedural bars. Furthermore, these claims are barred by the doctrine of the law of the case. Therefore, we conclude that the district court did not err in denying these claims.

Additionally, Pray argues that the State withheld exculpatory evidence at trial. However, the district court considered and rejected this claim in Pray's first habeas proceeding. On appeal, this court concluded that the challenged evidence would have been inadmissible. As this claim is successive, Pray was required to establish good cause and prejudice to overcome applicable procedural bars. We conclude that he failed to do so. Moreover, further consideration of this claim is barred by the doctrine of law of the case. Therefore, the district court did not err in denying this claim.

Pray also argues that trial counsel was ineffective for failing to call an expert witness to testify concerning methamphetamine intoxication and for failing to call a crime scene analyst. Pray raised these claims in his first post-conviction habeas petition. Therefore, the claims are successive. However, Pray failed to adequately explain good cause and

prejudice sufficient to overcome the procedural bar. Therefore, we conclude that the district court did not err in denying these claims.

Pray next argues that laches should not bar consideration of his petition on the merits under NRS 34.800(2), which provides that the State is presumptively prejudiced by the filing of a habeas petition later than five years after the decision on direct appeal. However, other than stating that the State will not suffer prejudice by the untimely filing of his petition, Pray fails to adequately explain how he has overcome the presumption of prejudice.

Next, Pray argues that a fundamental miscarriage of justice will result if his claims are not reviewed on the merits because he is actually innocent. This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrates that failure to consider them would result in a "fundamental miscarriage of justice."¹⁰ A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.¹¹ However, Pray has not introduced new evidence or any additional facts indicating that he is actually innocent. Therefore, he has not shown that

¹⁰Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹¹See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

the failure to consider his petition on the merits would result in a fundamental miscarriage of justice.¹²

Additionally, Pray argues that the district court erred in denying his petition pursuant to Byford v. State.¹³ In particular, Pray asserts that pursuant to Byford, under the Eighth Judicial District Court Rule 7.21, “the district court must make a ruling and state its findings of fact and conclusions of law before the State can draft an order for the district court’s review.”¹⁴ Pray further asserts that under Byford, pursuant to NCJC Canon 3B(7), if the district court requests that a party prepare the proposed findings of fact and conclusions of law, the other party must be notified of the request and given an opportunity to respond.¹⁵ Pray argues that the district court violated Byford because it made a ruling outside the parties’ presence, did not state its findings of fact before asking the State to draft the order, and did not give Pray the opportunity to review and respond to the State’s proposed draft. However, this case is distinguishable from Byford. In Byford, the district court failed to follow this court’s order to conduct an evidentiary hearing and summarily denied Byford’s habeas petition. We concluded, therefore, that

¹²See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614, 623 (1998); Murray v. Carrier, 477 U.S. 478, 496 (1986).

¹³123 Nev. ___, 156 P.3d 691 (2007).

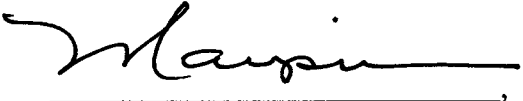
¹⁴Id. at Nev. ___, 156 P.3d at 692.

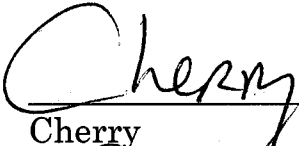
¹⁵Id.

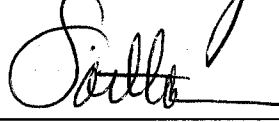
the District court's denial of Byford's habeas petition was improper.¹⁶ To the extent the district court may not have strictly followed the mandates of EJDC Rule 7.21 and NCJC Canon 3B(7), we conclude that Pray failed to demonstrate prejudice. Pray failed to identify any inaccuracies in the district court's findings of facts and conclusions of law or that any failure by the district court to strictly follow EJDC Rule 7.21 and NCJC Canon 3B(7) adversely affected his ability to seek full appellate review. Therefore, we conclude that Pray is not entitled to relief on this claim.

Accordingly, having considered Pray's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Lee A. Gates, 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

¹⁶Id.