

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK JOSEPH WIESE A/K/A
PATRICK ROY WIESE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48988

FILED

AUG 0 2 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Alvarado*
DEPUTY CLERK

This is an appeal from an order of the district court dismissing appellant Patrick Joseph Wiese's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On December 18, 2003, the district court convicted Wiese, pursuant to a jury verdict, of one count of possession of a controlled substance. The district court sentenced Wiese to serve a prison term of 19 to 48 months, ordered the sentence to be suspended, and placed Wiese on probation for a period not to exceed 36 months. Wiese did not file a direct appeal.

On January 27, 2005, the district court entered an order revoking Wiese's probation. The order specified that Wiese was to serve his original sentence and that he was to be given 317 days credit for time served. Wiese did not appeal the probation revocation order.

On October 11, 2005, Wiese filed a proper person petition for a writ of habeas corpus. The district court appointed counsel to represent Wiese, and counsel supplemented Wiese's petition. The State moved to dismiss the petition and supplement, and Wiese filed an opposition. The district court concluded that the petition was untimely filed and that

Wiese had not demonstrated good cause to excuse the procedural bar. This appeal follows.

First, Wiese contends that the district court abused its discretion by dismissing his petition as procedurally barred without providing him with an opportunity to demonstrate his claim of actual innocence.

A petitioner can overcome a procedural bar if he demonstrates that he is actually innocent of the underlying crime.¹ "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial."² To demonstrate that he is actually innocent of the underlying crime, a petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."³

Wiese did not allege a claim of actual innocence based on reliable evidence not presented at trial. Instead, he argued that he was innocent of the crime of possession of a controlled substance because there was no testimony as to the weight of the substance found in his possession, the amount that was found was too small to be capable of being applied to any use, the substance was found as the result of an unconstitutional search, and trial counsel was ineffective.

Because Wiese failed to make a colorable showing of actual innocence and therefore failed to demonstrate good cause for the untimely

¹Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

²Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schulp v. Delo, 513 U.S. 298, 324 (1995)).

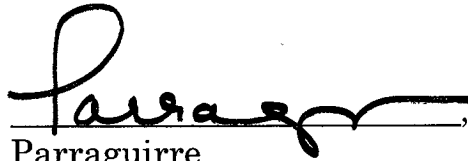
³Id. (quoting Schulp, 513 U.S. at 327).


filing of his petition, we conclude that he was not entitled to an evidentiary hearing and that the district court did not abuse its discretion by dismissing the petition.

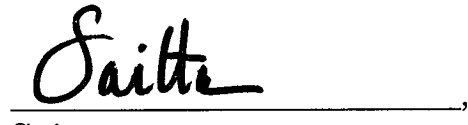
Second, Wiese contends that his "petition was timely filed as to the issue of credit for the additional 42 days of time served." Wiese did not raise the issue of credit for time served as a ground for relief in either his petition or supplemental petition. He merely noted that he had previously filed a petition seeking credit for time served. Because this issue was not raised as a ground for relief in Wiese's petition and was not addressed in the district court order dismissing the petition, we will not consider it here.⁴

Having reviewed the record on appeal, and for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Hardesty, J.


Saitta, J.

⁴See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

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