

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM JAMES BERRY, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49014

FILED

AUG 02 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
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; Sally L. Loehrer, Judge.

On January 21, 1987, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive life terms in the Nevada State Prison without the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on July 12, 1988.

On August 4, 1993, appellant filed a proper person petition for a writ of coram nobis. The district court denied the petition on November 23, 1993. This court subsequently dismissed the appeal from the district court's order.²

¹Berry, Sr. v. State, Docket No. 18098 (Order Dismissing Appeal, June 23, 1988).

²Berry, Sr. v. State, Docket No. 25244 (Order Dismissing Appeal, March 31, 1994).

On March 19, 1997, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On April 16, 1997, the district court denied the motion. This court subsequently dismissed the appeal from the district court's order.³

On March 30, 2000, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On April 19, 2000, the district court denied appellant's motion. This court affirmed the order of the district court on appeal.⁴

On January 30, 2006, appellant filed a proper person motion for county jail time credits. On February 27, 2006, the district court entered an amended judgment of conviction providing appellant with 226 days of credit for time served.

On November 13, 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, arguing that the petition was untimely filed. 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 February 6, 2007, the district court dismissed appellant's petition. This appeal followed.

³Berry v. State, Docket No. 30343 (Order Dismissing Appeal, December 24, 1997).

⁴Berry v. State, Docket No. 36054 (Order of Affirmance, December 13, 2001).

Appellant filed his petition almost nineteen years after this court issued the remittitur from his direct appeal.⁵ Thus, appellant's petition was untimely filed.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁹ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime or ineligibility for the death penalty.¹⁰

In an attempt to excuse his procedural defects, appellant argued that due to ineffective assistance of trial and appellate counsel he did not previously present a claim that his due process rights had been violated by the district court's failure to complete competency proceedings. Appellant further claimed that he was unable to previously present any of

⁵Further, the petition was filed more than thirteen years after the effective date of the amendments to NRS chapter 34 regarding the filing of a post-conviction petition for a writ of habeas corpus. See 1991 Nev. Stat., ch. 44, §, 33, at 92.

⁶See NRS 34.726(1).

⁷See *id.*

⁸See NRS 34.800(2).

⁹Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

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

his claims because he was incompetent to pursue post-conviction relief. Finally, he claimed that a fundamental miscarriage of justice would occur because he was legally insane at the time of the crime and he was incompetent during the trial proceedings.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that this petition was procedurally time barred and barred by laches. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects.¹¹ Although appellant's medical history indicates that he was diagnosed with polydrug abuse and manic depression prior to his crime, this history did not establish that appellant was incompetent.¹² Further, any alleged continuing incompetence was not good cause to excuse the almost nineteen-year delay in the filing of this petition.¹³ Appellant's claim of ineffective assistance of counsel was untimely and he did not demonstrate that he could not have raised this claim earlier, and

¹¹See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹²See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (holding that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him") (quoting Dusky v. United States, 362 U.S. 402 (1960)).

We note that appellant testified during the penalty hearing in the instant case and made cogent statements and answered all questions put to him appropriately.

¹³See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (providing that organic brain damage and poor assistance from inmate law clerks was not an impediment external to the defense).

thus, this claim would not constitute good cause in the instant case.¹⁴ Next, appellant's claim that he was actually innocent because he was legally insane at the time of his crime and incompetent during trial was without merit. As discussed earlier, appellant failed to demonstrate that he was incompetent during trial. Appellant further failed to demonstrate that he was legally insane as a diagnosis of polydrug abuse and manic depression and an abusive childhood do not establish legal insanity.¹⁵ Finally, appellant failed to overcome the presumption of prejudice to the State given the lengthy delay in this case. Therefore, we affirm the order of the district court.

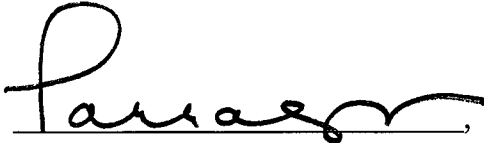
¹⁴See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (recognizing that in order to constitute adequate cause to excuse a procedural defect a claim of ineffective assistance of counsel must not be procedurally defaulted).

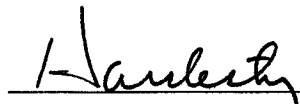
¹⁵See Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-5 (2001) (holding that to be recognized as legally insane a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law).


We further note that this court has questioned whether legal insanity establishes actual innocence sufficient to overcome a procedural default. See Pellegrini, 117 Nev. at 890, 34 P.3d at 539 (2001) (noting that "reasonable jurists have disagreed on whether proof of legal insanity satisfies the actual innocence benchmark of the fundamental miscarriage of justice exception"). Because appellant did not establish legal insanity, this court need reach the issue of whether legal insanity establishes actual innocence in the instant case.

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

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Sally L. Loehrer, District Judge
William James Berry Sr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁶See Lockett 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.