

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD CRAIG HENNAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49046

FILED

AUG 24 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. 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. Third Judicial District Court, Lyon County; David A. Huff, Judge.

On July 2, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of sexual assault on a child under the age of sixteen and one count of lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on May 9, 2000.

On May 3, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed a supplemental petition. The State opposed the petition. While the habeas proceedings were pending, appellant filed a motion to withdraw a guilty plea in the district court. The State opposed the motion. On April 23, 2002, after conducting an evidentiary hearing, the district court denied appellant's petition. On that same date, the district court also entered an order denying

¹Hennan v. State, Docket No. 34623 (Order Dismissing Appeal, April 12, 2000).

appellant's motion to withdraw a guilty plea. This court affirmed the orders of the district court on appeal.²

On February 2, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed post-conviction counsel, but post-conviction counsel did not supplement the petition. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On February 8, 2007, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition almost six years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was an abuse of the writ because he had previously filed a post-conviction petition for a writ of habeas corpus and raised new claims in his 2006 petition.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁶ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence.⁷

²Hennan v. State, Docket No. 39542 (Order of Affirmance, January 31, 2003).

³See NRS 34.726(1).

⁴See NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(3).

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁷Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

In an attempt to excuse his procedural defects, appellant argued that his post-conviction counsel was ineffective in the first proceeding. Appellant claimed that post-conviction counsel should have raised a claim that his trial counsel was ineffective for failing to explain the element of consent and that his guilty plea was invalid as a result. Appellant further claimed that he was actually innocent because there was implied consent with the fifteen-year old victim as she allegedly did not initially resist his sexual advances and he stopped when she did resist and pushed him away.

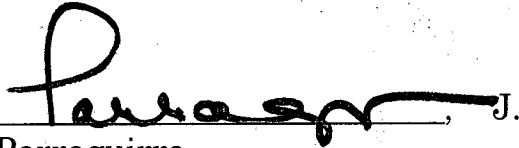
Based upon our review of the record on appeal, we conclude that the district court did not err in determining that the petition was procedurally barred. Ineffective assistance of post-conviction counsel is not good cause in the instant case because the appointment of counsel in the prior post-conviction proceedings was not statutorily or constitutionally required.⁸ Appellant's claim of actual innocence related to only one of the three victims, and thus, appellant necessarily failed to demonstrate that he was actually innocent in the instant case of both of the charges that he pleaded guilty to or the charges foregone by the State in exchange for his guilty plea.⁹ Therefore, we affirm the order of the district court.

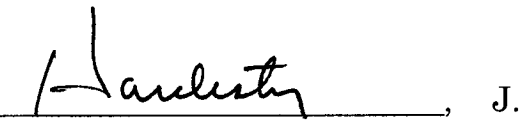
⁸Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

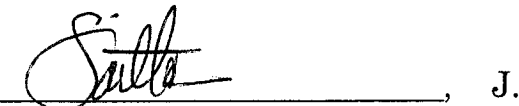
⁹See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (holding that a petition claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614 (1998) (recognizing that actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges foregone by the State in the course of plea bargaining).

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


Parraguirre J.


Hardesty J.


Saitta J.

cc: Hon. David A. Huff, District Judge
Donald Craig Hennan
Attorney General Catherine Cortez Masto/Carson City
Lyon County District Attorney
Lyon County Clerk

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We note that there is a clerical error in the judgment of conviction. The judgment incorrectly states that appellant was convicted of sexual assault of a minor under the age of fourteen. In fact, appellant was convicted of sexual assault of a minor under the age of sixteen. Following this court's issuance of its remittitur, the district court shall correct this error in the judgment of conviction. See NRS 176.565 (providing that clerical error in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that district court does not regain jurisdiction following an appeal until supreme court issues its remittitur).