

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT N. LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49208

FILED

SEP 25 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; Jennifer Togliatti, Judge.

On July 13, 1990, the district court convicted appellant, pursuant to a jury verdict, of burglary, attempted murder with the use of a deadly weapon, two counts of sexual assault with the use of a deadly weapon, and robbery with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison without the possibility of parole, and consecutive terms totaling 80 years.¹ This court affirmed appellant's judgment of conviction on direct appeal.² The remittitur issued on July 31, 1991.

On January 9, 1992, appellant filed a proper person post-conviction petition for relief in the district court. The district court

¹An amended judgment of conviction was filed on December 6, 1990 to correct a clerical error in the judgment of conviction.

²Lee v. State, 107 Nev. 507, 813 P.2d 1010 (1991).

appointed counsel and counsel filed a supplement to the petition. The district court denied appellant's petition, and this court affirmed the district court's order on appeal.³

On July 20, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court, which the district court denied. On appeal, this court affirmed the district court's order.⁴

On January 17, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition as being procedurally barred and specifically pleaded laches. 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 April 19, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition over fifteen years after the remittitur was issued in his direct appeal. Thus, appellant's petition was untimely filed.⁵ Moreover, appellant's petition was successive because he had previously raised and litigated some of his claims in his direct appeal and two previously filed post-conviction petitions; the petition was also an

³Lee v. State, Docket No. 24230 (Order Dismissing Appeal, August 26, 1993).

⁴Lee v. State, Docket No. 46164 (Order of Affirmance, February 24, 2006).

⁵See NRS 34.726(1).

abuse of the writ to the extent that appellant raised new claims for relief.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 a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁹ A reviewing court must reach a claim if failure to consider it would result in a fundamental miscarriage of justice, *i.e.*, where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.¹⁰ This requires a petitioner to show that "it is more likely than not that no reasonable juror would have convicted

⁶See NRS 34.810(2); NRS 34.810(1)(b). The doctrine of the law of the case prevents further litigation of issues previously litigated. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Notably, appellant also incorrectly asserted that none of the issues presented in the instant petition had been previously litigated, and therefore appellant failed to comply with the requirements set forth in NRS 34.735.

⁷See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁸See NRS 34.800(2).

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

¹⁰See Bousley v. U.S., 523 U.S. 614, 623 (1998); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

him."¹¹ "[A]ctual innocence' means factual innocence, not mere legal insufficiency."¹²

In an attempt to demonstrate good cause appellant claimed, once again, that newly discovered DNA evidence exonerated him. Appellant argued that he is actually innocent of the crimes for which he was convicted.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that there was good cause for his delay. Appellant previously litigated claims of newly discovered evidence and actual innocence in his prior post-conviction habeas proceedings. This court considered and rejected these claims. The doctrine of law of the case prevents further litigation of these issues.¹³ Moreover, appellant failed to demonstrate that no reasonable juror would have convicted him. As we have previously noted, DNA testing of the biological evidence in appellant's case did not exonerate appellant. In addition, appellant failed to present evidence that the criminologist or the State tampered with the evidence, intimidated appellant's alibi witness, or suborned perjury. Finally, appellant failed to rebut the presumption of prejudice to the State. Therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred.

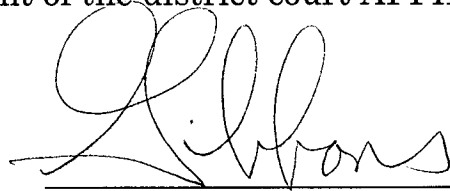
¹¹Bousley, 523 U.S. at 623 (quoting Schlup, 513 U.S. 298, 327-28 (1995)).

¹²Bousley, 523 U.S. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

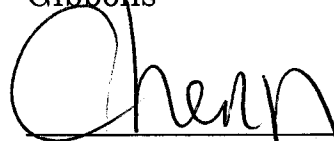
¹³Hall, 91 Nev. 314, 535 P.2d 797.

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.¹⁴ Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 _____, J.

Gibbons

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. Jennifer Togliatti, District Judge
Albert N. Lee
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).