

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED PITTMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49266

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 denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On January 15, 2004, appellant was charged by way of criminal complaint with one count of battery with the use of a deadly weapon (count 1) and battery constituting domestic violence (count 2). On January 7, 2005, appellant was convicted of battery constituting domestic violence (count 2) and sentenced to six months in the Clark County detention center. Appellant was bound over to the district court on count 1, for the battery with the use of a deadly weapon charge.

Subsequently, on June 15, 2005, the district court convicted appellant pursuant to a plea agreement of attempted battery with the use of a deadly weapon. The district court sentenced appellant to a term of 12 to 36 months in the Nevada Department of Corrections to run consecutive to district court case number C198468, with no credit for time

served. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on October 11, 2005.

On June 6, 2006, appellant filed a proper person motion to correct an illegal sentence in the district court and argued that his sentence violated the double jeopardy clause. The State opposed the motion. The district court denied the motion. On appeal, this court affirmed the district court's decision.²

On January 10, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 21, 2007, appellant filed an amended petition. The State opposed the petition. 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 27, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition over one year after this court issued the remittitur from his direct appeal. Appellant admitted that he was "time and statutorily barred." Appellant argued instead that he should be allowed to proceed because there had been a "fundamental miscarriage of justice." Notably, a petitioner may demonstrate that there

¹Pittman v. State, Docket No. 45436 (Order Dismissing Appeal, September 14, 2005).

²Pittman v. State, Docket No. 47690 (Order of Affirmance, December 5, 2006).

has been a fundamental miscarriage of justice upon a colorable showing that he or she is actually innocent of the crime.³

Here, appellant argued merely that his trial counsel was ineffective for failing to inform the court that his felony conviction for battery with the use of a deadly weapon was duplicative of his misdemeanor conviction for battery constituting domestic violence because the acts supporting each offense occurred during the same altercation. Additionally, appellant argued that his trial counsel was ineffective because trial counsel failed to assert appellant's right to a jury trial on the misdemeanor charge of battery constituting domestic violence.

In setting forth these claims, appellant failed to set forth any facts demonstrating that he was actually innocent of the charge of battery with the use of a deadly weapon.⁴ As a result, appellant did not demonstrate that a fundamental miscarriage of justice will result from the failure to consider these claims based on the merits. Therefore, the district court did not err in determining the petition was procedurally barred.

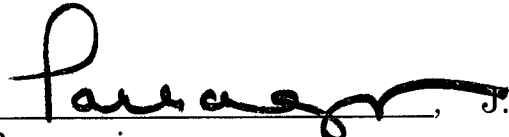
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

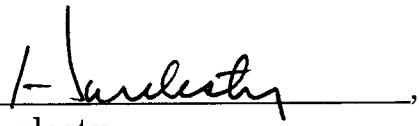
³Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).


⁴See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); 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).

briefing and oral argument are unwarranted.⁵ Accordingly, we affirm the orders of the district court and

ORDER the judgment of the district court AFFIRMED.


Parraguirre J.


Hardesty J.


Saitta J.

cc: Hon. Douglas W. Herndon, District Judge
Alfred Pittman
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).