

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY CLAYTON A/K/A TERRY LEE
CLAYTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49281

FILED

AUG 09 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 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; Jackie Glass, Stewart L. Bell, Judges.

On March 18, 2003, the district court convicted appellant, pursuant to a guilty plea, of five counts of attempted sexual assault, one count of attempted lewdness with a minor under the age of fourteen (Category C felony), and two counts of attempted lewdness with a minor under the age of fourteen (Category B felony). The district court sentenced appellant to serve five consecutive terms of 36 to 240 months in the Nevada State Prison for the attempted sexual assault counts and concurrent terms of 12 to 32 months for the Category C lewdness count and 24 to 96 months for each of the Category B lewdness counts. No direct appeal was taken.

On March 25, 2003, appellant filed a motion to withdraw the guilty plea in the district court. The State opposed the motion. On April 11, 2003, the district court denied the motion. No appeal was taken.

On July 15, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

State opposed the petition. On October 7, 2003, the district court denied the petition. This court dismissed appellant's subsequent appeal because the notice of appeal was untimely filed.¹

On July 19, 2005, appellant filed a motion to withdraw the guilty plea. On August 9, 2005, the district court denied the motion. No appeal was taken.

On September 21, 2005, appellant filed a proper person document labeled "motion for specific performance." The State opposed the motion. Appellant filed a response. On October 20, 2005, the district court amended the judgment to reflect that the sentence for count 5 was a term of 24 to 240 months, and on June 19, 2006, the district court denied his motion. Appellant filed notices of appeal from the order denying his motion for specific performance, the judgment of conviction and the amended judgment of conviction. This court affirmed the order of the district court denying the motion for specific performance and dismissed as untimely the appeals from the judgment of conviction and the amended judgment of conviction.²

On December 27, 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, and 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

¹Clayton v. State, Docket No. 42597 (Order Dismissing Appeal, February 19, 2004).

²Clayton v. State, Docket No. 46434 (Order Affirming in Part and Dismissing in Part, August 23, 2006).

April 5, 2007, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition more than three and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive and an abuse of the writ because he raised several claims previously litigated in his prior petition and raised several claims that could have been raised in the prior 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

In an attempt to excuse his procedural defects, appellant argued that the amended judgment of conviction, which "restructured" his sentence, provided good cause to excuse his procedural defects. Appellant further claimed that any errors relating to the denial of the motion for specific performance could not have been raised in the prior habeas corpus petition and that his trial counsel was ineffective for failing to raise a

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).

claim that his plea agreement was breached.⁸ Finally, in his response to the motion to dismiss, appellant claimed that he was actually innocent.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as procedurally barred. Entry of the amended judgment of conviction did not excuse the procedural defects in the instant case.⁹ Several of appellant's claims (claims 1, 2, 3, 4, 5, 6, 8, and 11) were reasonably available prior to entry of the amended judgment of conviction and could have been raised in appellant's timely first habeas corpus petition.¹⁰ Appellant's claim challenging the amended judgment of conviction (claim 9) was untimely as

⁸Pursuant to the plea negotiations, the parties stipulated that appellant would received a combined minimum sentence of fourteen years and that if the district court was inclined to sentence him to a greater term he would be allowed to withdraw his guilty plea. At sentencing and in the original judgment of conviction, the combined minimum sentence imposed was fifteen years. In response to the motion for specific performance, the district court amended the judgment of conviction to reduce the term for count 5 so that the combined minimum sentence was in fact a term of fourteen years. In the appeal from the denial of his motion for specific performance this court concluded that the district court did not abuse its discretion in amending the judgment of conviction to modify the term for count 5 as it appeared from the record that the district court had not intended to disregard the stipulation and made a misstatement regarding the sentence at the sentencing hearing.

⁹See Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004).

¹⁰See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). In fact, it appears that several of these claims (claims 1, 2, 3, and 6) were previously litigated either in the post-conviction petition for a writ of habeas corpus, motion to withdraw a guilty plea, and/or motion for specific performance. Claims 4, 5, 8 and 11 appear to be a new claims that could have been raised in the first habeas corpus petition.

the petition challenging the amended judgment of conviction was filed more than one year after entry of the amended judgment of conviction, and appellant offered no statement of good cause for why he was not able to file a habeas corpus petition challenging the amended judgment of conviction within one year from the amendment. Appellant's claims challenging the resolution of his motion for specific performance (claims 7 and 10) were inappropriately raised in a petition for habeas corpus relief as any challenge to the resolution of his motion for specific performance should have been litigated in the context of the appeal from the denial of the motion for specific performance. Notably, this court affirmed the district court's denial of appellant's motion for specific performance on appeal; the doctrine of the law of the case prevents further litigation of this issue.¹¹ Appellant's claim that his trial counsel was ineffective for failing to raise a claim that the plea agreement had been breached was untimely and appellant did not demonstrate that he could not have raised this claim earlier. Thus, this claim would not constitute good cause in the instant case.¹² Finally, appellant failed to demonstrate that he was actually innocent based upon the letters of the victim, the victim's mother, and the victim's testimony at the preliminary hearing.¹³ Therefore, we affirm the order of the district court.

¹¹See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹²See Hathaway, 119 Nev. at 252, 71 P.3d at 506 (2003).

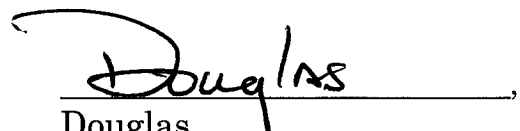
¹³See Pellegrini, 117 Nev. at 887, 34 P.3d at 537; see also Bousley v. United States, 523 U.S. 614 (1998); Murray v. Carrier, 477 U.S. 478, 496 (1986).

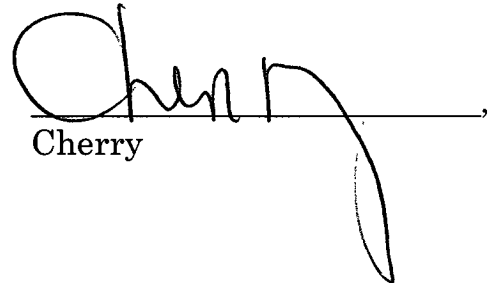
continued on next page . . .

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.
Douglas


_____, J.
Cherry

... continued

The victim's letter notably did not contain any express statement from the victim that she recanted her testimony or prior statements. The sentiments of regret expressed in the victim's letter, which appeared to be written prior to appellant's guilty plea, were not alluded to by the victim during her victim impact statement. Although the victim's mother's letter written before the preliminary hearing contained her opinion that the sexual contact between her husband and her daughter was consensual and did not begin until after the victim was sixteen years of age, the value of this letter was highly dubious in light of the victim's mother's statement at sentencing that appellant physically abused her daughter for six years (the abuse beginning prior to the victim's sixteenth birthday). Appellant offered no cogent argument as to how the preliminary hearing transcripts supported a claim of innocence. In sum, these documents do not support an argument that no reasonable juror would have convicted him.

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

cc: Hon. Jackie Glass, District Judge
Hon. Stewart L. Bell, District Judge
Terry Lee Clayton
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk