

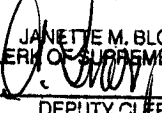
IN THE SUPREME COURT OF THE STATE OF NEVADA

HUGO APARICIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49296

FILED

SEP 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper 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; Sally L. Loehrer, Judge.

On February 19, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. For each count, the district court sentenced appellant to serve a term of 4 to 15 years in the Nevada State Prison, with a consecutive term of 4 to 15 years for the deadly weapon enhancement. The sentences for the two counts were to run concurrent. This court affirmed appellant's conviction on direct appeal.¹ The remittitur issued on October 12, 2004.

On August 9, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Aparicio v. State, Docket No. 43014 (Order of Affirmance, September 15, 2004).

district court denied the petition and this court affirmed the district court's order on appeal.²

On January 25, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 May 10, 2007, the district court denied appellant's petition.³ This appeal followed.

In his petition, appellant contended that (1) he received ineffective assistance of trial counsel; (2) he received ineffective assistance of appellate counsel; (3) he was denied his constitutional right to an appeal because he could not raise claims of ineffective assistance of counsel on direct appeal; and (4) the district court lacked jurisdiction to hear his case and convict him.

Appellant filed his petition more than two years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁴ Moreover, appellant's petition was successive

²Aparicio v. State, Docket No. 46316 (Order of Affirmance, February 24, 2006).

³The district court initially summarily denied appellant's petition on April 3, 2007. On May 10, 2007, the district court issued a new order with more extensive findings of fact and conclusions of law, which we consider the final order for the purpose of this appeal.

⁴See NRS 34.726(1).

and constituted an abuse of the writ as several of the claims set forth in the present petition could have been raised in appellant's previous petition.⁵ Appellant's petition was procedurally barred absent a

⁵See NRS 34.810(2). The following claims were successive: (1) trial counsel was ineffective because trial counsel told appellant he would be sentenced 4 to 10 years and (2) trial counsel was ineffective because she failed to inform him of the deadly weapon enhancement. The following claims of ineffective assistance of trial counsel were an abuse of the writ: (1) trial counsel failed to present exculpatory evidence that there were errors in the voluntary statement of the only eyewitness to the crime; (2) trial counsel failed to raise the issue that appellant was arrested without a warrant 12 days after commission of the crimes; (3) trial counsel failed to file an appeal regarding his certification as an adult; (4) trial counsel did not make a motion for his release even though he was not arraigned within 48 hours; (5) trial counsel failed to protest the fact that appellant was denied the right to bail; (6) trial counsel failed to object to the fact that the court lacked jurisdiction to hear the case; (7) trial counsel made misstatements of fact in the motions she filed with the district court; (8) trial counsel did not object to certain supposed errors contained in the presentence report; (9) trial counsel failed to object to his being sentenced for the deadly weapon enhancement even though appellant did not admit to personally using a gun in the commission of the crimes; and (10) juvenile counsel failed to prevent a finding of probable cause in the juvenile court because they did not challenge the admissibility of appellant's confession, which was excluded by the district court. The following claims were also an abuse of the writ: (1) appellant received ineffective assistance of appellate counsel; (2) appellant was denied his constitutional right to an appeal because he could not raise claims of ineffective assistance of counsel on direct appeal; (3) the district court lacked jurisdiction to hear appellant's case and convict him; and (4) appellant did not enter his plea knowingly or voluntarily.

demonstration of good cause and prejudice.⁶ In the event that good cause is not shown, 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.⁷ A petitioner may meet this standard upon a colorable showing that he or she is actually innocent of the crime.⁸ "[A]ctual innocence' means factual innocence, not mere legal insufficiency."⁹ To demonstrate actual innocence, appellant would have to establish that "it is more likely than not that no reasonable juror would have convicted him."¹⁰ Further, appellant had to demonstrate that he was actually innocent of more serious charges that were foregone by the State in the course of plea bargaining.¹¹

In an attempt to excuse his procedural defects, appellant argued that his lack of education and his inability to "effectively" speak, write, and understand English caused his delay. He also argued that because he was placed in the Youthful Offenders Program for the first two

⁶See NRS 34.726(1); NRS 34.810(3).

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

⁸Id.

⁹Bousley v. United States, 523 U.S. 614, 623 (1998); see also Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁰Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

¹¹Id. at 624.

years he was incarcerated he did not have "personal access" to the law library or to any adult law clerks that could assist him with his petition. Appellant further argued that his delay was excused because he did not file the proper motion to obtain his case file prior to submitting his first petition. Finally, appellant argued a fundamental miscarriage of justice based upon a claim of actual innocence.

Appellant failed to demonstrate that an impediment external to the defense prevented him from filing a timely petition.¹² Notably, appellant presented a timely post-conviction petition for a writ of habeas corpus and appellant failed to demonstrate that he could not have raised all his claims in that petition.¹³ Appellant failed to demonstrate that either his lack of education or his alleged inability to speak, write, or understand English caused his delay.¹⁴ A claim that a defendant did not receive case files from counsel is not good cause.¹⁵ Additionally, appellant failed to demonstrate that he was not provided with adequate access to legal materials or assistance in the prison because he could not personally access the library. Appellant failed to demonstrate that he was deprived of other means of access to legal materials and the filing of the first

¹²See Hathaway v. State, 119 Nev. 248, 252 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

¹³See Hathaway, 119 Nev. at 252-253, 71 P.3d at 506.

¹⁴See generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

¹⁵See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

petition indicates that appellant had some access. Moreover, poor assistance for inmates is not good cause.¹⁶

Furthermore, appellant failed to demonstrate a fundamental miscarriage of justice based upon his claims of actual innocence.¹⁷ Appellant claimed that the only witness who placed him at the scene of the crime gave an inaccurate description, because she stated that he was "bold" [sic], when he was not bald, and that he had a scar under his right eye, when his scar is actually under his left eye. Appellant failed to demonstrate that he was actually innocent. A review of the record reveals that the witness recognized appellant before he put the mask on and identified him by his first name in her voluntary statement. Under these circumstances, appellant failed to demonstrate that, "it is more likely than not that no reasonable juror would have convicted him."¹⁸ Therefore, we conclude that the district court did not err in determining that appellant's 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

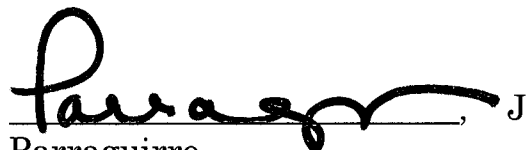
¹⁶Phelps, 104 Nev. at 660, 764 P.2d at 1306.

¹⁷See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (recognizing that a petitioner may not complain of events that preceded his guilty plea).

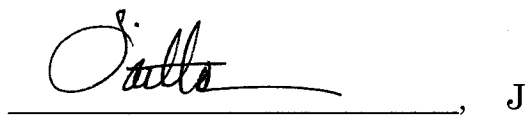
¹⁸Bousley, 523 U.S. at 623 (quoting Schlup, 513 U.S. at 327-28).

briefing and oral argument are unwarranted.¹⁹ Accordingly, we affirm the order of the district court, and

ORDER the judgment of the district court AFFIRMED.²⁰


Parraguirre J.


Hardesty J.


Saitta J.

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

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We 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.