

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN WHITE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49557

**FILED**

NOV 08 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Y. [Signature]  
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; Sally L. Loehrer, Judge.

On March 28, 2002, the district court convicted appellant, pursuant to an Alford plea,<sup>1</sup> of two counts of attempted lewdness with a child under the age of fourteen. The district court sentenced appellant to serve two consecutive terms of 24 to 120 months in the Nevada State Prison. No direct appeal was taken.

On November 8, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent appellant in the post-conviction proceedings. On April 4, 2003, after conducting an evidentiary hearing, the district court denied the petition. This court affirmed the order of the district court on appeal.<sup>2</sup>

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>White v. State, Docket No. 41087 (Order of Affirmance, February 11, 2004).

On August 11, 2006, appellant filed a proper person motion to correct an illegal sentence in the district court. On September 11, 2006, the district court denied the motion. This court affirmed the order of the district court on appeal.<sup>3</sup>

On September 29, 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 response to the claim of actual innocence, and appellant filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. After conducting an evidentiary hearing on the claim of actual innocence, the district court denied the claim of actual innocence, and on April 30, 2007, the district court entered an order dismissing the petition. This appeal followed.<sup>4</sup>

In his petition, appellant claimed that he was actually innocent. Appellant filed his petition approximately four and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>5</sup> Moreover, appellant's petition was an abuse of the writ because he had raised a new and different claim for relief from those claims litigated in the prior petition.<sup>6</sup> Appellant's petition was

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<sup>3</sup>White v. State, Docket No. 47964 (Order of Affirmance, January 22, 2007).

<sup>4</sup>To the extent that appellant appeals from the denial of a request for counsel, we conclude that the district court did not abuse its discretion in denying his request. See NRS 34.750.

<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.810(2). Moreover, to the extent that the underlying facts of the claim of actual innocence formed the basis for his claim in the

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procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup> A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>8</sup> In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.<sup>9</sup>

In an attempt to excuse his procedural defects, appellant argued that the procedural default rules applicable to a post-conviction petition for a writ of habeas corpus did not apply to his petition as he filed the petition pursuant to NRS 34.360 and NRS 34.500. Appellant further claimed that his petition should be construed to be a petition for a writ of audita querela. Appellant also claimed that he had new evidence of actual innocence in the form of an affidavit from the victims' mother who asserted that appellant did not inappropriately touch or molest her children and that a man named "Johnnie" had inappropriately touched her daughters. Appellant claimed that this affidavit was not available prior to the filing of this petition because a private investigation firm only recently located the victims' mother.

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*... continued*

prior petition that trial counsel was ineffective for failing to investigate, the claim was successive. See id.

<sup>7</sup>See NRS 34.726(1); NRS 34.810(3).

<sup>8</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>9</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as procedurally defective. Because appellant challenged the validity of the judgment of conviction, appellant's petition must be construed to be a post-conviction petition for a writ of habeas corpus.<sup>10</sup> Thus, the procedural default rules set forth in NRS 34.726 and NRS 34.810 are applicable to the petition. Further, appellant failed to demonstrate that he was actually innocent. The statements in the victims' mother's affidavit were neither new nor irrefutable evidence of actual innocence.<sup>11</sup> Appellant failed to demonstrate that it was more likely than not that no reasonable juror would have convicted him if the jury had been presented with the statements in the victims' mother's affidavit in light of the four witness statements in the instant case.<sup>12</sup> Therefore, we affirm the order of the district court.

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<sup>10</sup>See NRS 34.724(2)(b) (providing that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them").

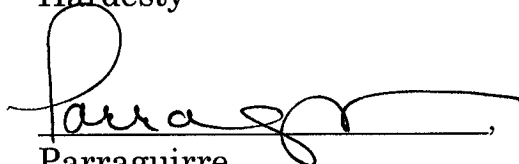
<sup>11</sup>Although the affidavit had only recently been obtained, it is clear from the record on appeal that the substantive information in the affidavit was known to appellant at the time he entered his guilty plea.

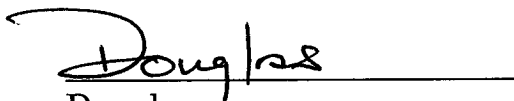
<sup>12</sup>We note that at the evidentiary hearing, appellant also asserted that one of the witnesses wrote him a letter in prison indicating that the witness was wrong in the statement. Appellant failed to identify the witness or present any proof of this assertion at the evidentiary hearing; thus, this assertion fell short of a demonstration of actual innocence.

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.<sup>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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

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<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).