

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JOHN CAUSEY,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 49797

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On August 12, 1998, appellant Matthew John Causey was convicted, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon, third-degree arson, and trafficking in a controlled substance. The district court sentenced Causey to serve two consecutive terms of life in prison with the possibility of parole after 20 years, a concurrent term of 19-48 months in prison, and a consecutive term of 18-50 months in prison.¹ Causey appealed from the judgment of conviction, and this court dismissed the appeal after rejecting Causey's arguments on their merits.²

¹On October 27, 1998, Causey was convicted in the same case, pursuant to a guilty plea, of ex-felon in possession of a firearm.

²Causey v. State, No. 33012 (Order Dismissing Appeal, July 7, 2000).

On July 3, 2000, Causey filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court initially dismissed the petition, finding that it was not properly verified. This court, however, reversed and remanded for further proceedings.³ On remand, the district court appointed counsel, and on September 29, 2003, counsel filed a supplemental petition. The district court thereafter denied the petition and supplemental petition without an evidentiary hearing. This court affirmed that decision on appeal.⁴

On November 9, 2006, Causey filed a second post-conviction petition for a writ of habeas corpus in the district court with the assistance of counsel. The State filed a motion to dismiss the petition as untimely and successive, which Causey opposed. The district court dismissed the petition as untimely and successive. This appeal followed.

On appeal, Causey argues that he presented good cause to excuse his procedural default on two grounds. Alternatively, he argues that he can overcome the procedural bars as to the second claim in his petition because he is actually innocent of first-degree murder.

First, Causey argues that he had good cause for his delay and for filing a successive petition because he did not have access to trial and appellate counsels' files when he filed the first petition. This argument

³Causey v. State, Docket No. 36721 (Order of Reversal and Remand, December 5, 2001).

⁴Causey v. State, Docket No. 42294 (Order of Affirmance, June 25, 2004).

does not establish good cause.⁵ And we decline Causey's invitation to overrule our prior case law rejecting similar arguments.

Second, Causey argues that he had good cause for his delay in raising claim 1 in his second petition and for filing a successive petition as to this claim because the factual or legal basis for the claim was not available when he filed the first petition.⁶ In particular, he argues that he was not previously aware of the conflict of interest alleged in claim 1 in his second petition—that the Washoe County Public Defender's Office had represented one of the witnesses against him, Brian Gilman.⁷ He also indicates that his first post-conviction counsel was not aware of the alleged conflict. We conclude that this does not rise to the level of good cause because Causey failed to allege sufficient facts to demonstrate that the alleged conflict could not have been discovered or raised previously and because Causey was not entitled to the effective assistance of first post-conviction counsel.⁸

⁵Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

⁶See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (“An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel’” (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))).

⁷Causey had been advised before trial that the public defender's office previously had represented two other witnesses against him, Joseph Warner and Connie Kelly. Causey executed a waiver of any conflict with respect to those two witnesses.

⁸Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996); NRS 34.750.

Finally, Causey argues that applying the procedural bars to claim 2 in his second petition would result in a fundamental miscarriage of justice because he is actually innocent of first-degree murder. In particular, Causey alleged in his second petition that his counsel were ineffective for failing to object to the jury instruction on aiding and abetting because the instruction failed to inform the jury of the specific intent required to find Causey guilty of first-degree murder as an aider and abettor. Causey relies on this court's recent decisions in Sharma v. State, which held that a defendant may be liable as an aider and abettor for the specific intent crime of another only if the defendant "knowingly aided the other person with the intent that the other person commit the charged crime,"⁹ and Mitchell v. State (Mitchell II), which held that Sharma merely clarified the law and did not announce a new rule.¹⁰ We conclude that this argument also lacks merit.

This court has recognized that the conviction of a person who is actually innocent would result in a "fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition."¹¹ Accordingly, when a petitioner cannot show good cause to overcome the procedural bars, the court may nonetheless grant habeas relief "if the petitioner can demonstrate that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'"¹² In

⁹118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

¹⁰122 Nev. ___, ___, 149 P.3d 33, 38 (2006).

¹¹Id. at ___, 149 P.3d at 36.

¹²Id. (quoting Murray, 477 U.S. at 496).

this context, “[a]ctual innocence” means factual innocence, not mere legal insufficiency.”¹³ Thus, as we have explained, a petitioner claiming actual innocence in order to overcome a procedural bar to a claim challenging the validity of a conviction “must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.”¹⁴

Here, we conclude that Causey has not demonstrated a fundamental miscarriage of justice sufficient to overcome the procedural bars. In particular, although it appears that the jury was not accurately instructed regarding the intent necessary to convict Causey of first-degree murder as an aider and abettor and that counsel were therefore deficient in failing to raise this issue at trial or on appeal, Causey has not demonstrated that this error resulted in the conviction of a person who is actually innocent. The error here is a matter of legal insufficiency with respect to the aiding and abetting instruction. Unlike in Mitchell II, the State in this case alleged two theories in addition to aiding and abetting: that Causey killed the victim with premeditation and deliberation and that Causey killed the victim by lying wait.¹⁵ As this court held on direct appeal, the evidence was sufficient to support these theories.¹⁶ Accordingly, Causey cannot demonstrate that he is actually innocent of

¹³Id. (quoting Bousley v. United States, 523 U.S. 614, 623-24 (1998)).

¹⁴Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

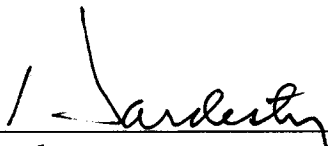
¹⁵See NRS 200.030(1)(a).

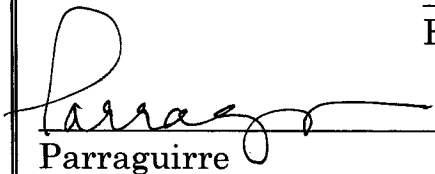
¹⁶Causey v. State, No. 33012 (Order Dismissing Appeal, July 7, 2000).

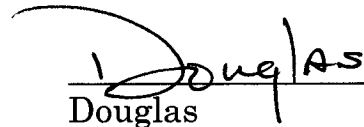
first-degree murder solely on the basis that the jury was not properly instructed on one of the three theories on which he was charged. In this, Causey's reliance on Bolden v. State¹⁷ is misplaced because the issue is not whether reversal would have been required on direct appeal given the erroneous instruction and the general verdict but whether Causey has demonstrated actual innocence for purposes of overcoming the procedural bars to an untimely and successive habeas petition. Because Causey failed to demonstrate that application of the procedural bars to his second claim would result in a fundamental miscarriage of justice, we conclude that the district court properly dismissed that claim as procedurally barred.

Having considered Causey's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁷121 Nev. 908, 124 P.3d 191 (2005).