

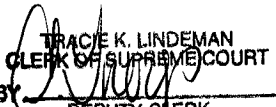
IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP JACKSON LYONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50002

FILED

JAN 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Lee A. Gates, Judge.

On May 2, 1991, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree kidnapping with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole for kidnapping with the use of a deadly weapon and two consecutive terms of nine years for robbery with the use of a deadly weapon, the latter terms to be served concurrently with the former terms. This court dismissed appellant's direct appeal.¹ The remittitur issued on February 23, 1993.

On July 16, 1993, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On

¹Lyons v. State, Docket No. 22332 (Order Dismissing Appeal, February 3, 1993).

January 4, 1995, the district court denied appellant's petition. This court dismissed appellant's appeal of the district court's order.²

On August 4, 1999, appellant filed a second proper person post-conviction petition for a writ of habeas corpus. On December 9, 1999, the district court denied appellant's petition. This court affirmed the district court's order denying the petition.³

On September 25, 2006, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On October 16, 2006, the district court denied appellant's motion. This court affirmed the district court's denial of appellant's motion.⁴

On May 7, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing that it was successive and untimely. Moreover, the State specifically pleaded laches. 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 August 15, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than 14 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition

²Lyons v. State, Docket No. 26436 (Order Dismissing Appeal, February 10, 1998).

³Lyons v. State, Docket No. 35151 (Order of Affirmance, August 7, 2001).

⁴Lyons v. State, Docket No. 48269 (Order of Affirmance, February 7, 2007).

was untimely filed.⁵ Moreover, appellant's petition was an abuse of the writ because he raised new claims not raised and litigated in his first post-conviction petition for a writ of habeas corpus.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁷ In addition, as the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice—the conviction of one who is actually innocent.⁹ To demonstrate actual innocence a petitioner must demonstrate in light of all the evidence, it is more likely than not that no reasonable juror would have convicted petitioner absent a constitutional violation.¹⁰ The United States Supreme Court has noted that actual innocence means factual innocence and not mere legal insufficiency.¹¹

Appellant did not attempt to demonstrate good cause or prejudice to excuse the procedural defects; rather, appellant argued that a failure to review his claims would result in a fundamental miscarriage of

⁵See NRS 34.726(1).

⁶See NRS 34.810(2).

⁷See 34.726(2); NRS 34.810(3).

⁸See NRS 34.800(2).

⁹Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁰See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹¹See Bousley v. United States, 523 U.S. 614, 623-24 (1998).

justice. Appellant asserted that he was actually innocent of first degree kidnapping. Specifically, appellant claimed that under Wright v. State,¹² he was innocent of kidnapping because the movement of the victim was incidental to the robbery and was only for the time necessary to complete the robbery.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred as untimely, an abuse of the writ, and barred by laches. Appellant failed to demonstrate that he was actually innocent in the instant case as his argument relating to dual convictions involved mere legal insufficiency. Further, appellant failed to demonstrate that in light of all the evidence, it was more likely than not that no reasonable juror would have convicted appellant of first degree kidnapping with the use of a deadly weapon had the jury been instructed pursuant to Wright. The evidence produced at trial showed that appellant forced the victim to drive into the desert after she denied having any money. While appellant took the victim's jewelry in the desert, he did not need to force the victim to drive to the remote location to accomplish the taking.¹³ Further, after appellant completed the robbery at the ATM, he forced the victim to drive


¹²94 Nev. 415, 581 P.2d 442 (1978).

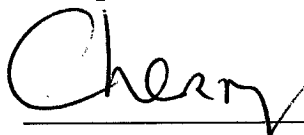
¹³See Woods v. State, 95 Nev. 29, 31-32, 588 P.2d 1030, 1032 (1979) (same) (holding that locking the victims in the trunk of a car in a remote area increased the risk of harm to them and was not necessary to complete the robbery).


him to her apartment complex and expose herself during the drive.¹⁴ Finally, appellant did not meet his burden of rebutting the presumption of prejudice to the State. Therefore, the district court did not err in denying his petition.

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.¹⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

¹⁴See Garcia v. State, 121 Nev. 327, 336, 113 P.3d 836, 842 (2005) ("To meet the asportation requirement when robbery is also charged, the movement of the victim must be over and above that required to complete the associated crime and must substantially increase the risk of harm beyond that necessarily present in the crime of robbery itself.") (citing Wright, 94 Nev. at 417-18, 581 P.2d at 443-44).

¹⁵See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Lee A. Gates, District Judge
Phillip Jackson Lyons
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk