

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY EMIL,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 50044

FILED

SEP 24 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On February 10, 1988, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence. Emil v. State, Docket No. 18989 (Order Dismissing Appeal, April 25, 1989). The remittitur issued on May 16, 1989.

On March 14, 1990, appellant filed a proper person petition for post-conviction relief pursuant to former NRS chapter 177 in the district court. The State opposed the petition. The district court appointed

counsel to represent appellant but declined to conduct an evidentiary hearing.¹ On December 18, 1990, the district court denied appellant's petition. This court dismissed appellant's appeal. Emil v. State, Docket No. 22136 (Order Dismissing Appeal, September 20, 1991).

On July 8, 1999, 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, the district court declined to appoint counsel but allowed attorney Patricia Erickson to represent appellant pro bono. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On February 3, 2000, the district court denied appellant's petition. This court affirmed the order of the district court on appeal. Emil v. State, Docket No. 35752 (Order of Affirmance, December 4, 2001).

It appears appellant has sought federal habeas corpus relief and has returned to state court for failure to exhaust claims. On July 10, 2006, appellant filed, through his federal public defender, a post-conviction petition for a writ of habeas corpus in the district court. The State argued that the petition was procedurally barred. Moreover, the State specifically pleaded laches. Appellant filed a response to the motion to dismiss. Pursuant to NRS 34.770, the district court declined to conduct

¹Counsel appointed to represent appellant in the first post-conviction petition was the same counsel that represented appellant on appeal.

an evidentiary hearing but allowed counsel and the State to argue at a hearing held on June 19, 2007. On July 16, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than seventeen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.² See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions and the first petition was decided on the merits. See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.³ See NRS 34.810(1)(b)(2); NRS 34.810(2).

Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). Specifically, NRS 34.800(2) provides that:

²Further, appellant's petition was filed almost 13 years after the effective date of NRS 34.726. 1991 Nev. Stat., ch. 44, § 5, at 75-76. (effective January 1, 1993); see also Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

³Appellant acknowledges that the first 19 claims raised in his 2006 petition were previously litigated. Appellant failed to include a copy of his 1999 petition and failed to provide a clear list of claims raised in that petition. Therefore, this court relies upon appellant's representation that the first 19 claims were raised in the previous petition and are therefore successive. To the extent that any claims were new and different, those claims would constitute an abuse of the writ. NRS 34.810(2).

[a] period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State.

NRS 34.800(2) requires the State to specifically plead laches in a motion to dismiss and affords a petitioner the opportunity to respond to the State's allegations before the district court rules on any motion to dismiss based on the rebuttable presumption of prejudice.

NRS 34.800 contemplates two types of prejudice to the State. First, the delay in filing a petition prejudices the State's ability to respond to the petition. See generally NRS 34.800(1)(a). Second, the delay in filing the petition prejudices the State's ability to conduct a retrial of the petitioner. See generally NRS 34.800(1)(b). Each of these types of prejudice require a different showing in order to rebut. Rebutting the presumption of prejudice to the State's ability to respond to the petition requires the appellant to demonstrate that "the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). In order to rebut the presumption of prejudice to the State's ability to retry appellant, appellant must demonstrate "that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b).

In order to demonstrate a fundamental miscarriage of justice to overcome the presumption of prejudice to the State, a petitioner must make a colorable showing of actual innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate actual innocence, a petitioner must show that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence” raised in the procedurally defaulted petition. Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). “To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial.” Id. (quoting Schlup, 513 U.S. at 324).

In the proceeding below, appellant did not attempt to specifically rebut the presumption of prejudice to the State. Instead appellant argued that the procedural bars, including laches, are invalid because Nevada courts have inconsistently applied statutory procedural bars in other cases. The district court denied the petition because it was subject to the procedural bars, including laches.

On appeal, appellant briefly addresses laches. Appellant argues that “the doctrine of laches is a procedural default doctrine and can be excused by proof of cause and prejudice.” However, this is not the correct standard for overcoming the presumption of prejudice to the State under NRS 34.800. Therefore, appellant failed to rebut the presumption of prejudice to the State, and we conclude that the district court did not

err in determining that the petition was barred by laches. See NRS 34.800(2).⁴

It appears that appellant may raise an argument of actual innocence in his brief. It appears that appellant argues he is actually innocent because witness Joseph Henslick recanted his trial testimony. Henslick was in jail with appellant before and during appellant's trial. On the first day of trial, Henslick contacted the State and informed the State that appellant confessed to him and had asked him to lie on the stand. At trial, Henslick testified that appellant told him that appellant shot the victim.⁵ On December 20, 2005, Henslick signed a declaration that stated that he lied when he testified that appellant confessed to him. Specifically, the declaration stated:

⁴Because the procedural default set forth in NRS 34.800(2) is alone sufficient to dismiss appellant's petition, we decline to consider the good cause and prejudice arguments related to NRS 34.726 and NRS 34.810. Further, appellant claimed in his petition that the district court erred by giving an erroneous instruction on premeditation. Appellant did not cite to Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), below, however, appellant cited to Polk on appeal because it was a newly decided case. Without deciding whether this claim was properly raised for the first time on appeal, we conclude that this claim lacks merit because, pursuant to Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 849 (2008), appellant cannot demonstrate actual prejudice.

⁵Henslick also testified that appellant asked him to testify falsely about a conversation that appellant had with Michael Lefever. Henslick does not appear to recant this testimony. He only appears to recant the testimony he gave regarding appellant confessing to him.

1. I testified against Rod Emil in Clark County, Nevada, in November 1987. Mr. Emil was being prosecuted for murder.
2. I told the jury that while we were in jail together Rod Emil confessed to me that he killed a man. This testimony was not true.
3. While we were in jail together, Rod Emil never told me he was guilty of anything.
4. The District Attorney told me to testify Rod Emil had confessed. I wanted to please the DA, so did as they asked.

Appellant fails to meet his burden for an actual innocence claim. Appellant fails to show that "it is more likely than not that no reasonable juror would have convicted him in light of" Henslick's recantation. Even assuming Henslick's recantation was credible, the evidence presented at trial, while not overwhelming, was sufficient to convict appellant without Henslick's testimony. Several witnesses testified that appellant confessed, including Ken Bono, Martin Koba, and Michael Lefever. Further, evidence was presented that Russ Tolley, the victim, was likely killed on March 3, or March 4, 1983, and that appellant was in Las Vegas at that time. Tolley was supposed to have 4 to 5 pounds of marijuana to sell and appellant and his co-defendant Todd Leavitt were supposed to buy it from him. On March 3, 1983, the last time Tolley was seen, he was on his way to sell some marijuana. Moreover, appellant and Leavitt had access to the type of gun that was used to kill the victim. The gun belonged to an employee of Leavitt's father, and was discovered missing on March 3. Shortly after the murder, appellant and Leavitt were

seen taking the carpet out of Leavitt's house. They later cleaned the walls of the house and when asked, Leavitt answered it was to get rid of the traces of Tolley's hair. Under these facts, we conclude that the district court did not err in rejecting appellant's actual innocence argument and determining that the petition was procedurally defaulted. Therefore, because appellant failed to rebut the presumption of prejudice to the State, the district court did not err in denying appellant's petition based on laches.

Having reviewed the documents submitted on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Federal Public Defender/Las Vegas
Law Office of Patricia M. Erickson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk