

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
TANIKO CURT SMITH,
Respondent.

No. 50122

FILED

JAN 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is the State's appeal from an order of the district court granting respondent's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On May 2, 1997, the district court convicted respondent, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon (Count 1), one count of attempted murder with the use of a deadly weapon (Count 2), two counts of robbery with the use of a deadly weapon (Counts 3 and 4), and one count of attempted robbery with the use of a deadly weapon (Count 5). The district court sentenced respondent to serve two equal and consecutive terms of life in the Nevada State Prison without the possibility of parole for Count 1 with additional terms totaling sixty years for the remaining counts. This court dismissed respondent's direct appeal.¹ The remittitur issued on December 22, 1998.

¹Smith v. State, Docket No. 30243 (Order Dismissing Appeal, December 3, 1998).

On October 30, 2000, respondent filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On January 31, 2001, the district court denied respondent's petition as untimely. This court affirmed the district court's order on appeal.²

On January 30, 2002, respondent filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. On July 10, 2002, the district court denied respondent's petition as untimely after conducting an evidentiary hearing. This court affirmed the district court's order on appeal.³

On February 23, 2005, respondent filed a motion to correct an illegal sentence in the district court. The district court denied the motion on May 18, 2005. This court affirmed the district court's order on appeal.⁴

On January 31, 2007, respondent, through counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that it was untimely filed. In addition, the State specifically pleaded laches. The district court did not conduct an evidentiary hearing. However, on August 21, 2007, the district court granted respondent's petition and vacated respondent's convictions

²Smith v. State, Docket No. 37387 (Order of Affirmance, November 20, 2001).

³Smith v. State, Docket No. 39860 (Order of Affirmance, April 10, 2003).

⁴Smith v. State, Docket No. 45258 (Order of Affirmance, November 10, 2005).

for murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. This appeal followed.

The State argues that the district court erred in finding that respondent demonstrated good cause to excuse his delay in filing the petition.

Respondent filed his petition more than 7 years after this court issued the remittitur from his direct appeal. Thus, respondent's petition was untimely filed.⁵ Respondent's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶

In his petition, respondent asserted that his convictions for murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon were based on aiding and abetting jury instructions that violated Sharma v. State.⁷ He claimed that this court's decision in Mitchell v. State,⁸ which held that Sharma should be applied retroactively, constituted good cause for his failure to raise this claim in a timely petition.

We conclude that the district court erred in finding that respondent demonstrated good cause sufficient to excuse his procedural defects. In Sharma, we rejected the natural and probable consequences

⁵See NRS 34.726(1).

⁶See id.

⁷118 Nev. 648, 56 P.3d 868 (2002).

⁸122 Nev. 1269, 149 P.3d 33 (2006).

doctrine and held that “in order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider and abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.”⁹ In Mitchell, this court held that Sharma was a clarification of the law.¹⁰ As Sharma reflects a clarification of the law, the underlying reasoning in Sharma existed at the time of respondent’s trial and presented a basis for which appellant could have presented a claim on direct appeal.¹¹ Additionally, respondent failed to establish prejudice. The jury was not instructed in accordance with the natural and probable consequences doctrine. Rather, the jury was properly instructed “[a] person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, the commission of such crime.” Therefore, we conclude that the district court erred in finding that respondent established good cause and

⁹Sharma, 118 Nev. at 655, 149 P.3d at 872.

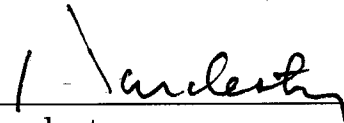
¹⁰Mitchell, 122 Nev. at 1276, 149 P.3d at 38.

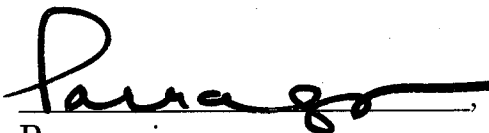
¹¹See Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (stating that if a decision merely construes and clarifies an existing rule rather than announce a new rule, this court’s interpretation is merely a restatement of existing law).

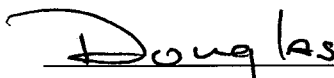
prejudice to excuse the filing of an untimely habeas petition.¹²

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Lee A. Gates, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Joel M. Mann, Chtd.
Eighth District Court Clerk

¹²As we conclude that appellant's claims were procedurally barred, we need not discuss the arguments regarding the merits of those claims.