

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID SCOTT SWANBERG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50293

**FILED**

APR 22 2008

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 dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On December 6, 2001, the district court convicted appellant David Swanberg, pursuant to a guilty plea, of one count of first-degree arson. The district court sentenced Swanberg to serve a prison term of 24 to 180 months. Swanberg did not file a direct appeal.

On August 15, 2005, Swanberg filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Swanberg and counsel filed a supplemental petition. The State opposed the petitions. Following an evidentiary hearing, the district court dismissed Swanberg's petition. This appeal follows.

Swanberg filed his petition approximately four and one half years after the entry of his judgment of conviction. Thus, Swanberg's

petition was untimely filed.<sup>1</sup> Swanberg's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>2</sup> A petitioner may also be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice, *i.e.*, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."<sup>3</sup> This requires a petitioner to show "that it is more likely than not that no reasonable juror would have convicted him."<sup>4</sup> "[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>5</sup> A district court's factual findings are entitled to deference when reviewed on appeal.<sup>6</sup>

Swanberg does not attempt to demonstrate good cause or prejudice to excuse his procedural defects. Rather, Swanberg argues that a failure to review his claims would result in a fundamental miscarriage of justice. Specifically, Swanberg argues that the district court erred in dismissing his petition because he demonstrated at the hearing that he is actually innocent of the arson. Swanberg contends that he presented

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

<sup>2</sup>See *id.*; NRS 34.810(3).

<sup>3</sup>See Murray v. Carrier, 477 U.S. 478, 496 (1986); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>4</sup>Bousley v. U.S., 523 U.S. 614, 622 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

<sup>5</sup>*Id.* at 623-24.

<sup>6</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

evidence at the hearing demonstrating that he had been inebriated at the time of the incident and therefore, could not recall starting the fire, and could not have started the fire with malicious intent. Additionally, Swanberg argues that the evidence demonstrated that the fire could have been started by accident since both he and his girlfriend smoked cigarettes.

Based upon our review of the record on appeal, we conclude that Swanberg failed to demonstrate that he was actually innocent. The district court found that Swanberg failed to prove that he did not intentionally cause the fire or was so inebriated that he could not form the requisite malicious intent. The district court's findings are supported by substantial evidence. In particular, we note that the fire investigator testified at the post-conviction hearing that someone intentionally set the fire, Swanberg's girlfriend was not in the apartment when the fire started, and Swanberg made incriminating statements following the fire. Swanberg has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Swanberg has not demonstrated that the district court erred as a matter of law.<sup>7</sup> Accordingly, we conclude that the district court did not err in dismissing Swanberg's petition as procedurally barred.<sup>8</sup>

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<sup>7</sup>See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); Riley, 110 Nev. at 647, 878 P.2d at 278.

<sup>8</sup>Swanberg also contends that his guilty plea was unknowing and his defense counsel was ineffective. Because we have determined that Swanberg's post-conviction petition is procedurally barred, we have not  
*continued on next page . . .*

Having considered Swanberg's contentions and determined that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

cc: Hon. Connie J. Steinheimer, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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considered the merits of these contentions. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("in order [for a claim of ineffective assistance of counsel] to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted").