

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVERETT WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50366

FILED

JUN 13 2008

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

ORDER OF AFFIRMANCE

This is a proper person 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; Jennifer Togliatti, Judge.

On September 17, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary (count 1), one count of battery with the intent to commit a crime (count 2), five counts of sexual assault with a deadly weapon (counts 3 through 7), and one count of robbery with the use of a deadly weapon (count 8). The district court sentenced appellant to serve the following terms in the Nevada State Prison: (1) for count 1, a term of 22 to 96 months; (2) for count 2, a term of 35 to 156 months, to be served consecutively to count 1; (3) for counts 3 through 7, two consecutive terms of life with the possibility of parole for each count, the term for count 3 to run consecutively to count 2, and the term for count 4 to run consecutively to count 3, with the remaining terms to run concurrently; and (8) for count 8, two consecutive terms of 35 to 156 months to run consecutively to count 7. This court affirmed the judgment

of conviction on direct appeal.¹ The remittitur issued on November 30, 2004.

On June 14, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On October 31, 2005, the district court denied the petition. This court affirmed the order of the district court on appeal.²

On May 24, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a response. 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 31, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that trial counsel was ineffective for failing to object to the introduction of the massage oil bottle without having it tested for the victim's DNA or appellant's fingerprints. Appellant further claimed that trial counsel was ineffective for failing to have tested for fingerprints other items, a laptop computer and chair, that the victim testified were touched by appellant. Appellant claimed that further investigation would have shown that the victim was lying. Appellant appeared to claim that he was innocent.

¹Walker v. State, Docket No. 42222 (Order Affirming and Remanding for Correction of Judgment of Conviction, November 4, 2004). On December 7, 2004, the district court entered an amended judgment of conviction correcting the error.

²Walker v. State, Docket No. 46083 (Order of Affirmance, March 24, 2006).

Appellant filed his petition approximately two and one-half years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁶ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime—"it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation."⁷

In an attempt to excuse his procedural defects, appellant argued that he had not exhausted state remedies. Further, it appeared that appellant claimed that he was actually innocent because of the alleged lack of testing for DNA and fingerprints on the items described above.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining appellant's petition was procedurally barred and without good cause for the procedural defects. Appellant's failure to exhaust his claims for federal review did not excuse

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁷Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

his procedural defects.⁸ Appellant's claim regarding ineffective assistance of counsel was reasonably available within the one-year period for filing a timely petition; thus, it does not provide good cause for the procedural defects.⁹ Further, appellant's claim that the failure to allegedly test certain items for DNA and fingerprints fell far short of a demonstration of actual innocence. Sperm cells found on the victim's person were tested and determined to come from appellant.¹⁰ Further, fingerprints at the point of entry, both inside and outside the residence, were identified as belonging to appellant. Although appellant testified that the victim allowed him into her residence and consented to performing fellatio, the victim testified that she did not allow appellant into her residence and did not consent to any of the sexual acts, but rather submitted when hit and threatened with a knife. It was for the jury to determine the weight and credibility of witnesses.¹¹ Appellant's claims regarding the testing of the objects described above was mere speculation without any demonstration that further testing would have had a reasonable probability of revealing exculpatory evidence.¹² Therefore, we conclude that the district court did not err in denying the petition.

⁸See generally Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

⁹See id.


¹⁰The probability of the DNA donor for the semen being someone other than appellant was presented as less than 1 in 600 billion people.

¹¹See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).


¹²Notably, during closing arguments, appellant's trial counsel argued that the bottle had not been tested for the victim's DNA and that the laptop computer had not been tested for appellant's fingerprints. Trial
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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.¹³ Accordingly, we

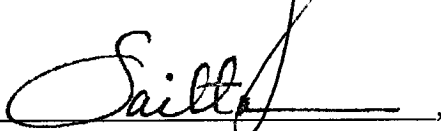
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Jennifer Togliatti, District Judge
Everett Walker
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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counsel's level of investigation appears to have been strategic in nature. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).