

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACOB OSCAR KAFER, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50556

FILED

AUG 19 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On August 1, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of grand larceny. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.¹

On August 28, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.² The State filed a motion to dismiss the petition. Appellant filed a number of

¹Kafer v. State, Docket No. 50028 (Order Dismissing Appeal, September 6, 2007).

²It appears that appellant also submitted a post-conviction petition for a writ of habeas corpus on August 13, 2007, and the petition was filed with another proper person document filed on August 13, 2007. The petition contains a handwritten date of August 6, 2007.

supplemental documents in support of the petition.³ 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 December 3, 2007, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition more than one year after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁴ Appellant's petition was procedurally barred absent a demonstration of cause for the delay 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

³Those documents included: (1) September 24, 2007 request for admissions; (2) September 24, 2007 supplemental brief in support of writ of habeas corpus; (3) October 8, 2007 "brief in support of writ [of] habeas corpus and[/]or opposition to whatever filed by state"; (4) October 8, 2007 motion requesting evidentiary hearing; (5) October 8, 2007 motion for production of document; and (6) October 29, 2007 response to state opposition.

⁴See NRS 34.726(1). Both petitions, the August 13, 2007 petition submitted with another proper person document and the August 28, 2007 petition were untimely filed.

⁵See *id.*

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

no reasonable juror would have convicted him absent a constitutional violation.”⁷

Appellant did not attempt to demonstrate good cause for the late filing. Rather, appellant claimed that he was actually innocent of the crime. Appellant claimed that he did not steal any items from the store, that his girlfriend had stolen the items, and that he had a receipt for items that he had purchased in the store. In support of his claim of innocence, appellant submitted a copy of a letter written by his girlfriend to the district court judge in her criminal case asking for sentencing relief. In her letter, appellant’s girlfriend stated that she left the store with items not purchased and that appellant did not have any merchandise on his person or in his possession.


Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was actually innocent in the instant case. Although appellant’s girlfriend stated in her letter that appellant did not have any merchandise on his person or in his possession and appellant had receipts for items he purchased, this account differs markedly from that set forth in the declaration of arrest. The declaration of arrest states that store employees observed both appellant and his girlfriend place merchandise in personal bags that they brought with them and leave the store without paying for the merchandise. The declaration of arrest further indicates that after he was taken into custody and read his rights, appellant spoke to the police and stated that due to the fact that his girlfriend had not taken her medication, they had forgotten about


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

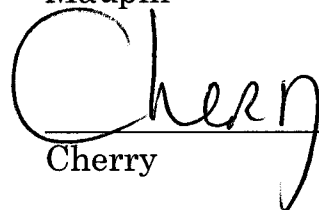
unpaid merchandise and had mistakenly left the store without paying for it. The police later discovered that appellant's girlfriend had 46 cents on her person and appellant had no money. The value of the merchandise taken was \$252.70. In exchange for his guilty plea, appellant avoided the possibility of habitual criminal adjudication.⁸ Under these facts, we conclude that appellant failed to demonstrate that it was more likely than not that no reasonable juror would have convicted him of theft in the instant case. Therefore, we conclude that the district court correctly determined that appellant's petition was procedurally barred.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C. J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

⁸The record on appeal indicates that appellant had approximately seven prior felony convictions—including grand larceny in 1980.

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. David B. Barker, District Judge
Jacob Oscar Kafer III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk