

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH GEIGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50974

FILED

AUG 18 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On May 1, 2003, appellant Michael Joseph Geiger was convicted, pursuant to a guilty plea, of one count of possession of a stolen motor vehicle. The district court sentenced Geiger to serve a prison term of 14 to 120 months. Geiger filed a direct appeal, and this court affirmed the judgment of conviction.¹ The remittitur issued on September 9, 2003.

On October 8, 2004, Geiger filed an untimely proper person post-conviction petition for a writ of habeas corpus. Appointed counsel subsequently supplemented the petition. The State moved to dismiss the petition. After hearing arguments on the motion, the district court

¹Geiger v. State, Docket No. 41452 (Order of Affirmance, August 13, 2003).

granted the State's motion and dismissed the petition as procedurally barred. On appeal, this court affirmed the district court's order.²

On May 22, 2006, Geiger filed another proper person post-conviction petition for a writ of habeas corpus. Counsel supplemented the petition. Thereafter, the State moved to dismiss the petition and supplement as procedurally barred, and Geiger opposed the motion. The district court declined to conduct an evidentiary hearing and dismissed the petition as procedurally barred. This appeal followed.

Geiger challenges the district court's order dismissing his petition on two grounds. First, Geiger argues that the district court erred in dismissing the petition as procedurally barred because he made a colorable claim of actual innocence. Second, Geiger argues that his claim that the district court considered suspect evidence at sentencing is not subject to the procedural bar because it was timely raised within one year after the relevant information came to light. We conclude that both arguments lack merit.

As to the procedural bar, Geiger does not dispute that the petition was untimely filed more than one year after this court issued its remittitur on direct appeal.³ Instead, he argues that his default is excused because he can demonstrate that he is actually innocent of the charge on which he was convicted—possession of a stolen vehicle. In particular, he indicates that he actually took the vehicle at issue but did not have the

²Geiger v. State, Docket No. 47475 (Order of Affirmance, September 7, 2006).

³See NRS 34.726(1).

intent to permanently deprive the owner of the vehicle, as evidenced by the fact that he contacted the owner several days later and told him where the car could be found. Based on these facts, Geiger argues that he is actually innocent of possession of a stolen vehicle and therefore it would be a manifest injustice not to consider the merits of the claims in his petition.

A colorable showing of actual innocence may excuse a failure to demonstrate cause to excuse procedural bars under the fundamental miscarriage of justice standard.⁴ “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”⁵ “To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.”⁶

Geiger raised the same claim of actual innocence in attempting to excuse the procedural default of his first post-conviction petition. This court rejected the claim on appeal from the district court’s order dismissing that petition.⁷ Geiger has not alleged any new or different facts in support of his actual innocence claim, and therefore, our

⁴Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

⁵Bousley v. United States, 523 U.S. 614, 623-624 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁶Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

⁷Geiger v. State, Docket No. 47475 (Order of Affirmance, September 7, 2006).

prior decision on that claim is now the law of the case.⁸ We therefore conclude that the district court properly dismissed the petition as procedurally barred.⁹

Alternatively, Geiger argues that one of his claims is not subject to a procedural bar because it involves facts that were not available when he filed his first petition. In particular, Geiger claims that the district court relied on suspect evidence at sentencing when it suggested that it imposed a lengthy maximum prison term so that Geiger would have a parole “tail” because the district court assumed that Geiger would be released on parole at some point. According to Geiger, however, the district court’s intent has been frustrated as he has been denied parole and informed that he must serve his sentence to expiration.¹⁰ Geiger therefore appears to argue that if the district court had known that he would be denied parole, it would have imposed a more lenient sentence.

Even assuming that this claim could not have been raised earlier and therefore is not untimely or an abuse of the writ, we conclude that the claim is not cognizable. Under NRS 34.810(1), a post-conviction habeas petition challenging a judgment of conviction upon a guilty plea is limited to allegations “that the plea was involuntarily or unknowingly

⁸Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

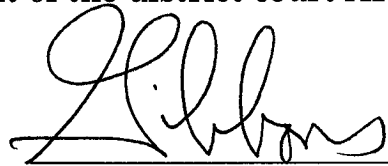
⁹Because the petition was procedurally barred, we need not reach the merits of Geiger’s claims that he received ineffective assistance of counsel.

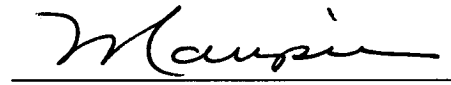
¹⁰We note that Geiger apparently presented no documentation below supporting his representation that he has been denied parole and told that he must serve his sentence to expiration.

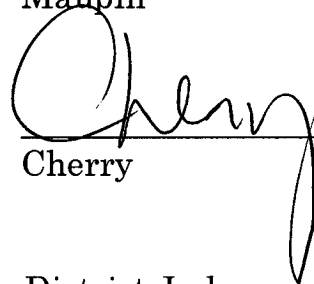
entered or that the plea was entered without effective assistance of counsel." Geiger's sentencing claim does not challenge the validity of his plea and therefore falls outside the scope of a habeas petition challenging a judgment upon a guilty plea. Accordingly, we conclude that the district court did not err in dismissing this claim.

Having considered Geiger's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C. J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

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