

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51409

FILED

NOV 17 2010

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 denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Floyd was sentenced to death for the 1999 murders of four people at a Las Vegas Albertson's grocery store. This court affirmed Floyd's convictions and sentences on direct appeal. Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008). On June 19, 2003, Floyd filed a state post-conviction petition for a writ of habeas corpus, which counsel supplemented on October 6, 2004. The district court denied the petition, and this court affirmed, Floyd v. State, Docket No. 44868 (Order of Affirmance, February 16, 2006). The remittitur issued on March 15, 2006.

On June 8, 2007, Floyd filed a second post-conviction petition for a writ of habeas corpus. Following an evidentiary hearing, the district court denied the petition. This appeal followed.

Floyd claims that the district court erred by limiting the evidentiary hearing on his petition and not permitting him to present evidence in support of his claims. The district court did not err.

“[A]n evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true.” Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007). However, many of the claims in Floyd’s petition had been raised previously and further litigation of those claims was barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). The remaining claims were barred because the petition was untimely and successive. See NRS 34.726(1); NRS 34.810(2). Therefore, the only issue appropriate for an evidentiary hearing would have been whether Floyd could overcome the procedural bars to his claims.

In his filings below, Floyd claimed that he had good cause to overcome the procedural bars because: (1) appellate and post-conviction counsel were ineffective; (2) the State failed to disclose material evidence; (3) application of the procedural default rules would violate his due process and equal protection rights because this court has complete discretion to ignore them and applies them inconsistently; and (4) NRS 34.726 is subject to statutory or equitable tolling and he filed his petition within eight months of discovering his new claims. In addition, Floyd argued that he was actually innocent of the crimes and the death penalty.

Floyd’s claims of ineffective assistance of appellate counsel were untimely and could have been raised previously. See NRS 34.726; NRS 34.810(1)(b)(2). Floyd’s second post-conviction petition for a writ of habeas corpus was filed more than one year after the remittitur issued from the appeal of the denial of his first petition, and therefore his claims

of ineffective assistance of post-conviction counsel were also untimely.¹ See State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005) (concluding that claims of ineffective assistance of first post-conviction counsel are not immune to the timeliness bar of NRS 34.726); Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 526 (2001) (holding that the time bar of NRS 34.726 applies to successive petitions). Because these claims were themselves procedurally defaulted, they did not provide good cause to overcome the procedural bars to Floyd's petition. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); see also Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (concluding that procedurally defaulted claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim); Stewart v. LaGrand, 526 U.S. 115, 120 (1999) (concluding that ineffective assistance of counsel claim failed as good cause because ineffective assistance claim was itself procedurally defaulted).

Floyd's claim that the State had withheld evidence was offered without explanation or support—the entire claim consisted of the statement that “Mr. Floyd and his previous counsel were prevented from discovering and alleging all of the claims raised in this petition by the state's action in failing to disclose all material evidence in possession of its

¹Accordingly, the district court properly denied Floyd's claim that post-conviction counsel was ineffective. The district court should not have reached the merits of Floyd's claim, see Riker, 121 Nev. at 231, 112 P.3d at 1074 (“Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.”), but we affirm because the district court reached the right result. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

agents.” Furthermore, Floyd referred to prior counsel; he did not assert that any evidence was withheld from his current counsel and thus failed to show good cause for the delay in filing the instant petition. He also failed to specify what evidence was withheld.

Floyd’s claim that the procedural bars are discretionary and inconsistently applied has been repeatedly rejected by this court. See Riker, 121 Nev. at 236, 112 P.3d at 1077; Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003), reh’g denied, 120 Nev. 307, 91 P.3d 35 (2004); Pellegrini, 117 Nev. at 886, 34 P.3d at 536.

Floyd’s claim that NRS 34.726 is subject to statutory or equitable tolling is patently without merit. To establish good cause, a petitioner must show that the delay was caused by some “impediment external to the defense.” State v. Powell, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006). Here, Floyd failed to explain how his claim of ineffective assistance of post-conviction counsel was previously undiscoverable; he simply stated that he did not discover it earlier. Moreover, even if the district court had accepted Floyd’s allegation that this claim was “discovered” approximately six months before the expiration of the statutory period to file a second petition, Floyd failed to explain his further delay.

As for his actual innocence claim, Floyd asserted that due to Fetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Dissociative Disorder, long-term drug use, and the use of alcohol and methamphetamine, he was incapable of premeditating or deliberating and that his own admissions of premeditation were undermined because he was “in the throes of a dissociative state” when the statements were made. Floyd claimed that this evidence rendered him innocent of both

first-degree murder and the death penalty.² However, the relevant evidence had either already been presented at trial or was contradicted by trial testimony.³ Thus, the proposed testimony would have, at most, presented cumulative conflicting evidence and was facially insufficient to prove actual innocence. See Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (“[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.”).

Floyd failed to show good cause and prejudice to overcome the procedural bars or demonstrate that he was actually innocent. The district court gave him an opportunity to highlight and argue the relevant issues, and, rather than offering evidence in an attempt to overcome the procedural bars, he elected to focus on the merits of his barred claims.

²Floyd failed to show that any aggravating circumstances were invalid and this court has not decided whether additional mitigating evidence can be sufficient to render a person actually innocent of the death penalty. However, to the extent that it can, we conclude that the evidence identified by Floyd was clearly insufficient to do so.

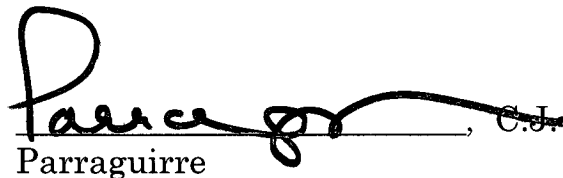
³In addition to overwhelming evidence that Floyd committed the murders, the following evidence was presented at trial: (1) a defense expert testified that Floyd’s reasoning was impaired due to mental problems exacerbated by drug and alcohol abuse and he did not act knowingly or purposefully; (2) the State’s expert testified that Floyd had average intelligence, no evidence of dissociative disorder or ADHD, was not insane or mentally ill, and knew right from wrong; (3) a blood test taken after the crimes showed no narcotics in Floyd’s system; and (4) a percipient witness testified that prior to the murders, Floyd stated his intention to kill multiple people.

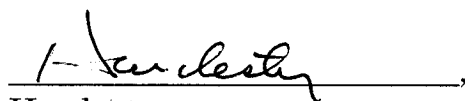
Because it was clear from the record that Floyd's substantive claims were procedurally barred, the district court properly refused to entertain them.

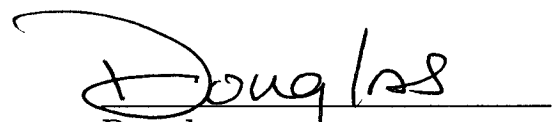
Finally, Floyd claims that the district court erred by filing, unchanged, the written order submitted by the State. This claim is largely speculative. The record reflects that Floyd filed written objections to the proposed order prior to its filing. See Byford, 123 Nev. at 69, 156 P.3d at 692 (holding that when one party to a proceeding submits a proposed order, the other party is entitled to the opportunity to respond to the proposed findings and conclusions). Floyd fails to provide sufficient evidence to support his claim that the district court did not review his objections.


Having considered Floyd's claims and concluded that no relief is warranted, we

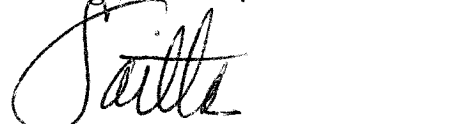
ORDER the judgment of the district court AFFIRMED.

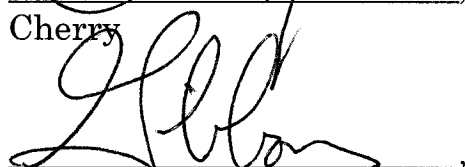

Parraguirre, C.J.

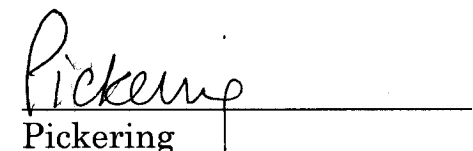

Hardesty, J.


Douglas, J.


Cherry, J.


Saitta, J.


Gibbons, J.


Pickering, J.

cc: Hon. Jackie Glass, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas
Eighth District Court Clerk