IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY EMIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51474

FILED

JUL 20 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 appellant Rodney Emil's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

In 1988, a jury sentenced Emil to death for the murder of his stepfather. This court affirmed Emil's conviction and sentence. Emil v. State, 105 Nev. 858, 784 P.2d 956 (1989). After unsuccessfully seeking post-conviction relief in both state and federal court, Emil filed the instant petition in the district court on June 19, 2006. The district court denied the petition as procedurally barred, and this appeal followed.

Emil's petition was filed over 16 years after the remittitur issued from his direct appeal and more than 6 years after this court dismissed his prior post-conviction petition. Thus, the instant petition is untimely, see NRS 34.726(1), and successive, see NRS 34.810(2). Moreover, because the delay in filing the instant petition was more than

five years and the State specifically pleaded laches, it is presumptively barred by laches. See NRS 34.800(2).

Emil claims that the district court erred by denying his petition because (1) the ineffective assistance of his former post-conviction counsel provided good cause to overcome the procedural bars, (2) the procedural bars do not apply because he is actually innocent, and (3) the doctrine of laches should not bar his claims because he overcame the presumption of prejudice to the State. Because we conclude that none of these claims has merit, we affirm the judgment of the district court.

Good cause and prejudice

The procedural bars to untimely and successive petitions can be overcome by a showing of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3). Emil claims that he has good cause to overcome the procedural bars because his prior post-conviction counsel was ineffective. This claim is patently without merit because Emil had no right to the effective assistance of post-conviction counsel. His prior petition was filed before the effective date of the statute mandating appointment of counsel for a first post-conviction habeas petition in a death penalty case. See NRS 34.820(1); 1991 Nev. Stat., ch. 44, §§ 32-33, at 92; Mazzan v. Warden, 112 Nev. 838, 841 n.1, 921 P.2d 920, 921 n.1 (1996). Because his counsel was not appointed pursuant to NRS 34.820, Emil did not have a right to the effective assistance of post-conviction counsel. See Bejarano v. Warden, 112 Nev. 1466, 1470 n.1, 929 P.2d 922, 925 n.1 (1996); McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). Therefore, the ineffective assistance of post-conviction counsel cannot serve as good cause to overcome the procedural bars, Pellegrini v. State, 117 Nev. 860,

887-88, 34 P.3d 519, 537-38 (2001); Bejarano, 112 Nev. at 1469, 929 P.2d at 925, and the district court did not err in concluding as much.

Emil argues that the law cited above violates equal protection and that this court should apply strict scrutiny because the right to litigate habeas claims is fundamental. His argument clearly lacks merit. There is no fundamental constitutional right to litigate a state habeas claim. See Murray v. Giarratano, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required."); State v. Bird, 741 N.E.2d 560, 565 (Ohio Ct. App. 2000) ("[T]here is no fundamental right to bring . . . a state petition for post-conviction relief."). And because Emil does not claim that he is a member of a protected class—or even a quasi-suspect class—this court faces "the rather benign and deferential prospect of scrutinizing the challenged legislation for foundational support containing an ingredient of rational basis." Allen v. State, 100 Nev. 130, 136, 676 P.2d 792, 795 (1984). The Ninth Circuit Court of Appeals has consistently rejected equal protection claims based on the application of different laws to two classes differentiated only by the effective date of a state statute. See McQueary v. Blodgett, 924 F.2d 829, 834-35 (9th Cir. 1991); Leigh v. United States, 586 F.2d 121, 123 (9th Cir. 1978). Therefore, we conclude that Emil's equal protection claim lacks merit.

Emil also claims that the district court's ruling violated procedural due process because it denied him his "fundamental constitutional right of access to the courts." See Bounds v. Smith, 430 U.S. 817, 828 (1977). However, the right of access to the courts does not include a right to counsel in post-conviction proceedings. See Murray, 492 U.S. at 11-12; Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

Even if Emil had a right to effective post-conviction counsel, he fails to demonstrate good cause because his claim of ineffective assistance of post-conviction counsel is itself procedurally defaulted. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); see also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that 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). The denial of Emil's most recent prior post-conviction petition was final in 2000, and he fails to explain his 6-year delay in filing the instant petition. Thus, he cannot use his claim of ineffective assistance of post-conviction counsel as good cause to overcome the procedural bars to his other claims.

Fundamental miscarriage of justice

When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime or is ineligible for the death penalty." Id. When claiming a fundamental miscarriage based on actual innocence, the petitioner thus "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Id. In this context, actual innocence means "factual innocence, not mere legal insufficiency." Mitchell v. State, 122

Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and citation omitted). Similarly, when claiming a fundamental miscarriage based on ineligibility for the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Emil contends that he is actually innocent, arguing that the evidence used to convict him is unreliable because: (1) contrary to testimony at trial, State's witness Frederick Woodall received beneficial treatment in exchange for his testimony; (2) corroborating witness Dona Kenny was facing felony drug charges at the time of trial; (3) corroborating witness Martin Koba was a confidential informant in other cases and received payment for his testimony at trial; (4) potential exculpatory witness Alan Carmack refused to testify at trial because he was intimidated by the State; (5) the State failed to provide blood spatter analysis to the defense before trial; (6) a pretrial polygraph examination showed that Woodall was lying; and (7) a pathologist and a criminalist have both concluded that some of the physical evidence was inconsistent with the trial testimony. However, even if all of Emil's allegations are true, this evidence does not prove his innocence.

Most of these allegations have previously been presented and rejected in Emil's prior post-conviction proceedings. Carmack's newfound willingness to testify was the basis for the motion for a new trial filed in 1990. See Emil v. State, Docket No. 21663 (Order Dismissing Appeal, June 27, 1991). The impeachment evidence of Woodall, Koba, and Kenny was presented in a prior post-conviction petition filed in 1993. See Emil v.

State, Docket No. 28463 (Order Dismissing Appeal, March 29, 2000). And the polygraph evidence was known to the defense before trial but was inadmissible and therefore has no bearing on whether a reasonable juror would have convicted him. See Emil v. State, 105 Nev. at 864, 784 P.2d at 960; Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Finally, while the potential expert testimony may introduce doubt regarding the specifics of Woodall's testimony, it does not prove that Emil is innocent. Other physical evidence corroborated Woodall's story. For example, the autopsy confirmed Woodall's testimony that the victim was shot three to four times in the back. A firearms examiner confirmed Woodall's description of the caliber of the weapon. An expert testified that the blood spatter patterns were consistent with Woodall's story. Testimony from investigators that there was no broken glass near the victim's truck and there was blood running to the rear wheels was consistent with Woodall's testimony that Emil drove the vehicle after the shooting. And a year after the crime, Woodall was able to direct investigators to the crime scene in the desert. Because Emil failed to show that he is actually innocent, the district court's denial of his petition did not result in a fundamental miscarriage of justice.

Laches

Emil claims that the district court erred in finding his petition barred by laches because he overcame the presumption of prejudice to the State. Specifically, Emil claims that the State will not be prejudiced in trying him 26 years after the crime because (1) the first time he was tried it was three years after the crime and the same witnesses are available, (2) the physical evidence in his case was "substantially based on police

reports written near the time of the offense" and the documentary evidence is still available, and (3) the State's key witness, Woodall, is still available. Emil's arguments lack merit.

NRS 34.800 allows the dismissal of a post-conviction petition if the delay in filing it prejudices the State in responding to the petition or in its ability to retry the petitioner. The statute also creates a rebuttable presumption of prejudice to the State based upon laches. To rebut the presumption that the State would be prejudiced in responding to the petition, a petitioner must demonstrate that his petition is based on grounds of which he could not have had previous knowledge by exercise of reasonable diligence. NRS 34.800(1)(a). To rebut the presumption that the State would be prejudiced in retrying the petitioner, the petitioner must demonstrate a fundamental miscarriage of justice. NRS 34.800(1)(b); Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001).

Emil makes no attempt to argue that he could not have raised the present claims previously. Therefore, he fails to overcome the presumption of prejudice under NRS 34.800(1)(a). And because he has failed to show a fundamental miscarriage of justice, he likewise fails to overcome the presumption of prejudice under NRS 34.800(1)(b). Therefore, the district court did not err in finding Emil's petition barred by laches.

Even if Emil's petition was not barred by laches, it would still be untimely and successive, see NRS 34.726(1); NRS 34.810(2), and Emil failed to show good cause and prejudice to overcome those procedural bars.

Having considered Emil's claims and concluded that they are without merit,[1] we

ORDER the judgment of the district court AFFIRMED.[2]

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Saitta, J.

Pickering, J.

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

---

[1]Emil also claims that the district court erred in rejecting some of his claims on the merits. Because all of Emil's claims are procedurally barred, resolution of those claims on the merits was unnecessary and the district court did not err in denying them.

[2]The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.