

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN EARL STARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51574

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingos*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant was originally charged with conspiracy to commit murder and first-degree murder with the use of a deadly weapon. On February 6, 1995, pursuant to a guilty plea, the district court convicted appellant of one count of first-degree murder. The district court sentenced appellant to serve a term of life without the possibility of parole in the Nevada State Prison. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction. Stark v. State, Docket No. 31664 (Order Dismissing Appeal, February 6, 1998).

On May 28, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 25, 1998, the district court denied appellant's petition. On appeal, this court affirmed the denial of the petition. Stark v. State, Docket No. 33116 (Order of Affirmance, October 10, 2000).

On October 4, 2005, appellant filed a second proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. 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 March 1, 2006, the district court denied appellant's petition as procedurally barred. On March 8, 2007, this court reversed the decision and remanded the case to the district court to conduct an evidentiary hearing on the limited issue of whether appellant could establish a credible or colorable claim of actual innocence. Stark v. State, Docket No. 46833 (Order of Remand, March 8, 2007).

On remand, the district court appointed counsel to represent appellant and conducted an evidentiary hearing. After conducting the evidentiary hearing, the district court found that appellant did not meet his burden of showing that he was actually innocent and again denied the petition as procedurally barred. On March 31, 2008, the district court entered a written order memorializing its decision. This appeal followed.

Appellant filed his petition more than 10 years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); (NRS 34.810(1)(b) NRS 34.810(3)).

A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). 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.” Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). When the conviction is based upon a guilty plea, the petitioner must demonstrate that he is innocent of charges foregone in the plea bargaining process. Bousley v. United States, 523 U.S. 614, 623-24 (1998).

In an attempt to excuse his procedural defects, appellant argued that he was actually innocent of first-degree murder. To support this claim, he provided the affidavits of two of his co-defendants, William Rohweder and Brian DeBarr. These affidavits stated that there was no plan to kill the victim prior to heading out to the desert and that the appellant was not present when the murder occurred. At the evidentiary hearing, to supplement the affidavits filed with his petition, the appellant had three of his co-defendants testify that appellant was not present during the murder and that appellant did not have prior knowledge that a murder would occur. Appellant claimed that the State failed to show that there was a conspiracy to commit murder and that appellant possessed the requisite intent to commit murder.

At the conclusion of the evidentiary hearing, the district court made specific findings of fact regarding appellant’s claim of actual innocence. The district court found that appellant and his co-defendants, Donald Towne, Rohweder, DeBarr and Crystal Reichenburg, were angry with the victim because of his drug use and an alleged assault on Reichenburg. The day before the murder, appellant, Towne, Reichenburg and others discussed options for dealing with the victim. Appellant suggested that the group could take the victim out to the desert and kill him. On the day of the murder, when told that he could not use one of DeBarr’s guns, appellant stated that he would “slash [the victim’s] throat.”

Appellant then drove out to the desert with Towne, Reichenburg, Rohweder, and DeBarr. Appellant dropped off Rohweder and DeBarr with .22 caliber rifles to wait for the appellant to return with the victim. Appellant, Reichenburg, and Towne then left and persuaded the victim to accompany them to the desert with the promise of drugs. Once back in the desert, appellant took off with Reichenburg on the three-wheeler.¹ After appellant left, DeBarr and Rohweder began shooting around the victim, eventually hitting him in the arm. Towne then dressed the wound and put the victim's arm in a sling.² Towne walked back to the truck, grabbed a crowbar and hit the victim over the head four to seven times. Rohweder and DeBarr then shot the victim in the head.³ Towne and Rohweder dragged the body to a nearby culvert and proceeded to cover the body with dirt, using shovels that were in the truck. At this time, appellant came back and helped clean up the blood by covering it in dirt and helped bury the body.

The district court found that appellant conspired with his co-defendants to murder the victim, that appellant was present at the scene

¹The State argued that they left on the three-wheeler to put the victim at ease.

²The State theorized that Towne did this to regain the victim's trust and to keep the victim from running away.

³DeBarr testified at the hearing that he did not actually shoot the victim and that during most of the activity he was scared and he hid in a ravine. Rohweder and Towne both testified that DeBarr, at some point, did shoot the victim.

of the murder⁴, and that appellant, along with his co-defendants, brought rifles and shovels to the murder site in order to murder the victim and to subsequently bury him. Therefore, the district court found that appellant failed to establish a credible or colorable claim of actual innocence, and denied appellant's petition.

Appellant argues on appeal that the district erred in finding that no credible or colorable claim of actual innocence was established. Appellant argues that he did not have the requisite intent to murder and was not present during the murder and, therefore, he is actually innocent. In particular, appellant claims that under Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002) and Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. ____, 195 P.3d 315 (2008), the State did not prove that he possessed the requisite specific intent to murder and, therefore, he could not be liable for the murder under an aiding and abetting theory or a conspiracy theory. Sharma held that in order to convict a defendant of a specific intent crime committed by a co-defendant under an aiding and abetting theory, the defendant must possess the specific intent to knowingly aid the co-defendant in committing that crime. 118 Nev. at 655, 56 P.3d at 872. Similarly, in Bolden, we held that a defendant must possess the specific intent to commit a crime committed by a co-conspirator under a vicarious co-conspirator liability theory. 121 Nev. at 922, 124 P.3d at 200-01. First-

⁴The evidence produced at the evidentiary hearing does not support a finding that appellant was present at the murder scene during the murder, but it does support that the appellant was at the murder scene before and after the murder.

degree murder, as alleged in the instant case, is a specific intent crime. See NRS 200.030. Therefore, the State would have to prove that appellant possessed the specific intent to commit the crime of first-degree murder.

Based upon our review of the record on appeal, we conclude that the district court did not err in finding that appellant's claim of actual innocence lacked merit because appellant failed to demonstrate that it was more likely than not that no reasonable juror would have convicted him. The evidence presented at the evidentiary hearing would have been sufficient for a reasonable juror to conclude that a conspiracy to commit murder existed and that appellant conspired and/or aided and abetted the murder. The evidence was also sufficient to show that appellant possessed the requisite intent to commit murder.

We conclude that appellant's intent manifested through his actions and comments made the day before and the day of the killing. Prior to the murder, appellant, along with others, discussed what "to do" with the victim. Appellant suggested they take him out to the desert and kill him. He also told his co-defendants that he would slash the victim's throat. Appellant also helped convince Rohweder and DeBarr to lie in wait for the victim in the desert and was the person who dropped them off in the desert with rifles. All of the defendants in this case claimed that they only went out to the desert to "beat up" the victim, not to kill him. However, the first action taken by the defendants against the victim when he arrived at the ambush site was to shoot at him. This further supports the State's case that there was a conspiracy to murder. In addition, the truck that was used in the crime contained a sheet and shovels, which were used in the burial of the victim. Therefore, we conclude that the district court did not err in finding that appellant failed to make a

colorable claim of actual innocence and, consequently, did not err in denying the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk