

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY NEAL LEONARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51607

FILED

OCT 18 2011

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 Gregory Neal Leonard's second post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

A jury convicted Leonard of robbery and first-degree murder for strangling Thomas Williams and taking his property. The jury sentenced Leonard to death. This court affirmed the convictions and the death sentence. Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998). Leonard unsuccessfully sought relief in a prior post-conviction proceeding. See Leonard v. State, Docket No. 39627 (Order of Affirmance, August 20, 2003). Leonard filed the instant petition in the district court on October 22, 2007, which the district court denied as procedurally barred. This appeal followed.

Leonard argues that the district court erred by denying his post-conviction petition as untimely and successive. He further contends that even if he cannot demonstrate good cause to overcome the applicable procedural bars, the district court erred by denying his petition because

the failure to consider his petition on the merits resulted in a fundamental miscarriage of justice.

Procedural bars

Because Leonard filed his petition nearly eight years after the remittitur issued in his direct appeal, the petition was untimely under NRS 34.726(1). The petition also was successive pursuant to NRS 34.810(2). The petition therefore was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default rules, Leonard advances several arguments: (1) he was prevented from filing his claim earlier due to the State's failure to comply with subpoenas and disclose exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963); (2) this court's decision in Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007), provides him with good cause to again raise his claim regarding the felony-murder instruction given at trial; (3) the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provides him good cause to raise a claim regarding the premeditation and deliberation instruction; (4) newly discovered additional evidence of improper jury contact provides him with good cause to again raise the claim; (5) his post-conviction counsel was ineffective; (6) the procedural bars should be equitably tolled; and (7) this court's inconsistent application of procedural default rules precludes application of those rules to his petition.

Failure to comply with subpoenas

Leonard argues that this court should consider his claims under Brady because he was prevented from filing his petition sooner due to the State's failure to comply with subpoenas. Brady obliges a

prosecutor to reveal evidence favorable to the defense when that evidence is material to guilt, punishment, or impeachment. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: “the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” Id. at 67, 993 P.2d at 37. However, this court has acknowledged that “a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.” Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997).

In the context of a procedurally barred post-conviction petition, the petitioner has the burden of demonstrating good cause for his failure to present his Brady claim earlier and actual prejudice. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); Mazzan, 116 Nev. at 67, 993 P.2d at 37. “Good cause and prejudice parallel the second and third Brady components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” Bennett, 119 Nev. at 599, 81 P.3d at 8.

Leonard argues that the State withheld evidence related to witnesses Phyllis Fineberg and Jesus Cintron. He asserts that the State withheld (1) part of a statement from Fineberg in which she was unable to identify the victim’s property at a pawn shop; (2) information related to an active bench warrant for Fineberg; (3) a statement from a witness who had paid for sex with Fineberg on the night of the murder; (4) a statement from another witness who observed Fineberg and the victim fighting on the night of the murder; (5) a statement from a witness that established a

window of time when Fineberg was unaccounted for on the day that the victim's body was discovered; (6) evidence that the State made witness payments to Fineberg under an alias; (7) records of Cintron's arrests and favorable treatment for testifying against Leonard; (8) records of witness payments to Cintron; and (9) evidence that the State offered favorable treatment in Cintron's girlfriend's fraud prosecution in exchange for testimony against Leonard.

Having carefully reviewed each of Leonard's Brady claims, we conclude that he failed to demonstrate good cause for his delay in raising the claim related to Cintron's girlfriend as the evidence of the State's offer was not exclusively in the State's possession and he failed to allege an impediment external to the defense that prevented him from interviewing her sooner. With regard to the remainder of the evidence, we conclude that, in light of the evidence adduced at trial, Leonard failed to show that any of the challenged evidence was material such that it affected the outcome of his trial. See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (providing that when there is a specific request for evidence, materiality is satisfied if there is a reasonable possibility that the omitted evidence would have affected the outcome). At trial, the State presented evidence that Leonard was involved in a dispute with Williams over a gambling jackpot and had a heated argument with him on the night of the murder. After Williams had been found strangled in his apartment, Leonard pawned several pieces of jewelry and firearms that were identified, by witnesses other than Fineberg, as belonging to Williams. A search of Leonard's apartment also revealed pawn tickets related to those transactions and ammunition that fit Williams' firearms. Further, an officer heard Leonard's message on Cintron's pager that indirectly

referenced the murder. Therefore, we conclude that the district court did not err by denying Leonard's Brady claims.¹

Felony murder instruction

Leonard argues that the district court erred in denying his claim regarding the objection to the felony-murder instruction and request that the jury be instructed that the intent to commit robbery must be formed prior to the killing to constitute felony murder. Leonard acknowledges that he raised the issue on appeal, but asserts that this court's decision in Nay v. State, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007), provides him with good cause to raise the issue in the instant petition. In Nay, this court concluded that "[r]obbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person." Id. Even assuming Nay provided good cause to again raise this claim and a basis to avoid the law-of-the-case doctrine, see Hsu v. County of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (observing that this court may "depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice" (quoting Arizona v. California, 460 U.S. 605, 618 n.8

¹Leonard asserts that the Brady violation is also good cause to excuse the procedural bars with regard to his claims of prosecutorial misconduct; ineffective assistance of trial counsel; that the State violated Batson v. Kentucky, 476 U.S. 79 (1986); that the representation of African-American venire persons was not reasonable; that the district court engaged in misconduct during voir dire; that the jury instructions were invalid; and that there was insufficient evidence to sustain the convictions. While the State's failure to turn over evidence could provide good cause for the delay in raising the aforementioned Brady claims, it does not excuse the procedural default as to these unrelated claims.

(1983))), Leonard failed to demonstrate prejudice considering evidence that he was involved in a dispute over money with Williams, had argued with Williams on the night of the murder, and pawned Williams' jewelry and firearms after the murder. The jury could conclude from that evidence that the murder occurred during the course of a robbery and that Leonard had intended to rob Williams prior to the murder. This court concluded as much on direct appeal. See Leonard, 114 Nev. at 1210, 969 P.2d at 297. Moreover, even if Leonard demonstrated that he would not have been convicted of first-degree murder under a felony-murder theory, he nevertheless failed to demonstrate that he would not have been convicted under a premeditation theory, which was included in the first-degree murder charge. Notably, the medical examiner testified that, considering Williams' age, health, and blood alcohol level, it would have taken the assailant, who in this case had wrapped a ligature around Williams' neck twice, between 30 and 90 seconds to strangle Williams. Thus, considering the prior animosity and the time that the assailant would have had to strangle Williams to ultimately kill him, the State presented sufficient evidence of premeditation and deliberation. See Cortinas v. State, 124 Nev. 1013, 1029, 195 P.3d 315, 326 (2008) (“[T]he use of a ligature and the time required to strangle a person are legitimate circumstances from which to infer that a killing is willful, deliberate, and premeditated.”); Leonard, 114 Nev. at 1210-11, 969 P.2d 297 (observing that from the medical testimony, it took between 30 and 90 seconds to strangle victim and “[t]he jury could reasonably infer from the evidence presented that the killing was willful, deliberate, and premeditated”). Even if the district court had given the proposed instruction, Leonard did not demonstrate that he would not have been convicted of first-degree

murder. Accordingly, the district court did not err in denying this claim as procedurally barred.

Premeditation and deliberation instruction

Leonard argues that the district court erred in denying his claim regarding the Kazalyn instruction² and that the Ninth Circuit Court of Appeals' decision in Polk provided good cause for his failure to raise the claim in a prior petition. We disagree. In Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000), this court disapproved of the Kazalyn instruction and provided the district courts with new instructions to use in the future. However, we concluded in Nika v. State, 124 Nev. 1272, 1287-89, 198 P.3d 839, 850-51 (2008), that Byford does not apply to cases that were final when it was decided. Leonard's conviction was final roughly five months before Byford was decided and therefore Byford does not apply. Accordingly, the district court did not err in concluding that Leonard failed to demonstrate good cause and prejudice to overcome the applicable procedural bars with respect to this claim.

Newly discovered evidence of improper juror contact

Leonard argues that the district court erred in denying his claim that Fineberg contaminated the jurors as barred by the law of the case because the facts presented in this claim were substantially different than those ruled upon previously. We disagree. In affirming his judgment of conviction, this court held that the district court did not abuse its discretion in denying Leonard's motion for a mistrial based on Fineberg's contact with several jurors. Leonard, 114 Nev. at 1207-08, 969 P.2d at

²Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

295-96. Under the law-of-the-case doctrine, a court may “depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.” Hsu, 123 Nev. at 630, 173 P.3d at 728-29 (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). This court has not formally adopted an exception to the law of the case doctrine based on newly discovered evidence. See id. at 633 n.26, 173 P.3d at 730 n.26. Nevertheless, even assuming the law-of-the-case did not preclude our consideration of this claim now, no relief is warranted because Leonard failed to allege an impediment external to the defense that prevented him from obtaining the new evidence prior to 2005, or prevented him from filing the instant petition until over two years after discovering the evidence. Therefore, this claim is procedurally barred under NRS 34.726, and the district court did not err in denying this claim.

Ineffective assistance of post-conviction counsel

Leonard argues that the district court erred in rejecting his claim of ineffective assistance of post-conviction counsel as good cause to overcome the procedural default rules. We disagree. While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), those claims are still subject to other procedural bars, including timeliness under NRS 34.726, State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted”); Edward 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). In other words, a petitioner must demonstrate cause for raising the ineffective-assistance-of-counsel claims in an untimely fashion. Leonard failed to explain how post-conviction counsel's failure to litigate claims of trial error and claims of ineffective assistance of counsel in a meaningful manner precluded him from filing his second post-conviction petition until nine years after the resolution of his direct appeal and more than four years after the order affirming the district court's denial of his first post-conviction petition. And while his ineffective-assistance-of-post-conviction-counsel claims were not available until this court resolved his first post-conviction appeal in August 2003, he was represented by his current counsel as early as 2005, and Leonard failed to explain the additional delay of over four years from the denial of his first post-conviction petition. See Hathaway, 119 Nev. at 255, 71 P.3d at 508 (requiring a petitioner to raise an appeal-deprivation claim within a reasonable time of learning that the petitioner had been deprived of a direct appeal). Therefore, the district court did not err in rejecting Leonard's claims of good cause based on the ineffective assistance of post-conviction counsel.

Equitable tolling

Leonard argues that the district court erred by denying his claims of ineffective assistance of post-conviction counsel as procedurally barred because NRS 34.726 should incorporate a "discovery rule" that permits the equitable tolling of the statute. He contends that tolling is necessary to permit him an adequate opportunity to research all his claims prior to filing a petition. We disagree. NRS 34.726(1) provides that a petitioner must demonstrate good cause for a delay in filing a post-conviction petition and that good cause may exist if he demonstrates that

the delay was not his fault and prejudice. NRS 34.726(1)(a), (b). We have explained that to demonstrate good cause, a petitioner must show that “an impediment external to the defense prevented him from raising his claims earlier.” Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001); see Hathaway, 119 Nev. at 252, 71 P.3d at 506. “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.’” Id. (some internal quotations and citations omitted) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Therefore, imposing any tolling provision is unnecessary as the plain language of the statute contemplates the concerns Leonard expresses.

Discretionary and inconsistent application of procedural bars

Leonard argues that the district court erred by denying his post-conviction petition as procedurally barred because the default rules are discretionary and this court inconsistently applies them. We disagree. This court has established that procedural default rules are mandatory, see Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001), and this court has rejected claims that it has the discretion to ignore procedural bars, Riker, 121 Nev. at 236, 239, 112 P.3d at 1077, 1079. Further, we have previously rejected similar claims that this court inconsistently applies procedural default rules. Id. at 236, 112 P.3d at 1077. Even assuming any inconsistent application, this court has rejected claims that any prior inconsistency excuses procedural default. Id.

Fundamental miscarriage of justice

Leonard argues that even if he cannot demonstrate good cause to overcome the procedural bars, the district court's failure to consider his post-conviction petition on the merits resulted in a fundamental miscarriage of justice. Specifically, he contends that he is actually innocent of first-degree murder based on the faulty instructions regarding premeditation and deliberation and felony murder.

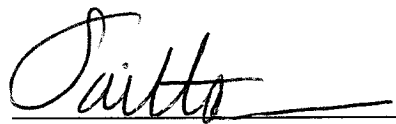
When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime." Id. This requires the petitioner to present new evidence of his innocence. See House v. Bell, 547 U.S. 518, 537 (2006) ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995))); Schlup, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."). 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. Schlup, 513 U.S. at 327. 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) (alteration and internal quotation marks omitted).

Leonard contends that a fundamental miscarriage of justice would occur if the district court failed to consider his challenges to the premeditation and felony-murder instructions. We disagree. First, Leonard’s claims rest solely on a change in law and he points to no new evidence supporting his claims. See House, 547 U.S. at 537; Schlup, 513 U.S. at 316. Second, Leonard failed to make a “colorable showing” of actual innocence. As explained above, the State presented sufficient evidence of premeditation and deliberation and felony murder. Leonard failed to demonstrate a fundamental miscarriage of justice.

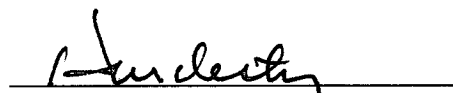
Having considered Leonard’s contentions and concluded that they lack merit, we

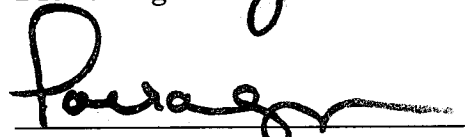
ORDER the judgment of the district court AFFIRMED.³


Saitta, C.J.


Gibbons, J.


Pickering, J.


Hardesty, J.


Parraguirre, J.

³The Honorables Michael L. Douglas and Michael Cherry, Justices, voluntarily recused themselves from participation in the decision of this matter.

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