

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN DORAN WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51720

FILED

JUN 10 2009
TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying appellant Christian Doran Walker's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On January 19, 1999, the district court convicted Walker, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced Walker to serve two consecutive prison terms of 48 to 120 months.¹ We ordered Walker's appeal dismissed after concluding that his contention was not properly preserved for appellate review. Walker v. State, Docket No. 33637 (Order Dismissing Appeal, June 21, 1999).

On July 14, 2003, Walker filed a post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, Walker filed an opposition, and the district court found that the

¹The district court entered an amended judgment of conviction on May 21, 1999.

petition was procedurally barred and ordered it denied. On appeal, we ordered the judgment of the district court affirmed. Walker v. State, Docket No. 42292 (Order of Affirmance, March 5, 2004).

On November 7, 2007, Walker filed a second post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, a response, and a supplemental response. Walker filed a reply. The district court heard argument, denied Walker's petition, and denied Walker's subsequent motion for rehearing. This appeal followed.

Our review of the record on appeal, and particularly the district court's findings of fact, conclusions of law, and order, reveals that the district court failed to determine whether the applicable procedural default rules applied to Walker's petition before deciding the petition on the merits.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). "The procedural rules pertinent to this case appear to be the following. NRS 34.726(1) provides in part that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal." Id. NRS 34.810(1)(b)(2) requires a court to dismiss a petition if the petitioner's conviction was the result of a trial and the grounds for the petition could have been raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of pleading and proving specific facts that demonstrate good cause for his failure to present a timely claim and actual prejudice. NRS 34.810(3).

To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with procedural default rules. See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997). Actual prejudice requires a petitioner to demonstrate “not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

A colorable showing of actual innocence may excuse a failure to demonstrate good cause under the fundamental miscarriage of justice standard. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998). “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.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

Finally, NRS 34.800(1) provides that a court may dismiss a petition if delay in its filing either prejudices the State “in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence” before the prejudice arose, or prejudices the State “in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred.” If

long enough, delay leads to a presumption of prejudice: “A period exceeding 5 years between . . . a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State.” NRS 34.800(2).

In the district court, Walker claimed that he “is actually innocent of the attempted murder charge;” asserted that “actual innocence overcomes any procedural bar;” and further appears to have offered the retroactivity of Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), and Bolden, 121 Nev. 908, 124 P.3d 191, pursuant to Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006), as good cause to overcome the procedural bars to his petition.

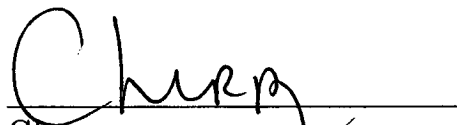
The State responded that Walker’s petition was filed more than eight years after the remittitur from his direct appeal issued. The State argued that the petition was untimely and that Walker failed to demonstrate good cause to overcome the procedural bar. And the State specifically pleaded laches in its motion to dismiss.² Walker’s reply did not address the untimeliness of his petition or rebut the presumption of prejudice to the State.

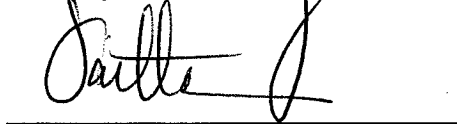
The district court’s order denying Walker’s petition did not contain factual findings regarding whether (1) procedural default rules applied to Walker’s petition, (2) the State would be prejudiced in responding to the petition or in its ability to conduct a retrial, or (3) Walker was actually innocent and a failure to consider his petition would

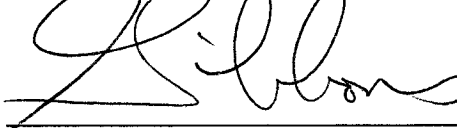
²We note that the record on appeal does not indicate that the district court ruled on the State’s motion to dismiss.

result in a fundamental miscarriage of justice. Given the untimely nature of Walker's habeas petition and the presumption of prejudice to the State, the district court had a duty to consider whether the petition was procedurally barred and its failure to do so was an abuse of discretion. See Riker, 121 Nev. at 234, 112 P.3d at 1076. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions to assess the record and determine the pertinent facts, consider and apply the appropriate rules of procedural default to Walker's petition, and issue a written order that sets forth, with suitable findings of fact and conclusions of law, which claims, if any, are procedurally barred.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Kirk T. Kennedy
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³In light of this order, we decline to consider the issues raised by Walker on appeal.