

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT GORDON JOHNSTONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51765

FILED

DEC. 18 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On December 16, 1974, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court reversed appellant's judgment of conviction and remanded for a new trial.¹

On September 21, 1976, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's judgment of conviction on appeal.² The remittitur issued on August 15, 1977.

¹Johnstone v. State, 92 Nev. 241, 548 P.2d 1362 (1976).

²Johnstone v. State, 93 Nev. 427, 566 P.2d 1130 (1977).

On August 11, 1978, appellant filed a proper person petition for post-conviction relief pursuant to former NRS chapter 177 in the district court. The district court denied the petition as procedurally barred. This court dismissed appellant's appeal from the district court's order.³

On June 25, 1984, appellant filed a petition for a writ of habeas corpus in the district court. The district court dismissed the petition as procedurally barred. This court dismissed appellant's appeal from the district court's order.⁴

On November 19, 1991, appellant filed a second petition for a writ of habeas corpus in the district court. The district court denied the petition as procedurally barred. This court dismissed appellant's appeal from the district court's order.⁵

On February 4, 2008, appellant filed the instant proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that it was untimely. Moreover, the State specifically pleaded laches. 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 May 20, 2008, the district court dismissed appellant's petition. This appeal followed.

³Johnstone v. Warden, Docket No. 11162 (Order Dismissing Appeal, February 13, 1979).

⁴Johnstone v. Director, Docket No. 16489 (Order Dismissing Appeal, June 26, 1986).

⁵Johnstone v. Nevada Dep't of Prisons, Docket No. 23021 (Order Dismissing Appeal, May 27, 1993).

Appellant filed his petition more than 21 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁶ Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.⁷ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸ A defendant seeking habeas corpus relief may be entitled to a review of defaulted claims if failure to review the claims "would result in a fundamental miscarriage of justice,"⁹ i.e., when a constitutional violation "has probably resulted in the conviction of someone who is actually innocent."¹⁰ This requires the defendant to show that "it is more likely than not that no reasonable juror would have convicted him."¹¹ "[A]ctual innocence' means factual innocence, not mere legal insufficiency."¹²

In an attempt to excuse his procedural defects, appellant claimed that the failure to review his claims would result in a

⁶See NRS 34.726(1). Appellant's petition was also filed more than 15 years after amendments to NRS chapter 34. See 1991 Nev. Stat., ch. 44, § 5, at 75-76.

⁷See NRS 34.726(1).

⁸See NRS 34.800(2).

⁹Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁰See Bousley v. United States, 523 U.S. 614, 623 (1998) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); Mazzan, 112 Nev. at 842, 921 P.2d at 922 (quoting Murray, *id.*).

¹¹Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

¹²Id. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

fundamental miscarriage of justice. Specifically, he claimed that (1) he was actually innocent because the State had not proven that appellant had the specific intent required to aid and abet in the crime as required under Sharma v. State,¹³ (2) he was convicted of charges not specifically set forth in the indictment, (3) the indictment did not support all the theories relied upon by the State and the jury instructions in support of those theories, and (4) the State failed to establish that appellant was guilty.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred. In Mitchell v. State, we held that the petitioner overcame the procedural bars to his untimely and successive petition by demonstrating that he was actually innocent of the crime of attempted murder because he did not have the requisite specific intent, as conceded by the State, to commit attempted murder.¹⁴ Mitchell had been convicted based on aiding and abetting jury instructions that violated Sharma.¹⁵ In the instant case, however, appellant failed to demonstrate that he was actually innocent. The State proceeded against appellant under the theories that he directly participated in the murders, he aided and abetted in the murders, and the murders occurred during the course of a felony. The State presented evidence that appellant traveled with two other men from Canada to Las Vegas, Nevada. In Las Vegas, appellant and his compatriots checked into the hotel where the victims were also staying.

¹³118 Nev. 648, 56 P.3d 868 (2002).

¹⁴122 Nev. 1269, 1276-77, 149 P.3d 33, 38 (2006).

¹⁵Id. at 1275, 149 P.3d at 37.

The victims were later found in their room stabbed to death. The fingerprints of one of appellant's companions were found in the room and the victims' car, which was later discovered in California. Appellant was later apprehended in Florida while attempting to use one of the victim's credit cards. Further, police recovered clothing from appellant with blood stains matching the victims' blood type. In addition, the State presented testimony of inmates detained with appellant that appellant admitted to entering the victims' hotel room and participating in the murders. Thus, as there was evidence supporting other theories of liability, appellant did not demonstrate that no reasonable juror would have convicted him had the jury been instructed pursuant to Sharma. Appellant's remaining claims failed to demonstrate that he was actually innocent as the arguments related to mere legal insufficiency. Therefore, the district court did not err in dismissing appellant's petition.

To the extent that appellant claimed that this court's decisions in Sharma and Mitchell provided good cause for his failure to raise these claims sooner, we conclude that the district court did not err in denying appellant's petition as procedurally barred. In Mitchell, this court held that Sharma was a clarification of the law.¹⁶ As Sharma reflects a clarification of the law, the underlying reasoning in Sharma existed at the time of appellant's trial and presented a basis for which appellant could have presented a claim in a prior proceeding.¹⁷ Moreover, appellant failed

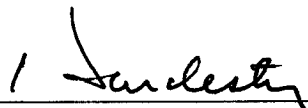
¹⁶Id.

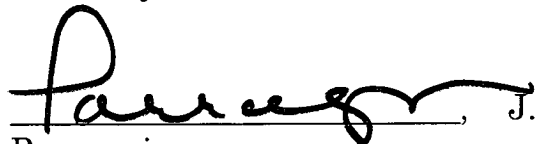
¹⁷See Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (stating that if a decision merely construes and clarified an existing rule rather than announce a new rule, this "court's interpretation is merely a restatement of existing law").

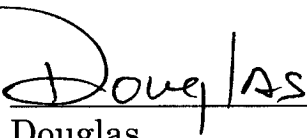
to demonstrate prejudice for the reasons discussed above. Finally, appellant did not meet his burden of rebutting the presumption of prejudice to the State. Therefore, we conclude that the district court did not err in dismissing appellant's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jennifer Togliatti, District Judge
Robert Gordon Johnstone
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk