IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WADE MORSE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
BILL DONAT,
Respondent.

No. 51826

FILED

JUL 31 2009

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 denying a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 28, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder, one count of burglary, and one count of coercion. The district court sentenced appellant to serve a term of 20 to 50 years in the Nevada State Prison for the murder count, a term of 16 to 72 months for the burglary count, and a term of 12 to 48 months for the coercion count. The district court imposed the terms between counts to run concurrently. This court dismissed the appeal from the judgment of conviction and sentence. Morse v. State, Docket No. 32296 (Order Dismissing Appeal, July 16, 1999). The remittitur issued on August 11, 1999. Appellant unsuccessfully sought relief from his conviction by way of a timely post-conviction petition for a writ of habeas corpus. Morse v. State, Docket No. 38713 (Order of Affirmance, February 12, 2002).

On July 24, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.

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 23, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective for abandoning the defense of extreme emotional disturbance to be used in tandem with his heat of passion defense "to negate [ ] murder to possible manslaughter" and in tandem with his theory of self defense, failing to seek and present expert witness testimony, failing to present evidence regarding appellant's mental state, failing to adequately investigate, failing to file pretrial motions, failing to make proper objections, and failing to adequately communicate with appellant. Appellant further claimed that trial counsel was ineffective at sentencing.

Appellant filed his petition almost 8 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive and an abuse of the writ because he had previously filed a post-conviction petition for a writ of habeas corpus and could have raised the grounds for relief in the prior proceeding. See NRS 34.810(1)(b)(2); NRS 34.810(2). 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).

In order to demonstrate good cause to excuse procedural defects in filing a post-conviction petition for a writ of habeas corpus, a petitioner must demonstrate that an impediment external to the defense excused the procedural defects. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). "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.'" Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1996)). Put in another way, a claim that was reasonably available to the petitioner during the time period for filing a timely petition would not constitute good cause to excuse procedural defects in a late, successive petition. Id. at 253, 71 P.3d at 506. Actual prejudice requires a showing that the error worked to the petitioner's actual and substantial disadvantage. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

A defendant may be entitled to a 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 defendant must make a colorable showing of actual innocence. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. To demonstrate actual innocence, a petitioner must show that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence'" raised in the procedurally defaulted petition. Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

Appellant did not attempt to demonstrate good cause for the delay or the filing of a second petition. Rather, appellant claimed that he was actually innocent because he acted under an extreme emotional disturbance. Specifically, appellant claimed an extreme emotional disturbance because of: (1) "poignant and painful emotions" based on his recent separation with his wife and his estranged wife's behavior, said emotions including grief, severe disappointment, indignation, wounded pride, shame, humiliation, despair, and a feeling that life was miserable and unendurable; and (2) blunt force trauma resulting in "an unconscious

action" when he was struck on the forehead after he followed his wife to the victim's residence, entered the victim's residence, and fought with the victim.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects. This court has recognized that there is a question as to whether a claim of legal insanity qualifies as actual innocence for purposes of demonstrating a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 890, 34 P.3d at 539. Regardless, even assuming that legal insanity qualifies, where a petitioner fails to demonstrate legal insanity, a petitioner necessarily fails to demonstrate actual innocence. Id. at 890-91, 34 P.3d at 539. Appellant failed to demonstrate legal insanity under the M'Naghten standard because he failed to demonstrate that he was in a delusional state such that he did not know or understand the nature and capacity of his act or the delusion was such that he could not appreciate the wrongfulness of his act. Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-5 (2001).[1] Thus, he failed to demonstrate that it was more likely than not that no juror would have convicted him in light of the evidence of extreme emotional disturbance.[2]

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[1]Nevada does not accept the technical defense of diminished capacity. Crawford v. State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005). Notably, appellant's medical records related to the incident are included in the record on appeal and the records indicate that appellant's neurological status was intact and there was not a history of loss of consciousness.

[2]Appellant was charged with open murder and the jury was instructed regarding the lesser included offense of voluntary manslaughter and heat of passion. The jury was further provided

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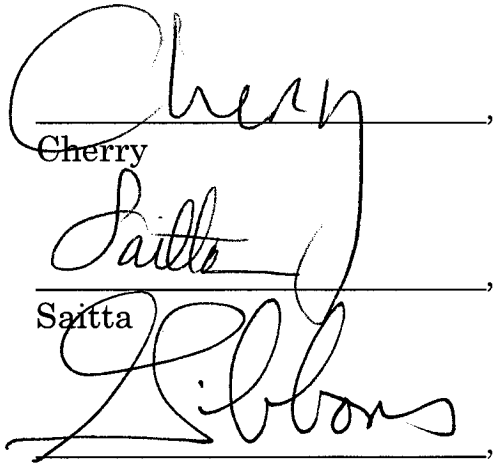
Therefore, we conclude that the district court did not err in denying the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]



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Gibbons

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instructions regarding self defense. It appears that the theory of defense was that the victim died of natural causes, a heart attack, during the fight and self defense. Appellant's estranged relationship with his wife was also presented to the jury.

[3]We 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. Andrew J. Puccinelli, District Judge
Robert Wade Morse
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk