

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS ALFREDO GURRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52185

FILED

JUL 23 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 dismissing a post-conviction petition for a writ of habeas corpus and a motion for a new trial. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On May 22, 1991, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, one count of conspiracy to commit robbery, one count of burglary with the intent to commit robbery, and one count of attempted robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole for the murder count and concurrent determinate terms for the remaining counts. This court affirmed the judgment of conviction on direct appeal. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992).¹ The remittitur issued January 25, 1994.

¹Echavarria was appellant's codefendant, and appellant's and Echavarria's direct appeals were filed in the same appeal in this court.

On September 13, 1993, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition without appointing counsel. On appeal, this court determined that the district court had abused its discretion in failing to appoint post-conviction counsel and reversed the decision of the district court. Gurry v. State, Docket No. 25880 (Order of Remand, December 2, 1994). On remand, the district court appointed counsel, and counsel filed a supplement to the post-conviction petition for a writ of habeas corpus. The district court denied the petition. This court dismissed the subsequent appeal. Gurry v. State, Docket No. 27922 (Order Dismissing Appeal, December 20, 1996).

In 2007, the district court appointed post-conviction counsel, and on March 11, 2008, post-conviction counsel filed a document labeled “supplement to petition for writ of habeas corpus and motion for new trial based upon new evidence.” The State opposed the petition arguing that the petition was procedurally barred as it was untimely and successive and that a motion for a new trial was untimely. Moreover, the State specifically pleaded laches in regards to the petition. On July 2, 2008, and on August 1, 2008, without conducting an evidentiary hearing, the district court dismissed appellant’s petition and motion. This appeal followed.

Preliminarily, we note that the label of “supplemental petition” was a misnomer. There was no pending post-conviction petition for a writ of habeas corpus in the district court for post-conviction counsel to supplement. Thus, we conclude that the district court properly treated this document as a second post-conviction petition for a writ of habeas corpus and motion for a new trial.

In his petition and motion, appellant claimed: (1) his trial counsel was ineffective for failing to seek disqualification of the trial judge on the ground of imputed bias because the FBI agent who was the victim of the crime in this case had investigated the trial judge in connection with his service on the Colorado River Commission; (2) trial counsel was not provided critical evidence regarding camera angles; (3) trial and appellate counsel were ineffective for failing to file a motion for a new trial based upon appellant's codefendant's affidavit allegedly demonstrating appellant's actual innocence; (4) appellant was improperly convicted of first-degree murder as there was no showing of specific intent to commit murder and a general verdict was returned; and (5) new evidence exonerated appellant of all crimes. We will examine the district court's dismissal of the petition and motion in the context of both a second post-conviction petition for a writ of habeas corpus and a motion for a new trial based upon newly discovered evidence.

Post-Conviction Petition for a Writ of Habeas Corpus

Appellant claimed that his 2008 petition was timely filed because the petition was filed in a timely manner following the Ninth Circuit Court of Appeal's decision on a federal habeas petition filed by appellant. This claim is patently without merit. Appellant filed his petition more than fourteen 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 because he had previously filed a post-conviction petition for a writ of habeas corpus and an abuse of the writ because he raised new and different claims in the 2008 petition. 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). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

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. Hathaway, 119 Nev. 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 petitioner unable to satisfy the good cause and prejudice requirements 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. 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)). “‘To be credible,’ a claim of actual innocence must be based on reliable evidence not presented at trial.” Id. (quoting Schlup, 513 U.S. at 324). This court will examine the district court’s dismissal of the claims raised in the petition as procedurally barred with these points in mind.

Disqualification of District Court Judge

First, appellant claimed that his trial counsel was ineffective for failing to seek disqualification of the trial judge on the ground of imputed bias because the FBI agent who was the victim of the crime in this case had investigated the trial judge in connection with his service on the Colorado River Commission. Appellant set forth an excerpt of trial counsel’s declaration apparently filed with his codefendant’s habeas corpus petition. In the declaration, appellant’s former trial counsel, David Wall, indicated that prior to trial appellant’s former trial counsel learned of the FBI’s earlier investigation of the trial judge and when asked by the trial judge if he wished to have the trial judge recuse himself, he declined. Appellant’s former trial counsel further indicated that he was unaware of the memoranda compiled by the FBI and that he was never served with any memoranda on this subject. Appellant claimed that he had good cause to raise this claim in a fourteen-year-old, successive petition because post-conviction counsel had to contact codefendant’s post-conviction counsel for most of the sealed information (the memoranda). Appellant further opined that it was unlikely that petitioner or his prior counsel could have obtained such information in a timely manner.

Appellant failed to demonstrate good cause to raise this claim in a procedurally-defaulted petition. First, appellant did not attach a copy of appellant's former trial counsel's declaration to his petition. Accepting the recitation of the declaration as set forth in the petition as accurate, it is clear from appellant's former trial counsel's statements in the declaration that he was aware prior to trial that the FBI had investigated the trial judge. No allegation has been made that the State of Nevada had possession of and withheld any of the FBI memoranda regarding the investigation. Further, appellant failed to demonstrate that these documents would not have been available to trial counsel at the time of trial with the exercise of reasonable diligence. A claim of ineffective assistance of counsel that is itself procedurally barred cannot be good cause to excuse a procedural defect. See Hathaway, 119 Nev. at 252, 71 P.3d at 506; see also Edwards v. Carpenter, 529 U.S. 446, 453 (2000). There was further no demonstration that these documents would not have been reasonably available during the first post-conviction proceedings. Therefore, we conclude that the district court did not err in determining that this claim was procedurally barred and without good cause for the procedural defects.

Camera Evidence

Second, appellant claimed that trial counsel was not provided critical evidence regarding camera angles. Appellant failed to provide any specific facts in support of this claim, failed to describe the allegedly critical evidence, or provide any cogent argument as to why the evidence was critical. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). More importantly, appellant offered no good cause argument for why this claim could not have been raised in a timely petition. Consequently, appellant

failed to demonstrate that this claim was not reasonably available within the time frame for filing a timely petition. Because of the deficiencies in pleading this claim, appellant necessarily failed to demonstrate actual innocence. Therefore, we conclude that the district court did not err in determining that this claim was procedurally barred and without good cause for the procedural defects.

Codefendant's Affidavit

Third, appellant claimed that his trial and appellate counsel were ineffective for failing to file a motion for a new trial based upon appellant's codefendant's affidavit allegedly demonstrating appellant's actual innocence. Appellant claimed that counsel had information prior to trial that "effectively exonerated [appellant] of all the crimes he was charged with." Appellant provided no good cause argument for failing to raise this claim earlier. Notably, appellant acknowledged in the petition that counsel had this information prior to trial. To the extent that appellant claimed ineffective assistance of counsel excused his procedural defects, as discussed earlier, a claim of ineffective assistance of counsel that is itself procedurally defaulted cannot be good cause to excuse a procedural defect. See Hathaway, 119 Nev. at 252, 71 P.3d at 506; see also Edwards, 529 U.S. at 453. Further, appellant does not describe the evidence of actual innocence or even provide a copy of the alleged affidavit by the codefendant. To the extent that appellant was referring to the affidavit obtained in Mexico detailing the codefendant's confession to Mexican authorities (Mexico affidavit), which made no mention of appellant's involvement in the offenses, the Mexico affidavit was admitted at trial. Appellant failed to set forth any new evidence of innocence that was not presented at trial. Calderon, 523 U.S. at 559. Thus, we conclude

that the district court did not err in determining that this claim was procedurally barred and without good cause for the procedural defects.

Specific Intent to Commit Murder

Fourth, appellant claimed that he was improperly convicted of first-degree murder as there was no showing of specific intent to commit murder contrary to this court's holdings in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002) and Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005). In Sharma, this court concluded that to convict a defendant of attempted murder pursuant to an aiding and abetting theory, the jury must find that the defendant aided and abetted with the intent to kill. 118 Nev. at 656, 56 P.3d at 873. In Bolden, this court similarly concluded that a defendant cannot be found guilty of specific intent crimes on the basis that commission of those offenses was a natural and probable consequence of a conspiracy, but rather it must be proven that the defendant participated in the conspiracy with the intent to commit those crimes. 121 Nev. at 922, 124 P.3d at 200-201. Finally, appellant claimed that the general verdict, which did not specify the theory on which the jury relied, was invalid pursuant to this court's holding in Bolden.

Preliminarily, we note that appellant did not identify any jury instructions that were allegedly flawed or provide any cogent argument regarding this claim beyond his bare and naked statement that no evidence supported the first-degree murder verdict. More importantly, appellant failed to demonstrate good cause for raising this claim in a procedurally-defaulted petition. In Mitchell v. State, this court held that Sharma was a clarification of the law and therefore applied to cases that were final before it was decided. 122 Nev. 1269, 1276, 149 P.3d 33, 38 (2006). Consequently, the legal grounds for appellant's Sharma claim

were previously available, and could have been raised at trial or in his direct appeal. Bolden was decided on December 15, 2005, yet appellant waited more than two years to file the instant petition. Thus, even if this court were to conclude that the Bolden decision provided good cause for a part of appellant's delay in filing, appellant did not demonstrate good cause for the entire length of the delay.

Further, even assuming that there was good cause to raise the claim, appellant failed to demonstrate actual prejudice. First-degree murder includes within its definition a murder committed during the perpetration or attempted perpetration of a burglary and/or robbery. NRS 200.030(1). The first-degree murder charge included the theory of felony murder in the instant case. Appellant was convicted of attempted robbery and burglary, as well as first-degree murder. On direct appeal, appellant challenged the application of the felony-murder rule to an aider and abettor, and this court determined that there was "ample evidence to support the conclusion that the murder took place during the chain of events which constitutes the attempted robbery, thus subjecting [appellant] to the felony murder rule as an aider and abettor." Echavarría, 108 Nev. at 748, 839 P.2d at 599. Further, this court has retreated from the "absolute certainty" test set forth in Bolden regarding a review of a general verdict which may be based on valid and invalid theories, and instead, recognized that harmless-error review would apply. Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 323 (2008). In the instant case, a review of the record on appeal reveals that any alleged error relating to the general verdict was harmless as there was sufficient evidence to support a felony-murder theory for first-degree murder. Therefore, we conclude that the district court did not err in determining

that this claim was procedurally barred and without good cause for the procedural defects.

New Evidence of Innocence

Fifth, appellant claimed that new evidence exonerated appellant of all crimes. Appellant claimed that the new evidence involved the codefendant's affidavit and the fact that witnesses in this case could not provide clear identification. Appellant failed to demonstrate that he was entitled to any relief on this claim. Appellant failed to specifically identify the exonerating evidence or the witnesses. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). To the extent that appellant was referring to the codefendant's affidavit made in Mexico, as discussed earlier, that affidavit was not new and was presented at trial. It further does not appear from appellant's vague claim that any of the witnesses were new and the issue regarding identification was litigated at trial. Appellant cannot avoid a procedurally defaulted petition on a claim of actual innocence based upon evidence presented at trial. Calderon, 523 U.S. at 559. Therefore, we conclude that the district court did not err in determining that this claim was procedurally barred and without good cause for the procedural defects.

Finally, appellant failed to set forth any argument to overcome the presumption of laches to the State. NRS 34.800(2). Accordingly, for the reasons discussed above, we conclude that the district court did not err in dismissing the petition as procedurally barred.

Motion for a New Trial

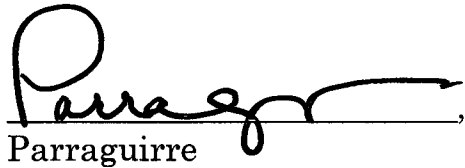
Appellant also raised the five claims discussed above in the context of a motion for a new trial based upon newly discovered evidence. A motion for a new trial based upon newly discovered evidence must be

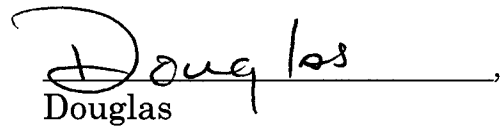
made within 2 years after the verdict. NRS 176.515(3). Appellant's motion, filed seventeen years after the verdict, was untimely, and thus, the district court did not err in denying the motion.

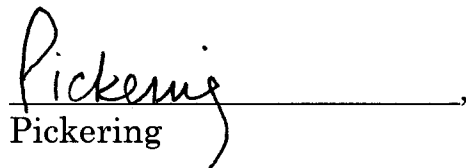
Conclusion

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.²

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

²We 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: Eighth Judicial District Court Dept. 8, District Judge
Carlos Alfredo Gurry
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk