

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY MCCOY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52508

**FILED**

**AUG 21 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a "petition for constitutional writ of habeas corpus." Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On February 23, 2007, the district court convicted appellant, pursuant to a guilty plea, of lewdness with a child under the age of 14. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 10 years. No direct appeal was taken.

On June 25, 2008, appellant filed a proper person "petition for constitutional writ of habeas corpus" in the district court. The State opposed the petition. Appellant filed a reply. 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 September 13, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant made the following claims of ineffective assistance of counsel: (1) forcing him to enter a guilty plea because of a failure to prepare for the pretrial and trial stages; (2) failing to prepare for sentencing; (3) failing to adequately meet and discuss the

case with appellant; (4) advising appellant to plead guilty and to “go along with” the questions from the district court; (5) failing to inform appellant of the results of the victim’s sexually transmitted disease test; (6) failing to inform appellant of the results of a DNA test; (7) failing to obtain an independent medical examination of the victim; (8) failing to inform appellant that probation was not available; (9) failing to inform appellant of lifetime supervision; (10) failing to explain the crime and its elements to appellant; (11) failing to properly advise appellant of the possible sentences; (12) failing to ensure appellant read and understood the guilty plea agreement because appellant was under the influence of medications; and (13) failing to properly advise appellant of direct appeal rights.

In his petition, appellant also claimed: (1) that the State of Nevada’s rules which do not to allow him to file a belated direct appeal violated due process; (2) the plea canvass was insufficient; (3) his plea was not made knowingly and intelligently; (4) the State failed to disclose exculpatory evidence from the sexually transmitted disease and DNA tests; (5) the State misrepresented the results of the sexually transmitted disease and DNA tests; and (6) cumulative error.

Appellant filed his petition more than one year after this court issued the remittitur from his direct appeal. Thus, appellant’s petition was untimely filed. See NRS 34.726(1). Appellant’s petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

To excuse his procedural defects, appellant claimed that the delay in filing the petition should be excused because the instant petition is not a post-conviction petition for a writ of habeas corpus, but is a

constitutional writ governed by Article 6 of the Nevada Constitution, and thus, is not subject to the procedural bar in NRS 34.726.

We conclude that this claim lacks merit. NRS 34.724(1) provides that a post-conviction petition for a writ of habeas corpus is a petition made by a person convicted of a crime and under imprisonment in order to obtain relief from a conviction. Appellant's petition meets the criteria established under NRS 34.724(1) for a post-conviction petition for a writ of habeas corpus. Further, a post-conviction petition a writ for habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them." NRS 34.724(2)(b). Thus, the instant petition is governed by the provisions of NRS Chapter 34. Accordingly, appellant's petition is subject to the procedural time bar set forth in NRS 34.726(1). Therefore, the district court did not err in construing appellant's petition as a post-conviction petition for a writ of habeas corpus and in denying this claim.

Next, appellant claimed that the procedural bars are unconstitutional as they are a limit on the district court's absolute constitutional power to issue writs of habeas corpus. This court has held that the one-year-time-limit, pursuant to NRS 34.726(1), for filing of a petition for a writ of habeas corpus is a reasonable regulation of the right to pursue habeas corpus relief. Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). Therefore, appellant failed to demonstrate that the district court erred in denying this claim.

Next, appellant claimed the delay in filing the petition was caused by his trial counsel's failure to send him the case file. Trial counsel's failure to send appellant his case file did not provide good cause

to excuse his untimely filing. See Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). Therefore, the district court did not err in denying this claim.

Next, appellant argued that he is actually innocent because the victim's mother forced the victim to fabricate the abuse allegations. Appellant claimed that the victim's mother coached the victim because she wanted to gain access to his finances.

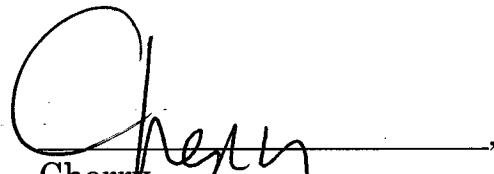
This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrated that failure to consider them would result in a "fundamental miscarriage of justice." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent. See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986). "In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." Bousley v. United States, 523 U.S. 614, 624 (1998).

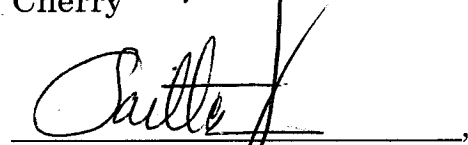
Appellant failed to demonstrate that his actual innocence claim has merit. The presentence investigation report states that appellant believed that the victim and her mother created the abuse allegations because they wanted access to his finances. Thus, evidence supporting this claim was reasonably available prior to the instant petition. Schlup v. Delo, 513 U.S. 298, 316 (1995) (stating "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious

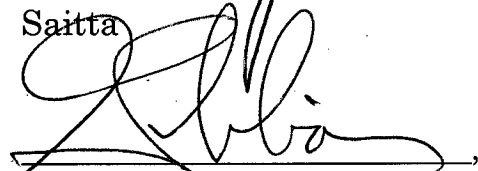
constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim"). Thus, he failed to demonstrate that failure to consider his petition on the merits would result in a fundamental miscarriage of justice. See Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley, 523 U.S. at 623; Murray, 477 U.S. at 496. Therefore, we conclude that the district court did not err in determining that appellant's petition was 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.

  
Cherry, J.

  
Saitta, J.

  
Gibbons, J.

cc: Eighth Judicial District Court Dept. 7, District Judge  
Larry McCoy  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk