

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN X. HIGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52790

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. Eighth Judicial District Court, Clark County; James A. Brennan, Judge.

On December 30, 1983, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary, one count of robbery with the use of a deadly weapon, and one count of sexual assault with the use of a deadly weapon in district court case number C62508. The district court sentenced appellant to serve consecutive terms totaling twenty-one years and two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence. High v. State, Docket No. 15612 (Order Dismissing Appeal, August 20, 1985). The remittitur issued on September 4, 1985.

Appellant unsuccessfully sought post-conviction relief by way of a petition for post-conviction relief and three post-conviction petitions for writs of habeas corpus. High v. State, Docket No. 22479 (Order Dismissing Appeal, September 30, 1991) (petition for post-conviction relief); High v. State, Docket No. 30814 (Order Dismissing Appeal, May

10, 2000) (post-conviction petition for a writ of habeas corpus); High v. State, Docket No. 35858 (Order of Affirmance, August 8, 2001) (post-conviction petition for a writ of habeas corpus); High v. State, Docket Nos. 42411, 42412, 42413 (Order of Affirmance, January 13, 2005) (post-conviction petition for a writ of habeas corpus).

On August 1, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was untimely. Moreover, the State specifically pleaded laches. 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 November 3, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he was improperly convicted of sexual assault under an aiding and abetting liability theory because it allowed the State to convict him without demonstrating specific intent to commit sexual assault. Appellant relied upon this court's decisions in Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) and Mitchell v. State, 122 Nev. 1269, 1276, 149 P.3d 37, 38 (2006). Appellant further claimed that it was not clear what theory of liability the jury relied upon, principal or aiding and abetting, in returning a guilty verdict for sexual assault. Thus, appellant claimed that the verdict was fatally defective pursuant to Bolden v. State, 121 Nev. 908, 923-24, 124 P.3d 191, 201-02 (2005), overruled by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008).

Appellant filed his petition approximately twenty-three years after this court issued the remittitur from his direct appeal.¹ Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was successive because he had filed a number of post-conviction petitions challenging his judgment of conviction. NRS 34.810(1)(b). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b). 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 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

¹Moreover, the petition was filed approximately fifteen years after the effective date of NRS 34.726.

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).

In an attempt to excuse his procedural defects, appellant argued that this court’s opinions in Sharma, Bolden and Mitchell were not decided until 2002, 2005, 2006, respectively, suggesting that he was unable to bring his claims arising from these decisions in a timely petition. Appellant further claimed that he was actually innocent of sexual assault because of the defective aiding and abetting theory of liability. Appellant claimed that the State had not demonstrated any prejudice based upon the 23-year-delay in the filing of the instant petition.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause for the delay. Appellant failed to demonstrate that an impediment external to the defense excused his procedural

defects. Even assuming that this court's decisions in Sharma, Bolden and Mitchell constituted legal grounds not reasonably available in time for filing a petition within the one-year deadline from the issuance of the remittitur on direct appeal or the effective date of NRS 34.726, appellant's 2008 petition was untimely filed from each of these decisions—approximately 6 years after Sharma, 2 1/2 years after Bolden and 1 1/2 years after Mitchell. Thus, appellant failed to demonstrate good cause for the entire length of his delay. Further, we note that in Mitchell, 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. at 1276, 149 P.3d at 38. Consequently, appellant failed to demonstrate good cause for the entire length of his delay.

Moreover, appellant's reliance upon Sharma, Mitchell and Bolden was misplaced in the instant case. Sexual assault is a general intent crime, not a specific intent crime. Winnerford H. v. State, 112 Nev. 520, 526, 915 P.2d 291, 294 (1996) ("Sexual assault is generally considered a general intent crime."); see also Bargas v. Burns, 179 F.3d 1207 (9th Cir. 1999). Thus, the Sharma, Mitchell and Bolden decisions would have no applicability to appellant or provide any cause for his delay in the instant case.²

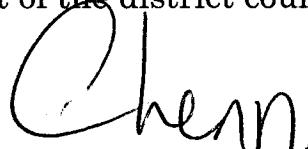
²Beyond the distinguishing fact that sexual assault is a general intent crime, this case is further distinguishable from the circumstances in Sharma where a codefendant faced liability as an aider and abettor for a specific intent crime of another in that the very basis of appellant's liability was that he aided and abetted in the commission of the sexual assault. The jury found appellant guilty of the sexual assault count set forth in count 6. The factual basis for count 6 was that the codefendant committed the act of sexual assault and appellant aided and abetted in the

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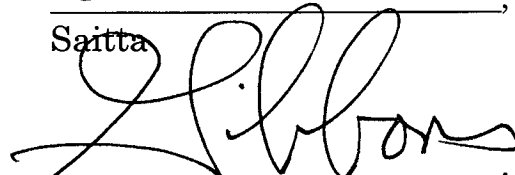
Finally, appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2), and for the reasons discussed above, appellant failed to demonstrate that he was actually innocent. Therefore, the district court properly denied the petition as procedurally barred.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

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commission of that act by holding a firearm on the victim and/or two others, which prevented the victim from resisting or receiving aid from the others. It is clear that the jury necessarily determined that appellant intended to aid and abet the sexual assault committed by the codefendant in finding him guilty of count 6. Although appellant was charged as a principal in other sexual assault counts, the jury returned "not guilty" verdicts on those counts. The sole theory of appellant's liability for count 6 was aiding and abetting.

cc: Chief Judge, Eighth Judicial District
Hon. James A. Brennan, Senior Judge
Juan X. High
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk