

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH FOSTER JACKSON, JR. A/K/A  
RALPH JACKSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52792

**FILED**

OCT 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 dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On March 30, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of open or gross lewdness, five counts of sexual assault with the use of a deadly weapon, and three counts of sexual assault. The district court sentenced appellant to serve terms totaling fifty years in the Nevada State Prison. This court affirmed appellant's judgment of conviction and sentence on appeal. Jackson v. State, Docket No. 35924 (Order of Affirmance, April 30, 2001). The remittitur issued on May 29, 2001. Appellant unsuccessfully sought post-conviction relief by way of three post-conviction petitions for writs of habeas corpus. Jackson v. State, Docket No. 39208 (Order of Affirmance,

October 24, 2002) and Jackson v. State, Docket No. 45943 (Order of Affirmance, December 21, 2005).<sup>1</sup>

On June 21, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, filed a motion to dismiss, and 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 October 10, 2008, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant raised four claims: (1) newly discovered evidence that appellant was actually innocent because he passed three polygraph tests prior to trial; (2) ineffective assistance of counsel because trial counsel failed to present polygraph evidence to jury when a stipulation was signed; (3) appellant's conviction was unconstitutional because his fingerprints were not found on the knife used in the crime; and (4) ineffective assistance of counsel because counsel did not communicate with appellant prior to trial and did not provide diligent representation.

Appellant filed his petition more than seven 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 three post-conviction petitions for writs of habeas corpus. See NRS 34.810(1)(b)(2).

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<sup>1</sup>Appellant filed an additional post-conviction petition for a writ of habeas corpus in the district court on May 6, 2002. Appellant did not appeal the district court's denial of that petition.

Further, appellant's petition constituted an abuse of the writ as claims one and two above were new and different from those claims raised in his previous post-conviction petitions for writs of habeas corpus. 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). Finally, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). A petitioner 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 of the crime—"it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).


In an attempt to excuse his procedural defects, appellant argued that his polygraph tests were newly discovered evidence because he did not receive the results of the tests from his attorney until March 17, 2008. Further, appellant claimed that he signed a waiver when these tests were performed which included language that the State and appellant stipulated to the polygraphs being admissible at trial whether appellant passed or not. Finally, appellant claimed that he was actually innocent because had the polygraph tests been presented to the jury, he would not have been convicted because the jury would have believed his consent defense because he "passed" the polygraph tests.

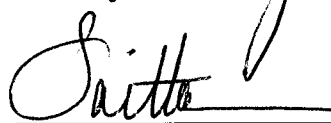
Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as


procedurally defective. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (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, or that some interference by officials, made compliance impracticable.’” Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (quotations and citations omitted)). Appellant failed to demonstrate that the polygraphs were newly discovered evidence and were not reasonably available prior to the filing of the instant petition. Appellant appears to have received the results of the polygraph tests from trial counsel pursuant to a letter he wrote. Appellant failed to demonstrate why he could not have requested this evidence from trial counsel earlier; notably, appellant was aware the tests had been conducted. Further, appellant failed to demonstrate that the polygraph evidence was admissible at trial. The results of a polygraph examination are not admissible unless both parties have signed a written stipulation to that effect. Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 184, 186 (1986). Apart from appellant’s bare allegation that a written stipulation was signed, there is no evidence in the record that suggests that the State stipulated to admit the polygraph evidence. There was no stipulation to admit the polygraph evidence and appellant failed to demonstrate that he was actually innocent because the evidence would not have been presented to the jury. Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

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

cc: Hon. James M. Bixler, District Judge  
Ralph Foster Jackson Jr.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk