

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CHARLES ADAMS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52917

**FILED**

**SEP 21 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On September 27, 2000, the district court convicted appellant, pursuant to a jury verdict, of two counts of trafficking in a controlled substance. The district court sentenced appellant to serve a term in the Nevada State Prison of 10 to 25 years and a second concurrent term of life with the possibility of parole after 10 years. This court affirmed the judgment of conviction on direct appeal. Adams v. State, Docket No. 36930 (Order of Affirmance, September 12, 2001). The remittitur issued on October 9, 2001.

On August 7, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant, conducted an evidentiary hearing, and on June 8, 2004, denied the petition. This court affirmed the order of the district court on appeal. Adams v. State, Docket No. 43467 (Order of Affirmance, January 24, 2005).

On July 9, 2007, appellant filed a second, untimely, post-conviction petition for a writ of habeas corpus. The State opposed the petition. Counsel was appointed and filed a supplemental petition on January 15, 2008. After conducting an evidentiary hearing, the district court dismissed the petition on October 29, 2008. This appeal follows.

In the petition and the supplemental petition, both filed below, appellant made the following claims: (1) trial counsel was ineffective for failing to properly prepare for trial; (2) trial counsel was ineffective for failing to interview and properly cross-examine witnesses; (3) the district court relied on improper evidence at the sentencing hearing; (4) the sentence imposed violated cruel and unusual punishment principles; (5) counsel at the trial and appellate stage was ineffective for failing to argue that two convictions for one drug conspiracy event violated double jeopardy; (6) that his trial counsel was ineffective for failing to demonstrate that the methamphetamine in the motel room and in the vehicle belonged to either Susan Birch or Fred Chapman; and (7) that he wanted to testify at trial but did not due to advice from counsel.

Appellant filed his petition more than six 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 in which he raised claims (1) and (6). See NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as claims (2)-(5), and (7) are new and different from those claims raised in his previous post-conviction petition for a writ of habeas corpus. See 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(3).

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 demonstrates 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). To demonstrate a fundamental miscarriage of justice based on a claim of actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995).

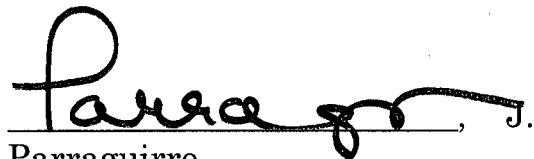
Appellant argues that the district court erred in dismissing his petition as procedurally barred and rejecting his actual innocence claim. Appellant acknowledges he cannot demonstrate good cause or prejudice. Rather, appellant argues he was actually innocent. In support of his actual innocence claim, appellant argues that the drugs that he allegedly possessed did not belong to him and appellant and his wife testified to that fact at the evidentiary hearing.

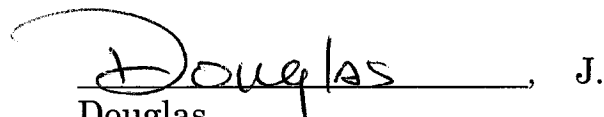
We conclude that appellant has not shown that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614, 623 (1998); Murray, 477 U.S. at

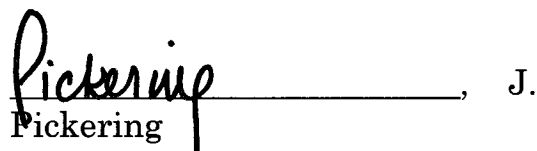
496. The district court concluded that the evidence appellant presented was not credible, and factual findings of the district court are entitled to deference when reviewed on appeal. See generally Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Further, appellant fails to demonstrate that no reasonable juror would have found him guilty beyond a reasonable doubt had this testimony been presented at trial. Schlup, 513 U.S. at 327. Therefore, appellant fails to demonstrate that this claim should excuse the procedural defects, and the district court did not err in applying the procedural bars in this case.

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre J.

  
Douglas J.

  
Pickering J.

cc: Hon. Connie J. Steinheimer, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk