

IN THE SUPREME COURT OF THE STATE OF NEVADA


JOSE LOPEZ GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53154

FILED

FEB 04 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant filed his petition on October 14, 2008, more than seven years after the remittitur from his direct appeal on January 25, 2000.² Thus, appellant's petition was untimely filed. See NRS 34.726(1). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

To excuse the procedural defects, appellant claimed that he was unable to file a timely petition because he did not receive the trial

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Garcia v. State, Docket No. 32879 (Order Dismissing Appeal, December 27, 1999).

transcripts in a timely manner and because he could not raise ineffective assistance of counsel claims on direct appeal. Counsel's failure to send appellant transcripts did not excuse the procedural defects. See Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). Further, appellant failed to demonstrate that any impediment external to the defense explained or excused the more than seven-year delay since the remittitur from his direct appeal. 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). In addition, appellant failed to overcome the presumption of prejudice to the State. See NRS 34.800(2).

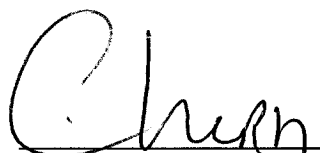
Next, appellant claimed that he was actually innocent. In support of his actual innocence claim, appellant argued that the victim and the victim's mother fabricated their testimony and that a DNA test on semen found on the victim's clothes would show that he was not the person who sexually assaulted the victim.

We conclude that appellant failed to demonstrate a fundamental miscarriage of justice should allow consideration of procedurally defaulted claims because he failed to demonstrate that "it is more likely than not that no reasonable juror would have convicted [appellant]." See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Appellant testified at trial that the victim's story was not accurate. It was for the jury to determine the weight and credibility to give conflicting testimony. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). In addition, appellant failed to demonstrate that there was a DNA sample that was available for testing. Even assuming there was a sample available; the victim knew appellant well and specifically identified him as

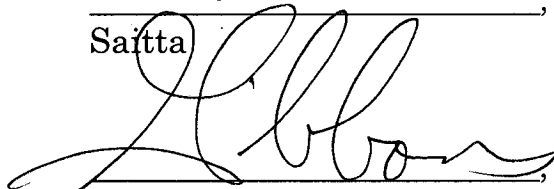
the person who sexually assaulted her. Thus, appellant failed to demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt had he had access to DNA evidence. Schlup v. Delo, 513 U.S. 298, 327 (1995). Therefore, appellant failed to demonstrate that this claim should excuse the procedural defects, and the district court did not err in applying the procedural bars in this case.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

³We 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: Hon. Jackie Glass, District Judge
Jose Lopez Garcia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk