

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMY MARVIN HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53196

FILED

OCT 21 2009

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. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On December 22, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of trafficking in a controlled substance, and pursuant to a guilty plea, of two counts of ex-felon in possession of a firearm. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole for the trafficking count and two concurrent terms of 12 to 48 months for the possession counts, the latter to be served consecutively to the former. This court affirmed the judgment of conviction on direct appeal. Harris v. State, Docket No. 42695 (Order of Affirmance, January 10, 2006). The remittitur issued on February 7, 2006.

Appellant then filed a motion to correct an illegal sentence, motion to withdraw a guilty plea, and motion for a new trial. The district court denied the motions. Appellant appealed from the denial of his motion to withdraw a guilty plea and motion for a new trial; this court

affirmed the district court's order denying these motions. Harris v. State, Docket No. 50285 (Order of Affirmance, April 25, 2008).

On October 13, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. 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 January 7, 2009, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than two years 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. Good cause must be an impediment external to the defense. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Appellant first argued that the petition was timely filed. Appellant asserted that the proceedings on the prior motions tolled the time for filing a post-conviction petition for a writ of habeas corpus. Appellant's timelines argument lacked merit. NRS 34.726(1) provides two triggers for the timely filing of a post-conviction petition for a writ of habeas corpus: entry of a judgment of conviction or entry of remittitur in a direct appeal. No tolling motions are recognized in regards to the filing of a timely post-conviction petition for a writ of habeas corpus. Rather, a petitioner filing a late petition must demonstrate good cause for the delay. NRS 34.726(1). The filing of the post-conviction motions did not affect the period for filing a timely petition. To the extent that appellant claimed that these proceedings provided good cause for the late petition,

appellant's argument lacked merit because the filing of these motions was not an impediment external to the defense.

Next, appellant claimed that he was actually innocent. Appellant noted that the original information stated that he had committed the crime on or around September 20, 2000, when in fact, he was incarcerated in the State of California from November 1999 through June 2001.

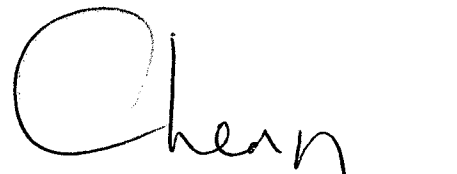
A petitioner unable to satisfy the good cause and prejudice requirements may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). 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).

The district court determined that the claim of actual innocence lacked merit in this case. We agree. The September 20, 2000 date was a typographical error in the original information. The correct date, September 20, 2001, was set forth in an amended information. The testimony at trial established that the crime occurred on September 20, 2001. In the guilty plea portion of the case, appellant acknowledged that the crime occurred on September 20, 2001. Notably, appellant was

arrested on September 20, 2001, and later transported to the hospital after faking convulsions. Appellant's assertion that he was incarcerated in California at the time the crime was committed in this case is not a reliable piece of evidence, and appellant failed to demonstrate that no reasonable juror would have convicted him in light of this new "evidence." Therefore, we affirm the order of the district court denying the petition as procedurally barred and without good cause.

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

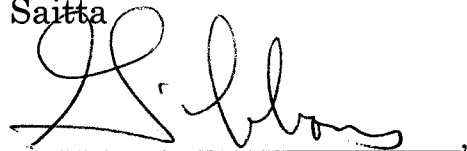
ORDER the judgment of the district court AFFIRMED.

 _____ J.

Cherry

 _____ J.

Saitta

 _____ J.

Gibbons

cc: Eighth Judicial District Court Dept. 15, District Judge
Sammy Marvin Harris
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk