IN THE SUPREME COURT OF THE STATE OF NEVADA

RODOLFO LEON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53372

FILED

DEC 16 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; Elissa F. Cadish, Judge.

On December 19, 1983, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's direct appeal. Leon v. State, Docket No. 15898 (Order Dismissing Appeal, December 4, 1986). The remittitur issued on December 23, 1986.

On June 19, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition as procedurally barred 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, February 19, 2009, the district court denied the petition. This appeal followed.

In his petition, appellant claimed: (1) his trial counsel was ineffective for failing to inform the district court that he was deaf; (2) his trial counsel previously worked for the district attorney's office and appellant's case was counsel's first case as a defense attorney; (3) the key witness was a drug user; (4) the blood that was on his clothes came from a fight the night before and not from the victims; (5) the DNA of the blood on his clothes did not match the victims.

The petition was filed almost 22 years after the issuance of the remittitur from the direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).[1] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1). In addition, because the State specifically pleaded laches, he was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). 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.

---

[1]We note that the petition was also untimely from the January 1, 1993 effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-6.

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 claimed he had good cause to excuse the procedural defects because DNA testing of the blood on his clothes was not available at the time of his trial. He also claimed the procedural defects should be excused because he is deaf and English is not his first language.

Based upon our review of the documents before this court, we conclude that the district court did not err in denying appellant's petition as procedurally barred. 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). Given that appellant argued in a 2000 motion that DNA testing should be conducted on the blood that was found on his clothes, the lack of availability of DNA testing when appellant's trial took place did not explain or excuse the almost 22 year delay since the filing of the judgment of conviction. Hathaway v. State, 119 Nev. at 252, 71 P.3d at 506. In addition, that appellant is deaf and that English is not his first language did not demonstrate good cause. See generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a

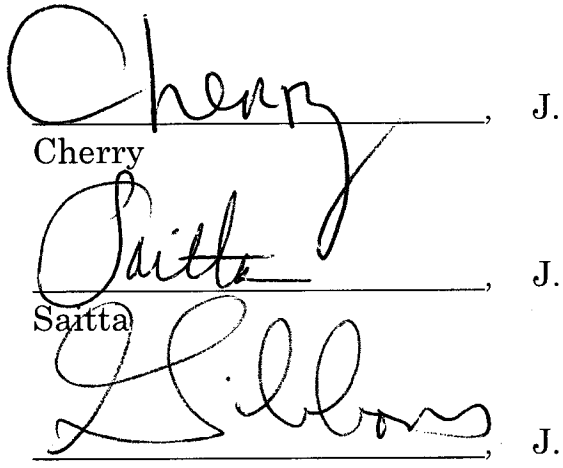
successive post-conviction petition). Finally, appellant failed to overcome the presumption of prejudice to the State. NRS 34.800(2).

Next, appellant claimed that he was actually innocent. In support of his actual innocence claim, appellant argued that a DNA test would show that the blood on his clothes did not belong to the victims because the blood came from a fight he was involved with the night before the murders.

We conclude that appellant failed to demonstrate that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. Further, appellant failed to demonstrate that DNA testing would conclusively establish his innocence. See Sewell v. State, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992) (recognizing that DNA testing is warranted "only where a conviction rested largely upon identification evidence and [testing] could definitively establish the accused's innocence"). Appellant argued at trial that the blood on his clothes came from a fight the night before the murders. 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). Further, this court previously determined in appellant's direct appeal that substantial evidence of appellant's guilt was presented at trial. 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, 513 U.S. at 327. 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 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.[2]



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Rodolfo Leon
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

---

[2]We 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.