

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREL M. ROBINSON A/K/A  
MARION ANDERSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53703

DARREL M. ROBINSON A/K/A  
MARION ANDERSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53960

**FILED**

DEC 03 2009

BRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 53703 is a proper person appeal from an order of the district court denying a motion to withdraw a guilty plea. Docket No. 53960 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition. NRAP 3(b). Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On January 3, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 60 to 180 months in the Nevada State Prison. No direct appeal was taken.

On June 22, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, appellant claimed, among other things, that he was deprived of a direct appeal due to ineffective assistance of counsel. The State opposed the petition. On November 22, 2005, appellant filed a motion to withdraw a guilty plea. The State opposed the motion. On February 10, 2006, and on February 28, 2006, the district court denied the petition and motion. On appeal, this court affirmed the order of the district court denying the motion and affirmed in part the order of the district court denying the petition, but reversed the district court's decision to deny the appeal deprivation claim and remanded the matter to the district court with instructions to provide appellant with the appeal deprivation remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Robinson v. State, Docket No. 46647 (Order Affirming in Part, Reversing in Part and Remanding, September 20, 2006).

On remand, appellant was appointed counsel and pursued the Lozada remedy in a habeas corpus petition filed in the district court. The district court denied the Lozada petition. On appeal, this court affirmed the judgment of conviction and the denial of the Lozada petition. Robinson v. State, Docket No. 50167 (Order of Affirmance, January 9, 2008). The remittitur issued on February 5, 2008.

Docket No. 53703

On March 10, 2009, appellant filed a proper person motion to withdraw a guilty plea in the district court. The State opposed the motion. Appellant filed a response. On April 29, 2009, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that the State breached the plea agreement, the guilty plea was involuntary, appellant did not receive discovery until after he entered his guilty plea, and his due process rights were violated.

This court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches. Hart v. State, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000). Application of the doctrine requires consideration of various factors, including: “(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant’s knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State.” Id. at 563-64, 1 P.3d at 972. Failure to identify all grounds for relief in a prior proceeding seeking relief from a judgment of conviction should weigh against consideration of a successive motion. Id. at 564, 1 P.3d at 972.

Based upon our review of the record on appeal, we conclude that appellant’s motion is subject to the equitable doctrine of laches. Appellant filed his motion more than four years after the judgment of conviction was entered and more than one year after his Lozada appeal was resolved. Appellant failed to provide any explanation for the delay. Appellant previously challenged the validity of his plea in his prior post-conviction petition for a writ of habeas corpus and in a prior motion to withdraw the guilty plea. Appellant failed to indicate why he was not able to present his claims prior to the filing of the instant motion. Finally, the lengthy delay provides a circumstance prejudicing the State’s ability to conduct a trial. Accordingly, we conclude that the doctrine of laches precludes consideration of appellant’s motion on the merits. Therefore, we affirm the order of the district court denying the motion.

Docket No. 53960

On March 9, 2009, 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 July 30, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed: (1) his court-appointed Lozada counsel was ineffective for failing present new evidence and witness testimony and raise claims desired by appellant; (2) the State breached the plea agreement and the district court should have granted his presentence motion to withdraw a guilty plea; (3) the guilty plea was not voluntary because he did not understand the circumstances or the case against him; and (4) there was a charging delay which violated his due process rights.

Appellant filed his petition more than one year after this court issued the remittitur from his Lozada 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.<sup>1</sup> See id.

In an attempt to demonstrate cause for the delay, appellant argued that he had newly discovered evidence of his innocence. Specifically, he claimed that in 2004, after he entered his guilty plea, he

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<sup>1</sup>The district court also determined that the petition was successive pursuant to NRS 34.810. Because the petition was untimely, this court need not consider whether the petition was also successive.

found out information about the victim in a conversation with his attorney. Appellant claimed that he discovered that Leo Patrick, one of the victims, told the police he was not robbed by appellant and that the witness, Mary Jane Kahn-Weinstein, falsely identified appellant. Purported evidence of innocence discovered by appellant in 2004 does not qualify as newly discovered evidence in a 2009 petition. There is no explanation for the more than four-year delay in raising a claim relating to this purported new evidence.

Appellant further claimed that he can overcome the procedural bar because he is actually innocent. Appellant claimed that he was actually innocent for the following reasons: (1) he was convicted upon perjured testimony from Mary Jane Kahn-Weinstein because her testimony at the preliminary hearing differed from her statements to the police; (2) he received disproportionate sentences in violation of equal protection; (3) his trial counsel was ineffective for failing to sever the deadly weapon enhancement from the primary offense, failing to ensure that he received a limiting jury instruction, and failing to challenge the testimony at the preliminary hearing; and (4) he was innocent because Leo Patrick identified appellant as not being the perpetrator.

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, 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

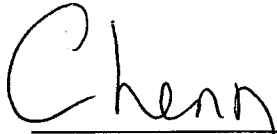
juror would have convicted him in light of the new evidence” raised in the procedurally defaulted petition. Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). When the conviction is based upon a guilty plea, the petitioner must demonstrate that he is innocent of charges foregone in the plea bargaining process. Bousley v. United States, 523 U.S. 614, 623-24 (1998).

Based upon our review of the record on appeal, we conclude that the district court did not err in concluding appellant was not entitled to a review of defaulted claims. Appellant failed to demonstrate that he was actually innocent. Appellant’s recitation of the facts and his statements of new evidence do not comport with the facts in the record. Appellant was not convicted upon testimony, but rather, he was convicted by his plea of guilty to robbery with the use of a deadly weapon. Mary Jane Kahn-Weinstein, one of the victims named in the amended criminal complaint, identified appellant at the preliminary hearing as the man who robbed her and Leo Patrick. While the record indicates that Patrick could not identify appellant at the show-up identification, this does not prove that appellant was innocent. The necessarily limited facts in the record indicate that bystanders in the parking lot identified appellant as the individual running through the gated community. The police officer who apprehended appellant positively identified appellant and explained the circumstances of the apprehension. The other claims raised fell far short of demonstrating actual innocence. Appellant failed to demonstrate that he was innocent of the charges foregone by virtue of the negotiations. Therefore, we affirm the order of the district court denying the petition.


Conclusion

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 judgments of the district court AFFIRMED.

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

 \_\_\_\_\_, J.

Gibbons

cc: Hon. Michael Villani, District Judge  
Darrel M. Robinson  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk