

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO LEON ALVAREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53782

FILED

OCT 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
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; Stefany Miley, Judge.

On December 17, 2001, the district court convicted appellant, pursuant to a jury verdict, of eight counts of trafficking in a controlled substance, one count of conspiracy to sell a controlled substance, and two counts of possession of a controlled substance. The district court sentenced appellant to serve a total of two consecutive terms of 10 to 25 years in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal. Alvarez v. State, Docket No. 38995 (Order of Affirmance, February 5, 2003). The remittitur issued on March 4, 2003.

On February 5, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant retained counsel, and counsel filed a

supplement to the petition. On January 30, 2007, the district court denied the petition. No appeal was taken.

On January 20, 2009, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was untimely and successive. Moreover, the State 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 May 19, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he was actually innocent because the State had never proven he was "Poncho," he did not know about any drugs or participate in any drug transactions, and he was working the entire day the incident occurred.

Appellant filed his petition almost 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 and an abuse of the writ because the claim raised was new and different. See NRS 34.810(1)(b)(2); 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(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant argued that the petition was filed within one year of the decision on his first post-conviction petition for a writ of habeas corpus. NRS 34.726(1) provides only two triggers for filing a timely post-conviction petition for a writ of habeas corpus: entry of the judgment of conviction or the issuance of the remittitur on direct appeal. Thus, the decision date relating to the first petition does not excuse the late or successive filing. Appellant did not attempt to overcome the presumption of prejudice by the delay in filing his petition. Thus, the petition was procedurally defective pursuant to NRS 34.726; NRS 34.800(2); NRS 34.810(1)(b); NRS 34.810(2).

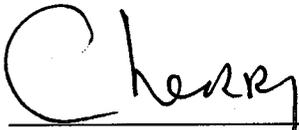
A petitioner unable to satisfy the good cause and prejudice requirements may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental 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).

Appellant did not present any new evidence of innocence; rather, appellant merely stated that based upon the evidence in the record

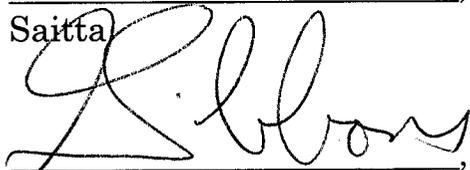
on appeal he was innocent. This was insufficient to demonstrate actual innocence to excuse the procedural defects. Therefore, we affirm the order of the district court denying the petition as procedurally barred.

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 judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Stefany Miley, District Judge
Francisco Leon Alvarez
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk