

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RAY HOGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54011

FILED

JAN 20 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Hogan*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Michael Ray Hogan's fourth post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

A jury convicted Hogan of first-degree murder with the use of a deadly weapon for killing Heidi Hinkley and attempted murder with the use of a deadly weapon for shooting Claudia Brown. The jury sentenced Hogan to death. This court affirmed the convictions and sentence. Hogan v. State (Hogan I), 103 Nev. 21, 732 P.2d 422 (1987). Hogan unsuccessfully sought relief in prior post-convictions proceedings. See Hogan v. State (Hogan IV), Docket No. 46293 (Order of Affirmance, November 15, 2006); Hogan v. Warden (Hogan III), 109 Nev. 952, 860 P.2d 710 (1993); Hogan v. State (Hogan II), Docket No. 18994 (Order Dismissing Appeal, December 21, 1988). Hogan filed the instant petition in the district court on September 10, 2008. The district court denied the petition as procedurally barred, and this appeal followed.

Hogan argues that the district court erred by denying his post-conviction petition as untimely and successive without conducting an

evidentiary hearing. He further contends that even if he cannot demonstrate good cause to overcome the applicable procedural bars, the district court erred by denying his petition because the failure to consider it on the merits resulted in a fundamental miscarriage of justice.

Procedural bars

Because Hogan filed his petition over 21 years after the remittitur issued in his direct appeal, the petition was untimely under NRS 34.726(1). The petition also was successive pursuant to NRS 34.810(2). The petition was therefore procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default rules, Hogan advances several arguments: (1) his post-conviction counsel rendered ineffective assistance, (2) the State failed to disclose requested evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963), (3) any delay in filing the instant petition was not Hogan's fault, and (4) this court's inconsistent application of procedural default rules precludes application of those rules to his petition. Hogan was entitled to an evidentiary hearing on his claims of good cause to overcome the various procedural bars only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).

Ineffective assistance of post-conviction counsel

As cause to overcome the procedural default rules, Hogan argues that his post-conviction counsel rendered ineffective assistance. He further contends that his conviction was final before former NRS 177.345 was amended to only permit the discretionary appointment of counsel and

he was entitled to the mandatory appointment of counsel at the time his conviction was final. He asserts that he had a vested right to the appointment of counsel and the statutory revision violates his equal protection rights.

We conclude that Hogan failed to demonstrate good cause to excuse the procedural bars. In addressing a similar claim in a prior petition, this court concluded that Hogan failed to demonstrate that he had a statutory right to the appointment of post-conviction counsel; therefore an allegation of post-conviction counsel's ineffectiveness is not sufficient good cause for filing another petition. Hogan IV, Docket No. 46293, at 2. This court further noted that even if he was entitled to appointed counsel, Hogan failed to demonstrate that counsel's ineffectiveness could excuse the untimely petition. Id. Because this court has previously decided that Hogan was not entitled to the appointment of post-conviction counsel and therefore the ineffective assistance of post-conviction counsel did not provide Hogan with good cause to excuse an untimely and successive petition, further consideration of this issue is barred by the law of the case. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Hogan has not cited any that would warrant revisiting our prior decision. See Pellegrini v. State, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001) (acknowledging that this court may "revisit the wisdom of its legal conclusions when it determines that further discussion is warranted"). Therefore, the district court did not err in rejecting this claim of good cause without conducting an evidentiary hearing.

Failure to disclose evidence

Hogan contends that the State's violation of Brady v. Maryland, 373 U.S. 83 (1963), by refusing to comply with a request for

information on the prior criminal records of intended State witnesses, provides cause to overcome the procedural bars. See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (explaining that cause and prejudice showings required to overcome procedural default parallel second and third prongs of Brady violation). We conclude that this argument lacks merit. Hogan does not identify any record that he has since discovered that the State failed to provide at the time of trial. His mere allegation is not sufficient good cause to excuse the procedural default. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in rejecting this claim of good cause without conducting an evidentiary hearing.

Fault

Hogan argues that NRS 34.726 does not apply to him because the delay in filing the instant petition was not his fault but was the fault of counsel. He contends that the plain language of NRS 34.726(1) evinces the Legislature's intent that the petitioner himself must act or fail to act to cause the delay and that any failure to raise claims in a timely manner was the fault of counsel. We disagree. This court has interpreted NRS 34.726(1) as requiring "a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the control of the defense team as a whole, not solely the defendant. Considering the nature and purpose of legal representation, we conclude that Hogan's view that NRS 34.726(1) contemplates only delay personally caused by a petitioner is untenable. Moreover, even if we accepted Hogan's interpretation of

NRS 34.726(1), he waited approximately 22 months after this court resolved his appeal concerning the denial of his third habeas petition to file the instant petition, and the only apparent explanation for the delay is that he was seeking relief in federal court. The election to go to federal court prior to pursuing state remedies does not provide good cause to excuse the procedural bars. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, the district court did not err in rejecting this claim of good cause without conducting an evidentiary hearing.

Alleged inconsistent application of procedural bars

Hogan also argues that the district court erred by dismissing his post-conviction petition as procedurally barred because the default rules are discretionary and this court inconsistently applies them. We disagree. Procedural default rules are mandatory, see Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini, 117 Nev. at 886, 34 P.3d at 536, and we do not have the discretion to ignore them, State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 239, 112 P.3d 1070, 1077, 1079 (2005). Even assuming any prior inconsistent application, that inconsistency cannot excuse procedural default in other cases. Id. at 236, 112 P.3d at 1077.

Fundamental miscarriage of justice

Hogan argues that even if he cannot demonstrate good cause to overcome the procedural bars, the district court's failure to consider the merits of his post-conviction petition resulted in a fundamental miscarriage of justice because he is actually innocent of murder and the death penalty.

Murder

Hogan contends that the failure to consider his ineffective-assistance-of-trial-counsel claim will result in a fundamental miscarriage of justice. Specifically, he argues that his counsel failed to present evidence that his neuropsychological impairment and drug use at the time of the crimes rendered him incapable of premeditating or forming the intent to kill. Further, Hogan contends that counsel was ineffective for failing to pursue an insanity defense based on his “organic toxicity state.” In support of his claim, Hogan submitted statements from family that detailed his mother’s substance abuse while she was pregnant with Hogan, Hogan’s history of head injuries and substance abuse, and the existence of mental illness in Hogan’s extended family. In addition, Hogan presented reports from several psychologists and a neuropharmacologist who opined that Hogan suffered from mild to moderate brain dysfunction, which, combined with his prior substance abuse and acute intoxication prior to the murder, rendered him unable to form the specific intent to murder the victim.

When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice requires “a colorable showing” that the petitioner is “actually innocent of the crime.” Id. When claiming a fundamental miscarriage based on actual innocence, the petitioner thus “must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.” Id. In this context, “actual innocence means factual innocence, not mere legal insufficiency.”

Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and alteration omitted).

We conclude that Hogan failed to demonstrate a fundamental miscarriage of justice, as he did not make a “colorable showing” of actual innocence for two reasons. First, the jury was already aware of his theory that his neurological impairment rendered him less responsible for the crime through the testimony of Dr. William O’Gorman. Dr. O’Gorman, who reviewed information about Hogan’s birth, childhood diseases, and several traumatic head injuries, testified that Hogan’s testing indicated that he had a disorganized personality and possibly a severe character disorder. He further opined that Hogan “would be a very impulsive person.” Dr. O’Gorman also discussed the possible effects of cocaine and marijuana on a person. While Hogan contends that Dr. O’Gorman’s report and testimony were not as thorough as the later experts’ findings, Dr. O’Gorman nevertheless came to a similar conclusion and based it on many of the same factors as the later evaluations.

Second, considering the other testimony at trial, which showed that the murder was premeditated and not a product of impulse, Hogan failed to demonstrate that the additional psychological evidence was of such significance that no reasonable juror would have convicted him of first-degree murder. Notably, Hogan repeatedly threatened to kill Hinkley in the days prior to the shooting. Given that Hogan and Hinkley continually quarreled and Hinkley had indicated that their relationship was over before the final conversation when she again ended their relationship and was shot, Hogan did not demonstrate that the murder was the likely result of a rash impulse incited by a sudden emotional episode. Moreover, the brief span of time during which Hogan and

Hinkley talked and the first shots were fired suggested the firearm was very near, possibly in Hogan's possession, when he initiated the conversation with Hinkley. In addition, Hogan's actions immediately after the shooting, which included shooting the only witness to the murder, tearing her phone out of the wall, and interrogating her concerning what she told the police, suggested that Hogan was not acting merely on impulse but in a deliberate manner.¹

Death penalty

Hogan argues that the failure to consider the merits of his challenges to the aggravating circumstances and his claim that trial counsel was ineffective for failing to investigate and present additional mitigation evidence would result in a fundamental miscarriage of justice. A petitioner who claims a fundamental miscarriage based on ineligibility for the death penalty "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Great-risk-of-death aggravating circumstance

Hogan contends that the failure to consider his claim that the great-risk-of-death aggravating circumstance was invalid will result in a fundamental miscarriage of justice. Hogan asserts that the aggravator's legislative history precludes its use in this case.

¹Regarding Hogan's claim that his counsel was ineffective for failing to pursue an insanity defense, he fails to demonstrate a fundamental miscarriage of justice as his most recent psychological evaluator, Dr. Jonathan Mack, conceded that Hogan was not insane at the time of the crime.

We conclude that this argument lacks merit. The arguments underlying this claim were litigated on direct appeal from the judgment of conviction and in two previous post-conviction appeals. Hogan v. State (Hogan IV), Docket No. 46293 (Order of Affirmance, November 15, 2006); Hogan v. State (Hogan III), 109 Nev. 952, 860 P.2d 710 (1993); Hogan v. State (Hogan I), 103 Nev. 21, 732 P.2d 422 (1987). Our prior decisions upholding the great-risk-of-death aggravating circumstance preclude further consideration of these issues. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Although we have the discretion to “revisit the wisdom of [our] legal conclusions when [we] determine[] that further discussion is warranted,” Pellegrini, 117 Nev. at 885, 34 P.3d at 535-36, and “depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice,” Hsu v. County of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)), Hogan has not cited any authority that would warrant such a departure. Therefore, we conclude that the district court did not err by denying relief on this claim.

Prior-violent-felony aggravating circumstance

Hogan contends that the prior-violent-felony aggravating circumstance is invalid as applied to him because his guilty plea in the prior manslaughter case was not voluntary, his trial counsel was ineffective for failing to challenge the validity of the prior conviction, and the evidence presented during the penalty hearing was insufficient to demonstrate that the prior conviction involved the use or threat of violence.

We conclude that Hogan failed to demonstrate a fundamental miscarriage of justice. The same underlying challenges to this

aggravating circumstance were litigated on direct appeal from the judgment of conviction and in two previous post-conviction appeals. Hogan IV, Docket No. 46293 (Order of Affirmance, November 15, 2006), at 3-6; Hogan III, 109 Nev. 952, 860 P.2d 710; Hogan I, 103 Nev. 21, 732 P.2d 422. Our prior decisions upholding this aggravating circumstance precludes further consideration of these issues, Hall, 91 Nev. at 315-16, 535 P.2d at 798-99, and Hogan has not cited any authority that would warrant revisiting this issue, see Hsu, 123 Nev. at 630, 173 P.3d at 728-29. Therefore, we conclude that the district court did not err by denying relief on this claim.

Mitigating evidence

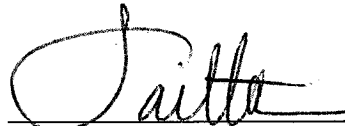
Hogan contends that the failure to consider his claim that trial counsel was ineffective for not investigating and presenting additional mitigation evidence will result in a fundamental miscarriage of justice. Specifically, he contends that had the jury been presented with evidence of his family background, including extensive evidence of abuse, chemical dependence, and mental illness, the jury would not have found him death eligible. We disagree.

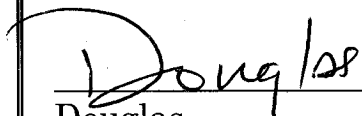
Even if the fundamental-miscarriage exception includes consideration of additional mitigation evidence that was not presented at trial as the result of constitutional error (such as ineffective assistance of counsel), see Sawyer v. Whitley, 505 U.S. 333, 347 (1992) (stating that “the ‘actual innocence’ requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of claimed constitutional error”), Hogan failed to “show by clear and convincing evidence that, but for a constitutional error, no reasonable

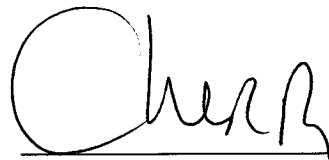
juror would have found him death eligible," Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

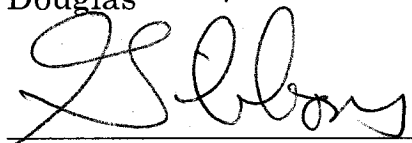
Having considered Hogan's contentions and concluded that no relief is warranted, we

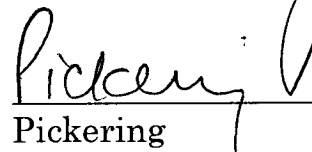
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Saitta

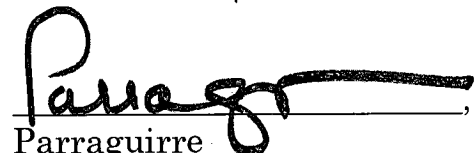

_____, J.
Douglas


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Federal Public Defender/Las Vegas
Clark County District Attorney
Attorney General/Las Vegas
Eighth District Court Clerk