

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54570

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE AND DISMISSING APPEAL IN PART

This is an appeal from an order of the district court denying appellant's post-conviction petition for writ of habeas corpus and motion for reconsideration.¹ Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant filed his petition on November 7, 2007, more than eight years after this court's July 19, 1999, issuance of the remittitur from his direct appeal. Walker v. State, Docket No. 33637 (Order Dismissing Appeal, June 21, 1999). Appellant's petition was therefore untimely filed.

¹Appellant filed an amended notice of appeal to include a district court order denying a motion for reconsideration. Eighth Judicial District Court, Clark County; T. Arthur Ritchie, Jr., Chief Judge. Because no statute or court rule provides for an appeal from an order denying a motion for reconsideration, we lack jurisdiction over this portion of the appeal and dismiss it. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990).

See NRS 34.726(1). Further, appellant's petition was successive as to claims that were previously raised, NRS 34.810(1)(b), and was an abuse of the writ for claims raised for the first time in the instant petition, NRS 34.810(2).² Thus, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(2); 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. NRS 34.800(2).

Appellant argues on appeal that ineffective assistance of appellate and post-conviction counsel provided good cause to excuse his procedural defects. However, as appellant did not raise these arguments below, we decline to consider them here in the first instance.³ Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

²Walker v. State, Docket No. 33637 (Order Dismissing Appeal, June 21, 1999); Walker v. State, Docket No. 42292 (Order of Affirmance, March 5, 2004).

³Although the State pleaded laches under NRS 34.800 as an additional basis for dismissal below, the district court's order did not rely on it. Appellant attempts for the first time on appeal to rebut the State's claim of laches. Because we determine that appellant's claims are procedurally barred under NRS 34.726 and NRS 34.810, we do not address whether laches applies here.

Appellant also attempts to overcome his procedural defects by arguing that he is actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice, see Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996), and that the district court erred in denying him an evidentiary hearing on this claim. First, appellant claims that he is actually innocent of the deadly weapon enhancement. As this ground was not raised below, we decline to consider it on appeal in the first instance. Davis, 107 Nev. at 606, 817 P.2d at 1173. Second, he claims that he is actually innocent of attempted murder because he lacked the specific intent that his codefendant murder the victim. While a claim of actual innocence may allow an otherwise procedurally barred constitutional claim to be considered on the merits, it must be accompanied by new evidence, and appellant must “show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” Schlup v. Delo, 513 U.S. 298, 315-16, 327 (1995); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Appellant presented no new evidence to the district court in support of his actual-innocence claim.⁴ Accordingly, appellant was not

⁴Appellant attached to his petition his codefendant’s 2002 affidavit, a document that he first attached to his 2003 post-conviction petition and that he now contends for the first time constitutes new evidence of his actual innocence. Merely presenting a document as an attachment without any explanation does not put an issue before a court. Cf. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). The issue was therefore
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entitled to an evidentiary hearing on his bare, naked claim. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Because appellant has failed to demonstrate actual innocence to overcome his procedural defects, we conclude that the district court did not err in denying his petition without an evidentiary hearing.⁵

Finally, appellant attempts to “preserve” an argument that this court inconsistently applies procedural bars. As appellant failed to raise this argument below, we decline to consider it on appeal in the first instance. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

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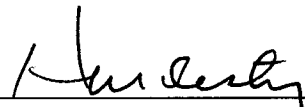
not properly raised below, and accordingly, we decline to consider it on appeal in the first instance. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

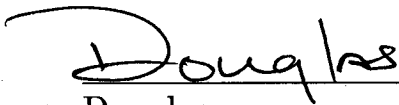
We also note that appellant’s actual-innocence claim below was a bare, naked claim that the district court chose to liberally construe as encompassing arguments made elsewhere in the petition: appellant was actually innocent because of faulty jury instructions. The district court then analyzed that claim on its merits. Because we conclude that appellant’s actual-innocence claim fails due to a lack of new evidence, we express no opinion on the merits of his claim as construed by the district court.

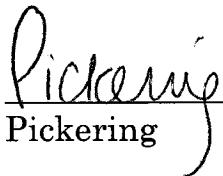
⁵To the extent that appellant appears to argue he is actually innocent because insufficient evidence of his specific intent was adduced at trial, this claim fails to afford him relief. Nevada has not recognized the availability of such a freestanding claim of actual innocence, and as this claim was not raised below, we decline to consider it in the first instance on appeal. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

For the foregoing reasons, we conclude appellant's petition is procedurally barred, and we

ORDER the August 18, 2009, judgment of the district court AFFIRMED and DISMISS the appeal in part.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. James M. Bixler, District Judge
Hon. T. Arthur Ritchie Jr., Chief Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk