

IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD V. BROWN A/K/A HOWARD
V. BROWN, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56769

FILED

MAR 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Meep*
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.¹ Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant filed his petition on May 6, 2010, almost seven years after issuance of the remittitur on direct appeal on August 5, 2003. Brown v. State, Docket No. 39795 (Order of Affirmance, July 9, 2003). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1);

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Brown v. State, Docket No. 42784 (Order of Affirmance, August 19, 2004).


NRS 34.810(3). To raise a Brady claim in an untimely post-conviction habeas petition, the petitioner has the burden of pleading and proving specific facts that demonstrate cause to excuse the delay and undue prejudice to overcome the procedural bar. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

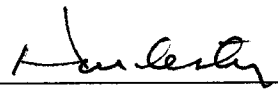
To excuse the procedural bars, appellant claimed that the State withheld exculpatory evidence in the form of a medical report which he asserted showed that the victim's death was actually caused by administration of the drug heparin at the hospital. Appellant's claim that he could not have raised this claim earlier because he only recently learned of possible complications from the use of heparin did not demonstrate that this claim was not reasonably available to be raised in a timely petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). Further, appellant failed to demonstrate that the State withheld the medical report because he failed to demonstrate it would not have been available through other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In addition, appellant failed to demonstrate that the medical report was material to his defense, because the medical examiner who performed an autopsy on the victim concluded that the victim was killed by swelling and bleeding in the brain caused by blunt force trauma. See Bennett, 119 Nev. at 599, 81 P.3d at 8. Therefore, appellant failed to demonstrate actual prejudice to overcome the procedural bars. See id.

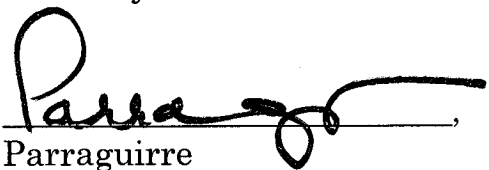
Next, appellant claimed that the medical report demonstrated that he was actually innocent. Given the medical examiner's determination of the cause of the victim's death, appellant did not

demonstrate actual innocence because he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We therefore conclude that the district court did not err in denying appellant's petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Jennifer Togliatti, District Judge
Howard V. Brown, Sr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk