IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY A. WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58798

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a motion to correct or modify an illegal sentence and a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Motion to correct or modify

Appellant filed a motion to correct or modify an illegal sentence on November 5, 2009. Appellant raised three claims in his motion: (1) the State could not prove each element of the charge, (2) his sentence was based on false testimony given during the sentencing phase, and (3) trial counsel failed to mitigate, investigate, or act as a zealous advocate. The district court denied claims one and three above and appointed counsel to represent appellant on claim two.

On November 4, 2010, appellant filed a supplemental motion to correct an illegal sentence. The State filed a motion to dismiss the motion to correct or modify. In appellant's opposition to the motion to dismiss, appellant admitted that the claims raised in the motion were

more properly suited for a post-conviction petition.[1] The district court treated this admission as a concession that the claims raised in the motion to correct or modify an illegal sentence were outside the scope of such a motion, and dismissed the motion.

On appeal, appellant appears to argue that the district court did not correctly dismiss the motion to correct or modify because the district court only entered the order in the post-conviction petition case file and not in the criminal case file that the motion was originally filed in. We note that appellant filed the supplement to the motion to correct in both files. Since both cases relate to the same original criminal case, the order was properly entered.

Appellant also argues that he did not concede that the claims were outside the scope of a motion to correct. Appellant fails to demonstrate that the district court erred. Appellant admitted in his supplement to the motion to correct or modify that the issues raised in his motion to correct or modify should have been raised in habeas proceedings. Appellant fails to provide cogent argument in support of his claim that the district court erred in dismissing his motion to correct or modify.[2]

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[1]Appellant raised the exact same claims in a post-conviction petition for a writ of habeas corpus filed the same day as the supplement.

[2]We note that appellant fails to provide this court with copies of the police reports or the transcript of the first sentencing hearing at which the "recanting" witnesses supposedly testified. The burden is on appellant to provide an adequate record enabling this court to review assignments of error. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4, (2004); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688

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Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). Therefore, the district court did not err in dismissing the motion to correct or modify.

Post-conviction petition for a writ of habeas corpus

Appellant filed his petition on November 4, 2010, twelve years after entry of the judgment of conviction on October 28, 1998. 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. See id. A petitioner is only entitled to an evidentiary hearing on claims supported by specific facts not belied by the record that, if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Appellant appears to claim that his delay should be excused because in 2008, two people recanted statements they made to police and at appellant's first sentencing hearing. Appellant appears to suggest that this was newly discovered evidence excusing his delay. While good cause may be shown by demonstrating that the factual basis of a claim was not reasonably available during the period for filing a timely petition, a petitioner must raise a claim based on new facts within a reasonable time period of learning of the new facts. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). The documents before this court indicate that

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(1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). This court cannot evaluate the recantations and how they may have affected sentencing.

appellant had access to those letters more than one year prior to filing his petition because he filed these recantations with his motion to correct or modify on November 5, 2009. Therefore, appellant waited more than one year after gaining knowledge of these letters to file his petition; this delay was not reasonable and appellant fails to demonstrate good cause for the entire length of his delay. Further, were this court to consider appellant's claim that these two witnesses recanted testimony given at his first sentencing hearing, appellant received a second sentencing hearing after withdrawing and reentering his plea. The testimony complained about in appellant's petition was not presented or referenced at the second sentencing hearing.[3] Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Appellant also claims that he was actually innocent because two people recanted their statements made to police and made at appellant's first sentencing hearing. A petitioner 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 of the crime. Pellegrini v. State, 117 Nev. 860, 887, 34

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[3]To the extent that appellant argues that the information was contained in the PSI, appellant failed to present a copy of the PSI for this court's review, and we therefore cannot address this argument. See Thomas, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4; see also Greene, 96 Nev. at 558, 612 P.2d at 688; Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

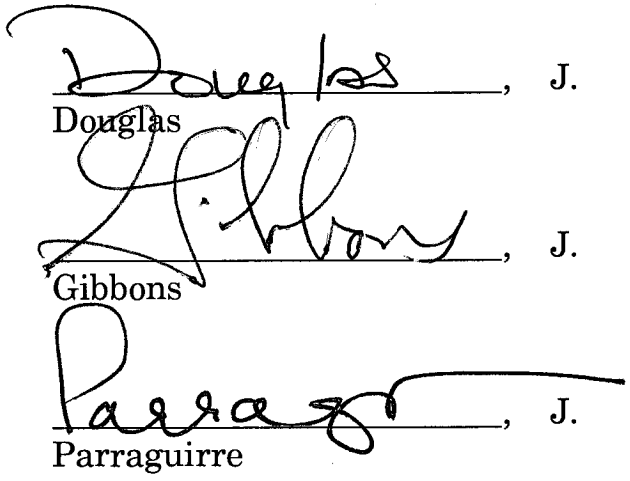
P.3d 519, 537 (2001). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show that "'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'" Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

The district court rejected appellant's actual innocence argument on the ground that such an argument could not be raised when the conviction challenged arose from a guilty plea. This is in error. A petitioner may argue actual innocence when the conviction arises from a guilty plea. Bousley v. United States, 523 U.S. 614, 616, 623-24 (1998). However, we conclude that the district court did not err in declining to consider appellant's actual innocence argument because appellant failed to set forth facts that demonstrated that he was actually innocent of the crime. Appellant presented the district court with two notarized[4] letters from two people recanting their statements made to police and at the first sentencing hearing. Neither of these two people were the victim in this case. These letters do not demonstrate that appellant was actually innocent of the crimes he was convicted of, and therefore, appellant fails to demonstrate that no reasonable juror would have convicted him in light of new evidence. The district court did not err in denying this claim without an evidentiary hearing. For this reason, we affirm the decision of the district court to dismiss the petition as procedurally barred. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct

[4]These letters do not appear to be sworn.

result will not be reversed simply because it is based on the wrong reason).[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[5]In light of our decision, we decline appellant's request to set forth standards for evidentiary hearings regarding recantation evidence. We further decline the invitation to adopt equitable tolling to the filing of post-conviction petitions.