

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANKLIN SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58973

FILED

MAR 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Handwritten Signature*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed his petition on January 21, 2009, more than twelve years after issuance of the remittitur on direct appeal on August 13, 1996. Smith v. State, 112 Nev. 871, 920 P.2d 1002 (1996). Thus, appellant's petition was untimely filed.² See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See id. A petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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).

²An amended judgment of conviction was entered on June 17, 2002, setting forth a definite amount of restitution.

Appellant first claimed that his delay should be excused because he was not trained in the law and because he had difficulty finding post-conviction help. The district court did not err in rejecting this argument as appellant's lack of training in the law and difficulty finding post-conviction help are not impediments external to the defense. Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

Appellant also claimed that his delay should be excused because in 2001 he learned that the victim had allegedly recanted, in a deposition in a civil lawsuit, her story that she was raped. Appellant appeared to suggest that this was newly discovered evidence excusing his delay. The district court did not err in rejecting this good cause argument. While good cause may be shown by demonstrating that the factual basis of 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, 119 Nev. at 252-53, 71 P.3d at 506. Eight years is not reasonable. Thus, appellant failed to demonstrate good cause for the entire length of his delay.³

Finally, appellant argued that he was actually innocent because the victim had allegedly recanted her claim that she was raped and because of alleged inconsistencies with the victims' statements.

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

³In fact, appellant's documents indicate that his former trial counsel informed him of the alleged recantation in 2001 and that he should file a petition for a writ of habeas corpus.

must make a colorable showing of actual innocence of the crime. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error,⁴ 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)); see also Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan, 112 Nev. at 842, 921 P.2d at 922.

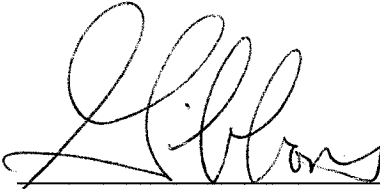
The district court appeared to reject his actual innocence argument on the ground that such an argument could not be raised when the conviction challenged arose from a guilty plea. This is in error. A petitioner may argue actual innocence when the conviction arises from a guilty plea. Bousley v. United 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 in the instant case because he failed to set forth specific facts or present any “evidence” to support his allegation that the victim recanted her statement that she was raped.⁵ While appellant referred to a deposition in a civil lawsuit that contained an alleged recantation, appellant did not specifically identify the statements of recantation or provide the court with copies of the

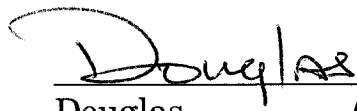
⁴A free-standing claim of actual innocence, if it exists at all, is not available in a non-capital case. Herrera v. Collins, 506 U.S. 390, 404-05, 416-17 (1993).

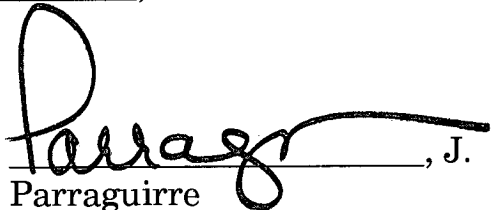
⁵Appellant likewise failed to specifically identify the alleged inconsistencies in the victims’ statements that would support his claim of actual innocence.

transcripts of the deposition.⁶ NRS 34.735 (setting forth the form petition and requiring the petitioner to set forth specific facts supporting the claims); NRS 34.370(4) (providing that where a petitioner seeks relief from a judgment of conviction, the petitioner must attach affidavits, records or other evidence supporting the allegations unless the petition recites the cause for failure to attach the materials). Appellant failed to provide the court with “evidence” to review, and this provided reason enough for the district court to decline the actual innocence argument raised in the instant petition. 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 result will not be reversed simply because it is based on the wrong reason). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Elliott
Gibbons


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
John Franklin Smith
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁶We note that a document attached to appellant’s petition, attorney Richard Cornell’s 2004 affidavit, indicates that appellant is in possession of the transcripts of the deposition.