

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDMUNDO ANTONIO ZUNIGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59193

**FILED**

NOV 15 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY A. Ingerow  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Appellant filed his petition on June 3, 2009, more than two years after entry of the judgment of conviction on December 15, 2006. Thus, appellant's petition was untimely filed.<sup>1</sup> See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See *id.*

This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrates that failure to consider them 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

---

<sup>1</sup>No direct appeal was taken.

showing of actual innocence—factual innocence, not legal innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Calderon v. Thompson, 523 U.S. 538, 559 (1998).

First, appellant argues that an illegal sentence may be corrected at any time, and therefore, the procedural time bar does not apply. Appellant's argument is without merit. A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'" Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). Appellant raises no arguments that the district court was without jurisdiction to impose sentence or that the sentence was imposed in excess of the statutory maximum for a conviction of second-degree murder. Accordingly, appellant fails to demonstrate that his sentence was illegal.

Second, appellant argues that ineffective assistance of his trial counsel provides good cause to excuse the procedural bar. Appellant's argument is without merit. Appellant's claims regarding ineffective assistance of trial counsel were reasonably available to be raised in a timely petition and claims of ineffective assistance of counsel cannot serve as cause for other procedurally defaulted claims if they are themselves procedurally defaulted. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, the district court did not err in dismissing the petition as procedurally barred.

Next, appellant argues the procedural bar should not apply because he is actually innocent. Appellant asserts he is innocent of second-degree murder because he stated at the plea canvass that he did not intend to kill the victim when he threw the knife at her, indicating that appellant should have been convicted of involuntary manslaughter rather than second-degree murder. Appellant also asserts that a portion of the guilty plea agreement indicates the parties agreed the crime was committed without malice. Appellant fails to demonstrate actual innocence. 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, 523 U.S. at 559 (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.

Here, appellant’s claim that his statements and a portion of the guilty plea agreement indicate he should have been convicted of manslaughter rather than second-degree murder fails to establish that no reasonable juror would have convicted him as appellant’s claim goes to legal innocence, not factual innocence. Moreover, “[m]alice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner.” Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975), modified on other grounds by Collman v. State, 116 Nev. 687, 717 n.13, 7 P.3d 426, 445 n.13 (2000). Appellant’s statement that he threw the knife at the victim demonstrated that he intentionally used a deadly weapon in a deadly and dangerous manner. See Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271-72. We therefore conclude that the

district court did not err in dismissing appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.  
Douglas

Gibbons, J.  
Gibbons

Parraguirre, J.  
Parraguirre

cc: Chief Judge, Second Judicial District Court  
Law Office of Thomas L. Qualls, Ltd.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk