

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH WILLIAM SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59495

FILED

JUL 26 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 denying appellant Keith William Sullivan's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Keith William Sullivan contends that the district court erred by denying his habeas petition. The district court denied Sullivan's petition on the merits after conducting a limited evidentiary hearing on the claims of ineffective assistance of counsel; it found that Sullivan entered his guilty plea voluntarily, knowingly, and intelligently and received effective assistance of counsel.

We conclude that the district court erred by failing to apply the procedural bars. Sullivan filed his petition more than three years after the amended judgment of conviction was entered and after having previously filed a habeas petition. Therefore, Sullivan's petition was untimely and successive, and it was procedurally barred absent a showing of good cause and actual prejudice or that failure to consider his claims would result in a fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(2), (3); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In an attempt to overcome the procedural bars, Sullivan

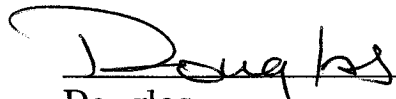
claimed that he is innocent of the charged offense because the stolen vehicle was not worth \$2,500. A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). However, Sullivan has not shown that he is factually innocent of possessing the stolen vehicle. See Bousley v. United States, 523 U.S. 614, 623-24 (1998); Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006). Although Sullivan has shown that the evidence was insufficient to enhance his punishment from a category C felony to a category B felony, the record reveals that he pleaded guilty to the category B felony as part of a global negotiation that allowed him to avoid habitual criminal adjudication.¹ We conclude that Sullivan's petition was procedurally barred and should have been denied as such. See State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction habeas petitions is mandatory).


As a separate and independent ground for denying relief, we conclude that the district court's factual findings are supported by substantial evidence and are not clearly erroneous, and Sullivan has not demonstrated that the district erred as a matter of law. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a two-part test for ineffective-assistance); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (providing the standard of review for ineffective-assistance claims); Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123,

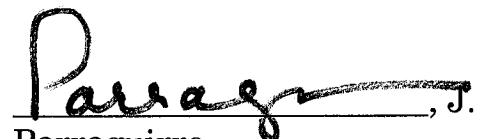
¹At the time relevant to this case, NRS 205.273(4) provided that a person commits a category B felony if the value of the vehicle is \$2,500 or more. See 1997 Nev. Stat., ch. 150, § 17, at 344.

1125 (2001) (providing the standard of review for guilty plea challenges); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (applying the Strickland test to convictions arising from guilty pleas); see also Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner must prove the facts underlying his ineffective-assistance claims by a preponderance of the evidence). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Douglas, J.


Gibbons, J.


Parraguirre, J.

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