

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED LUDWIG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60990

FILED

JAN 16 2013

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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; Kathleen E. Delaney, Judge.

Appellant filed his petition on February 1, 2012, nearly 6 years after the filing of his judgment of conviction.² Appellant's petition was therefore untimely filed and, accordingly, was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

First, appellant argued that the procedural default should be excused because he was "conned" into believing that he was retaining an attorney who was pursuing his direct appeal and the withdrawal of his

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).

²No direct appeal was taken.


guilty plea. Appellant failed to identify an impediment external to the defense that prevented him from complying with the procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Moreover, appellant claimed to have learned in November 2008 that no appeal had been filed yet waited more than 3 years to file the instant petition or raise this issue. Cf. id. at 252-53, 71 P.3d at 506 (holding that a claim asserted as cause must not itself be procedurally defaulted).


Second, appellant argued that the procedural default should be excused because the State violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding impeachment evidence that the victim's mother was arrested in 2005 for burglary and grand larceny. Appellant failed to demonstrate cause or undue prejudice. While establishing a Brady violation may demonstrate cause and prejudice, the State does not necessarily violate Brady when it withholds impeachment information before entry of a guilty plea. State v. Huebler, 128 Nev. ___, ___ & 97 n.6, 275 P.3d 91, 95-98 & 97 n.6 (2012). Even assuming that Brady applied here, appellant failed to demonstrate a violation because he admitted that he himself had posted the mother's bail as a result of that arrest such that the evidence was not withheld by the State. See Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) ("Brady does not require the State to disclose evidence which is available to the defendant from other sources.>").


Finally, appellant argued that he was actually innocent because a long-standing medical issue rendered him incapable of committing the acts constituting the alleged crimes. 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). Further, appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Kathleen E. Delaney, District Judge
Fred Ludwig
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk