

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY EMIL,

No. 35752

Appellant,

vs.

DIRECTOR, NEVADA STATE PRISON,
ROBERT BAYER, WARDEN, ELY
STATE PRISON, E.K. MCDANIEL,
FRANKIE SUE DEL PAPA, ATTORNEY
GENERAL OF NEVADA,

FILED

DEC 04 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

Respondents.

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a successive post-conviction petition for a writ of habeas corpus.¹

On February 10, 1988, appellant Rodney Emil was convicted, pursuant to a jury verdict, of one count of first degree murder with use of a deadly weapon. Emil was sentenced to two consecutive terms of life imprisonment without the possibility of parole. This court dismissed Emil's direct appeal on April 25, 1989.² Remittitur issued on May 16, 1989. On March 14, 1990, Emil filed in the district court a proper person petition for post-conviction relief pursuant to former NRS 177.315-.385. The State opposed that petition, and the district court appointed counsel to represent Emil. The district court denied the petition on December 18, 1990. Emil appealed from that denial, and on September 30, 1991, we ordered the appeal dismissed.³

¹On February 14, 2001, appellant Emil moved this court to take judicial notice of the brief and appendix of the Federal Public Defender, amicus curiae, in Pellegrini v. State, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 71, November 15, 2001). The State opposes Emil's motion. Having rejected appellant Pellegrini's claims as supported by the amicus filings in that appeal, we deny Emil's motion.

²Emil v. State, Docket No. 18989 (Order Dismissing Appeal, April 25, 1989).

³Emil v. State, Docket No. 22136 (Order Dismissing Appeal, September 30, 1991).

01-20259

According to Emil, he next petitioned the federal district court for a writ of habeas corpus. On May 10, 1999, that petition was stayed for Emil to exhaust his claims in state courts.

On July 8, 1999, Emil filed a proper person petition for a writ of habeas corpus raising claims of trial court error and of ineffective assistance of trial, appellate and first post-conviction counsel. As good cause for reraising previously decided claims or for the delay in raising new claims, Emil alleged that he had received ineffective assistance by trial, appellate and first post-conviction counsel. The court granted Emil's request for pro bono representation by attorney Patricia Erickson but denied his request to appoint counsel.

The State opposed Emil's successive petition, arguing that it was procedurally barred under NRS 34.726, NRS 34.800 and NRS 34.810. In reply, Emil argued that: (1) NRS 34.726 could not be properly applied to successive post-conviction petitions; (2) NRS 34.800 and NRS 34.810 could not be properly applied to his claims because Nevada's statutory procedural bars have been inconsistently applied by Nevada courts in other cases; (3) good cause was demonstrated by the ineffective assistance of appellate counsel in his direct appeal; and (4) any failure to show good cause must be excused because Emil is actually innocent of the murder for which he was convicted. The State filed a surreply, and the district court heard argument from counsel.

Without conducting an evidentiary hearing, the district court entered its order denying the petition on February 3, 2000. The district court found that Emil's successive petition raised issues that were or could have been raised earlier. The court concluded that Emil had failed to demonstrate good cause for his failure to comply with the procedural bars at NRS 34.726 and NRS 34.810 and, therefore, consideration of his claims on the merits was barred. Emil timely appealed.⁴

Emil argues that the district court erred in applying NRS 34.726 to bar his successive petition. He specifically contends that NRS 34.726 cannot be properly applied to any successive petition in light of the

⁴Although the State raised the laches bar at NRS 34.800 in opposition to Emil's petition, the district court's order did not address the laches bar. Because all of Emil's claims are barred under either NRS 34.726 or NRS 34.810, we need not address whether NRS 34.800 also bars them.

legislative history of the habeas statutes, rules of statutory construction, principles of equitable estoppel, and the Nevada Constitution. Emil's contentions lack merit. We recently considered and rejected identical arguments in Pellegrini v. State.⁵ We perceive no basis to revisit the arguments here.

We conclude that the district court properly applied NRS 34.726 to bar Emil's successive petition. This court issued its remittitur in the direct appeal on May 16, 1989. The time bar at NRS 34.726 was enacted in 1991 and applies to petitions filed on or after its effective date of January 1, 1993.⁶ Where there has been an appeal from a judgment of conviction, NRS 34.726(1) requires petitions for writs of habeas corpus to be filed "within 1 year after [this court] issues its remittitur," absent a showing of good cause and prejudice.⁷ Because Emil had filed a timely first petition pursuant to former NRS 177.315-385, he could have filed a timely successive petition (though still subject to other statutory procedural bars) within one year of the effective date of NRS 34.726, i.e., until January 1, 1994.⁸ Emil failed to file his successive petition, however, until July 8, 1999 – more than ten years after issuance of remittitur on direct appeal and more than six years after the effective date of NRS 34.726. Therefore, his petition is barred under NRS 34.726(1) unless he demonstrates good cause for the delay and prejudice.

Emil next argues that the district court erred in applying NRS 34.810 to bar his claims. He contends that NRS 34.810 may not be applied to his claims because Nevada courts have inconsistently applied statutory procedural bars in other cases. We rejected the same allegation in Pellegrini,⁹ and we decline to revisit it here. Accordingly, we conclude that Emil's claim lacks merit.

⁵Adv. Op. No. 71, at 12-19.

⁶See 1991 Nev. Stat., ch. 44, §§ 5, 32-33, at 75-76, 92.

⁷See NRS 34.726(1).

⁸See Pellegrini, Adv. Op. No. 71, at 13-14 (holding that petitioners who filed timely post conviction petitions pursuant to NRS Chapter 177 are allowed one year from the effective date of NRS 34.726 to file any successive petition, but such petition would remain subject to other procedural bars).

⁹See id. at 19-20, 28.

NRS 34.810 requires dismissal of claims which could have been raised in earlier proceedings or which were raised in a prior petition and determined on the merits.¹⁰ Here, Emil's claims numbered 1, 2, 3 and 12 were raised and rejected on direct appeal. Claim 4 was raised in Emil's first petition and rejected by the district court in its denial of the petition, which we upheld on appeal. Our decisions are now the law of the case.¹¹ Additionally, the district court's determinations of the merits of Emil's claims in his first petition may not be reargued absent a showing of good cause and actual prejudice.¹² To the extent that Emil's successive petition presents any variation in the above claims, these variations and claims 5 to 11, 13 to 18, and 20 are new claims which could have been raised either at trial, on direct appeal or in the first post-conviction petition.¹³ Without a demonstration of good cause and actual prejudice, these new claims are procedurally barred under the waiver provisions of NRS 34.810(1)(b) or as an abuse of the writ under NRS 34.810(2).

Emil argues that he was entitled to an evidentiary hearing on whether his failure to comply with procedural rules should be excused. We disagree. A district court may dismiss a petition without an evidentiary hearing where the petitioner has failed to plead specific facts that demonstrate a valid basis exists to excuse any applicable procedural bars.¹⁴ We conclude that Emil has failed to make sufficient allegations to warrant an evidentiary hearing.

Emil argues that his allegations of ineffective assistance by appellate counsel show good cause to excuse any failure to comply with procedural rules. But ineffective assistance of appellate counsel cannot

¹⁰See NRS 34.810(1)-(3).

¹¹See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.") (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)).

¹²See NRS 34.810(2)-(3).

¹³Claim 19 alleges that first post-conviction counsel was ineffective for failing to fully raise claims 5 to 18 and 20. Although claim 19 could not have been raised in the previous proceedings, like Emil's other claims, it is nevertheless time-barred.

¹⁴See Pellegrini, Adv. Op. No. 71, at 6-7.

excuse Emil's delay, his failure to bring his claims in his first post-conviction petition, or his reargument of claims already determined on the merits in the first petition. Neither can any ineffectiveness of first post-conviction counsel. At the time of Emil's first post-conviction petition, which he filed on March 14, 1990, appointment of counsel was discretionary.¹⁵ Because Emil had no right to post-conviction counsel, he cannot show good cause based on the ineffectiveness of that counsel.¹⁶ Thus, the district court properly rejected Emil's allegations of good cause without an evidentiary hearing.

Emil argues that he was entitled to an evidentiary hearing on his claim that he need not show good cause to overcome the procedural bars because he is actually innocent of the murder for which he was convicted. Emil asserts that the evidence presented at trial and in support of his petition shows he was not present in Las Vegas at the time the victim was last seen there on March 2, 1983, or when the victim was later killed by a gunshot wound to the head.¹⁷ Emil claims that he left Las Vegas in February of 1983 and did not return until one to three o'clock a.m. on March 3, 1983. He argues that based on the weather conditions between March 2 and March 9, the date the victim's body was found and autopsied, and based on the contents of the victim's stomach at the time of the autopsy, "it is clear that [the victim] was killed shortly after he left his residence on the evening of March 2, 1983 prior to the time that [Emil] returned to Las Vegas." We conclude that the district court properly rejected Emil's contention without an evidentiary hearing.

¹⁵In 1990, NRS 177.345(1) provided only for discretionary appointment of counsel. See 1987 Nev. Stat., ch. 539, § 42, at 1230. This statute was repealed in 1993. See 1991 Nev. Stat., ch. 44, §§ 31-33, at 92. NRS 34.750(1) now provides for discretionary appointment of counsel in non-capital cases.

¹⁶See Pellegrini, Adv. Op. No. 71, at 30; Berjano v. Warden, 112 Nev. 1466, 1469-71, 929 P.2d 922, 924-25 (1996); McKague v. Warden, 112 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996).

¹⁷We note that Emil's counsel states in Emil's briefs filed with this court, "All of the facts enunciated at App. p.39-44, as enunciated in Claim Five of the Petition For Writ of Habeas Corpus (Post Conviction), are specifically incorporated herein by reference." Counsel's attempt to incorporate documents by reference is unacceptable, see NRAP 28(e), and we admonish counsel to adhere to the Nevada Rules of Appellate Procedure in the future.

We have recognized that the lack of a good cause showing may be excused when the failure to consider a petitioner's claims would amount to a fundamental miscarriage of justice.¹⁸ This standard can be met where a petitioner makes a colorable showing that he is actually innocent of the crime for which he was convicted.¹⁹ A petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.²⁰ Emil fails to meet this burden.

Evidence of Emil's alleged alibi and of the time of death was presented to the jury at Emil's trial. The only additional evidence Emil puts forth in support of his claim of actual innocence consists of: (1) copies of newspaper weather reports for March 2 to March 8, 1983, showing that temperatures ranged from a low of 44 to a high of 70 during that period; and (2) copies of preliminary hearing transcripts showing that Dr. Giles Sheldon Green, the pathologist who conducted the autopsy of the victim, testified that the victim died within four hours of eating and further testified that the estimated time of death was based in part on the cool weather prior to discovery of the body, which slowed decomposition. Emil contends that this evidence conclusively shows that the victim died after eating during the evening of March 2, prior to Emil's return to Las Vegas.

We note, however, that Dr. Green testified at trial that his best estimate was that the victim died "around four to five days" but not more than "six, seven, eight" days before the March 9 autopsy. This estimate was based on the condition of the victim's body, where it was found, how it was protected, and the weather conditions and temperatures. The date and time Emil claims that the victim died, i.e., the evening of March 2, is within Dr. Green's estimate of the time of death as testified to at trial. Even assuming the accuracy of the newspaper reports upon which Emil now relies, these reports do nothing to impeach the pathologist's testimony as to the time of death. Neither does the fact that the victim ate shortly before his death. Though not in the context of an insufficient evidence claim, we have already concluded that the State

¹⁸See Pellegrini, Adv. Op. No. 71, at 29.

¹⁹Id.

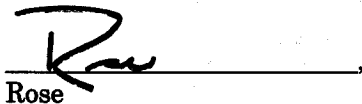
²⁰Id.

met its burden of proof with respect to the murder charge.²¹ Moreover, the jury was free to reject Emil's alibi defense. Emil merely reargues the evidence submitted to the jury and determined to be sufficient, based on the conjecture that other non-contradictory evidence not submitted to the jury could have affected the verdict. We conclude that Emil's reargument does not constitute a colorable showing of actual innocence.²²

Having considered Emil's contentions and concluded that they lack merit,²³ we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Patricia Erickson
Clark County Clerk

²¹See Emil, Docket No. 18989 (Order Dismissing Appeal), at 2.

²²See Washington v. Hargett, 889 F. Supp. 260, 264-65 (S.D. Miss. 1995) (holding that reargument of evidence adduced at trial and found sufficient to support a conviction does not establish a colorable claim of actual innocence); accord U.S.A. ex rel. Thomas v. Welborn, No. 00 C 2601, 2000 WL 1831548, at *3-4 (N.D. Ill., December 13, 2000).

²³We have also considered Emil's claims related to the adequacy of the district court's findings of fact and conclusions of law and his claims related to whether he was denied any rights by the procedure followed in the district court. We conclude that these claims lack merit and do not warrant further discussion.