

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A
ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65298

FILED

NOV 13 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER GRANTING REHEARING, REINSTATING APPEAL, AND
AFFIRMING*

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; Elissa F. Cadish, Judge.

On September 16, 2014, this court entered an order of affirmance in the above captioned case which affirmed the district court's denial of appellant's post-conviction petition for a writ of habeas corpus. On September 23, 2014, appellant filed a proper person petition for rehearing arguing this court overlooked his claim of actual innocence made in the district court below. Having reviewed the petition for rehearing, we have determined that rehearing of this matter is warranted. Accordingly, we grant the petition for rehearing and reinstate this appeal.

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).

Having reviewed the record, this court concludes that appellant failed to demonstrate good cause and prejudice or that he was actually innocent, and therefore, the district court did not err in denying his petition as procedurally barred.

Appellant filed his petition on December 16, 2013, more than nine years after issuance of the remittitur on direct appeal on July 27, 2004. *Hermanski v. State*, Docket No. 41405 (Order of Affirmance, July 1, 2004). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, appellant claimed that he had good cause to overcome the procedural bars because the district court did not have jurisdiction to enter an amended judgment of conviction. Appellant claimed that this court had not yet issued the remittitur from the decision regarding the appeal of the denial of his post-conviction petition for a writ of habeas corpus which also included a limited remand to correct a clerical error in the judgment of conviction. This claim was previously raised and rejected

²*Hermanski v. State*, Docket No. 47011 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, July 13, 2006).

by this court. *Hermanski v. State*, Docket No. 64951 (Order of Affirmance, June 12, 2014). Therefore, this claim was barred by the doctrine of law of the case. *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Second, appellant claimed that he had good cause to overcome the procedural bars because his attorney during his re-sentencing hearing recently argued in his own criminal case that he suffered diminished capacity because of a head injury he received in 1991. Appellant failed to demonstrate good cause. Appellant failed to demonstrate that his counsel actually suffered diminished capacity. Further, all of his ineffective-assistance-of-counsel arguments raised in the instant petition were rearguments of claims this court already rejected, and he failed to demonstrate how counsel's supposed diminished capacity would have affected our determination of those claims in his previous petition. See *Hermanski v. State*, Docket No. 47011 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, July 13, 2006).

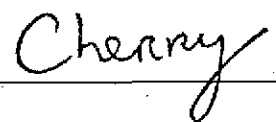
Third, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), appellant argued that he had good cause because he was not appointed counsel in the first post-conviction proceedings. We conclude that this argument lacked merit. The appointment of counsel was discretionary in the first post-conviction proceedings, see NRS 34.750(1), and appellant failed to demonstrate an abuse of discretion. Further, this court has recently held that *Martinez* does not apply to Nevada's statutory post-conviction procedures. See *Brown v. McDaniel*, ___ Nev. ___, 331 P.3d 867, (2014). Thus, the failure to appoint post-conviction counsel and the decision in *Martinez* would not provide good cause for this late and successive petition.

Finally, appellant claimed that he was actually innocent. 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). Therefore, we conclude that the district court did not err in denying appellant's petition, and we

ORDER the petition for rehearing granted, the appeal reinstated, and the judgment of the district court AFFIRMED.

, J.
Hardesty

, J.
Douglas

, J.
Cherry

cc: Hon. Elissa F. Cadish, District Judge
Gregory Scott Hermanski
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk