

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH DAVID HOUSTON,

No. 36271

Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,

Respondent.

FILED

AUG 07 2001

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

ORDER OF AFFIRMANCE

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

On February 14, 1983, appellant pleaded guilty to one count of first-degree murder and one count of sexual assault causing substantial bodily harm. The district court sentenced appellant to serve two consecutive prison terms of life without the possibility of parole. Appellant did not file a direct appeal.

On May 8, 1991, appellant filed his first post-conviction petition for a writ of habeas corpus in the district court, arguing that his plea was not knowingly entered. Without conducting an evidentiary hearing, the district court dismissed appellant's petition, ruling that it

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was procedurally barred. On appeal, this court affirmed the order of the district court.¹

On September 17, 1992, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court. The district court dismissed appellant's petition. On appeal, this court affirmed the order of the district court.²

On March 24, 1995, appellant filed a post-conviction petition for a writ of habeas corpus in federal court. The federal court dismissed appellant's petition.³

On November 20, 1996, appellant filed a motion to withdraw his guilty plea in the district court. The district court denied appellant's motion. On appeal, this court affirmed the order of the district court.⁴ Appellant then filed a petition for rehearing with this court, which was also denied.⁵

¹Houston v. State, Docket No. 22706 (Order Dismissing Appeal, December 30, 1991).

²Houston v. State, Docket No. 24101 (Order Dismissing Appeal, March 31, 1994).

³Appellant has failed to provide this court with copies of all the prior orders. However, because neither party contests the procedural history of this case, we presume the procedural history set forth in appellant's brief is accurate and complete.

⁴Houston v. State, Docket No. 30059 (Order Dismissing Appeal, March 30, 1999).

⁵Houston v. State, Docket No. 30059 (Order Denying Rehearing, July 20, 1999).

On October 22, 1997, appellant filed a second post-conviction petition for a writ of habeas corpus in federal court. According to appellant, the federal court dismissed appellant's petition without prejudice to allow him to seek authorization from the Ninth Circuit Court of Appeals to file a second federal habeas petition.

On July 11, 1997, appellant filed a third post-conviction petition for a writ of habeas corpus in Nevada district court. The district court dismissed appellant's petition, ruling that it was untimely and that appellant failed to demonstrate good cause and prejudice to excuse his procedural defaults. Appellant filed the instant appeal, arguing that the district court erred in dismissing his petition.

The district court found that appellant's petition was untimely because it was filed more than thirteen years after entry of the judgment of conviction.⁶ Further, the district court found that appellant failed to establish that the dismissal of his petition as untimely would result in undue prejudice.⁷

⁶See NRS 34.726(1) (providing that a petition is untimely if it is not filed within one year after entry of the judgment of conviction, if no direct appeal was taken).

⁷See *id.* (providing that untimely petition will be dismissed unless good cause is shown; namely, that the delay is not petitioner's fault and that the dismissal of the petition would "unduly prejudice" petitioner).

In the petition, appellant contended that he would be prejudiced by the dismissal of his petition because his plea was unknowing, since he was not informed or aware prior to the entry of his guilty plea that an essential element of crime of sexual assault was a live human victim. Appellant claimed that he did not discover that a live human victim was an essential element until after 1996, when this court published Doyle v. State.⁸ Appellant further claimed that he would not have pleaded guilty to sexual assault and first-degree murder (based on the theory of felony murder arising from the sexual assault) if he had known that a live victim was required because he was actually innocent of the crime of sexual assault since he had sexual intercourse with the victim after he killed her. Appellant's claim is belied by the record.

The plea agreement set forth the elements of the crimes to which appellant was pleading guilty to and which the State was required to prove beyond a reasonable doubt. With respect to the sexual assault charge, the plea agreement provided that: "I subjected [the victim] to sexual penetration against her will and during the commission or attempt to commit the act, I caused her substantial bodily

⁸112 Nev. 879, 899, 921 P.2d 901, 914 (1996) (holding that the crime of sexual assault required a live victim, and that one could not be guilty of sexual assault for engaging in sexual intercourse with a corpse).

harm or death."⁹ The plain language of the agreement implies the existence of a live victim because implicit in perpetrating an act against an individual's "will" is the requirement that the individual be alive.¹⁰ Likewise, implicit in the language that death occurred "during" or while "attempting" the commission of a sexual assault is the requisite that the sexual assault began prior to the murder. Appellant's claim that he was not informed that a live victim is a requirement for the crime of sexual assault is therefore without merit. Appellant was implicitly informed of this requirement by the terms of the plea agreement. To the extent that appellant is arguing that the victim was not alive at the time of the sexual assault, this assertion is also belied by the record. As explained above, appellant pleaded guilty to sexually assaulting a live victim.¹¹

Based on the foregoing, we conclude that the district court did not err in finding that appellant failed to demonstrate undue prejudice sufficient to overcome the procedural defaults. Moreover, we conclude that the district

⁹Emphasis added.

¹⁰See Doyle, 112 Nev. at 900, 921 P.2d at 915 (upholding sexual assault instruction that required the jury to find that sexual penetration occurred "against the victim's will and without her consent" because it required an implied finding that the victim was alive at the time of the sexual assault).

¹¹See Giese v. Chief of Police, 87 Nev. 522, 525, 489 P.2d 1163, 1164 (1971) ("The effect of the plea of guilty, generally speaking, is a record admission of whatever is well charged in an indictment . . .") (quoting Ex parte Dickson, 36 Nev. 94, 101, 133 P. 393, 396 (1913)).

court did not err in dismissing appellant's petition under NRS 34.800(1)(b). The State was presumptively prejudiced, and also demonstrated actual prejudice, in its ability to retry appellant, in part, because of the length of the time that had passed since the judgment of conviction.¹² Further, appellant failed to overcome the prejudice to the State by showing that a fundamental miscarriage of justice had occurred.¹³

Having considered appellant's contention and concluded that it is procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young
Leavitt, J.
Leavitt
Becker, J.
Becker

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
State Public Defender
Carson City Clerk

¹²See NRS 34.800(2).

¹³See NRS 34.800(1)(b); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).