

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENNY HAMMONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71523

FILED

JUL 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Benny Hammons appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on July 11, 2016.¹ Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Hammons claims the district court erred by denying his petition without an evidentiary hearing. Hammons' petition was untimely because it was filed more than four years after the Nevada Supreme Court issued the remittitur on direct appeal on October 11, 2011.² See NRS 34.726(1). Hammons' petition was also successive because he previously filed a postconviction petition for a writ of habeas corpus and that petition was denied on the merits.³ See NRS 34.810(2). Consequently, Hammons' petition was procedurally barred absent a demonstration of good cause and actual prejudice or that failure to consider his claims would result in a

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²See *Hammons v. State*, Docket No. 55801 (Order of Affirmance, September 14, 2011).

³See *Hammons v. State*, Docket No. 63648 (Order of Affirmance, September 17, 2014).

fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(3); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Hammons claimed he was actually innocent. He argued Melissa Madison, a witness at his trial, sent his sister an email containing new evidence relevant to his innocence. The email stated Madison was the girl who found the safe in the desert, the safe was not damaged when she found it, the prosecutor showed her a photograph of a damaged safe when he met with her, and she told the prosecutor it was not the safe she had found. Based on this email, Hammons argued the prosecutor obtained his convictions through false evidence, the prosecutor violated *Brady*⁴ by not disclosing this exculpatory evidence, and, if this evidence had been presented to the jury, “it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.” Hammons attached a copy of Madison’s email to his petition.

The district court found Madison’s email appeared “to allege that the prosecutor presented false evidence during the trial. However, authentication issues and admissions of a motive to fabricate in the email undermine the reliability of the email. Thus, [Hammons’] claim of actual innocence is rejected for failing to provide reliable evidence.” On appeal, Hammons claims the district court erred by denying his petition without an evidentiary hearing because he submitted evidence that was not belied by the record and supported his actual-innocence claim.

A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. In *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1155 (2015), the Nevada Supreme Court held a

⁴*Brady v. Maryland*, 373 U.S. 83 (1963).

petitioner claiming actual innocence is entitled to an evidentiary hearing on a claim of actual innocence if he presents "specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence." In deciding whether the petitioner has made such a showing, the district court *must* "evaluate whether the new evidence presents specific facts that are not belied by the record and then, if so, to evaluate whether the new evidence, considered in the light of all the evidence at trial, would support a conclusion that the petitioner has met the actual-innocence test." *Id.*

The record does not demonstrate the district court applied the test set forth in *Berry* when determining whether Hammons had met his burden and was entitled to an evidentiary hearing. Therefore, we reverse the district court's order and remand for the district court to apply the *Berry* test to determine whether Hammons was entitled to an evidentiary hearing on his claim of actual innocence. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Tao


_____, J.
Gibbons

C.J. SILVER, dissenting:

I dissent.


_____, C.J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Benny Hammons
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk