

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SALVADORE GARCIA, A/K/A
SALVADOR GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71339

FILED

AUG 16 2017

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

ORDER OF AFFIRMANCE

Salvadore Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on January 29, 2016, and a supplemental petition filed on June 16, 2016. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Garcia contends the district court erred in denying his petition as procedurally barred. We disagree.

Garcia filed his petition more than eight years after issuance of the remittitur on direct appeal on November 6, 2007. *See Garcia v. State*, Docket No. 48582 (Order of Affirmance, October 11, 2007). Garcia's petition was therefore untimely filed and 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, Garcia was required to overcome the presumption of prejudice. *See* NRS 34.800(2). To warrant an evidentiary hearing on his arguments that his petition should not be procedurally barred, Garcia's claims must be supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *See Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154-55 (2015).

Garcia first argues the ineffective assistance of trial counsel provided cause to excuse his delay. More specifically, he claims counsel did not adequately communicate with him or prepare for trial. While such claims may excuse an untimely petition, the claims themselves cannot be procedurally barred. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). To the extent Garcia argues his poor grasp of English inhibited communication, any linguistic impediment was not external to the defense. *See id.*; *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). Further, we note Garcia testified at trial without the aid of an interpreter and did not appear to have any issues understanding the questions posed or giving appropriate responses. Garcia offers no plausible explanation for failing to raise these claims within the statutory time limit.

Garcia next argues the ineffective assistance of appellate counsel provided cause to excuse his delay because counsel did not inform him of the resolution of his appeal from his judgment of conviction and of his postconviction remedy options.¹ Garcia does not indicate when he finally learned his appeal had been resolved or what efforts he made in the intervening eight years to learn of its status. He has thus failed to specify facts indicating he filed his petition within a reasonable time of learning of the resolution of his appeal.

Garcia also argues his procedural default should be excused because he is actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice.

¹To the extent Garcia claims equitable tolling excuses his delay, the Nevada Supreme Court has rejected this argument. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 874 (2014)

To demonstrate a fundamental miscarriage of justice, Garcia had to show “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).

In support of his claim, Garcia points to evidence collected during a post-trial crime scene investigation and to two eyewitnesses to the crime who were not questioned by police or called to testify at trial. The evidence against Garcia is substantial: the victim was shot from behind, he testified to seeing Garcia shoot him out of the corner of his eye, and there was no physical evidence on the victim’s body to support it was a self-inflicted gunshot wound. Further, the jury had already heard the other percipient witnesses testify Garcia was not in a position to shoot the victim and biological matter was found on the ceiling above the victim. Although the new evidence corroborates the exculpatory evidence presented at trial, it does not outweigh the inculpatory evidence presented, and accordingly, Garcia has failed to allege facts that demonstrate no reasonable juror would have convicted him in light of the new evidence.


Finally, to overcome the presumption of prejudice to the State for the delay of more than five years, Garcia had to demonstrate both his “petition is based upon grounds of which [he] could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred,” NRS 34.800(1)(a), and “a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction,” NRS 34.800(1)(b). NRS 34.800(2). As just discussed, he failed to demonstrate a fundamental miscarriage of justice.


Further, Garcia cannot demonstrate he could not have had knowledge of the new evidence by the exercise of reasonable diligence because all of his new evidence was known before his judgment of conviction was filed. Garcia has thus failed to overcome the presumption of prejudice to the State.

For the foregoing reasons, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk