IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN MAURICHAL SIMON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36578

FILED

NOV 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On May 19, 1988, appellant was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to two consecutive life prison terms. Appellant filed a direct appeal. This court dismissed appellant's appeal, concluding that his contentions lacked merit.[1] The remittitur issued on June 6, 1989.

On May 11, 1990, appellant filed a post-conviction proper person petition for a writ of habeas corpus, claiming that his counsel was ineffective. The district court denied appellant's petition, finding that appellant's contentions were conclusory in nature and that his counsel was not ineffective. Appellant filed an appeal. This court dismissed appellant's appeal, concluding that his contentions lacked merit.[2]

On May 17, 1994, appellant filed a second post-conviction petition, contending that his trial and appellate counsel were ineffective. The district court granted the petition, finding that the jury was not properly instructed with respect to self-defense. The State appealed, and this court reversed the order of the district court, concluding that

[1]Simon v. State, Docket No. 19234 (Order Dismissing Appeal, May 18, 1989).

[2]Simon v. State. Docket No. 21447 (Order Dismissing Appeal, October 29, 1990).

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appellant was unable to show good cause for his procedural defaults and that the substantive issues raised in his petition lacked merit.[3]

On January 30, 1998, appellant filed a post-conviction petition for a writ of habeas corpus in federal district court, which was dismissed.

On October 29, 1999, appellant filed a third post-conviction petition for a writ of habeas corpus contending that: (1) there was insufficient evidence to convict him of second-degree murder; (2) the jury was inadequately instructed on self-defense; (3) the jury instruction on reasonable doubt and malice unconstitutionally diminished the State's burden of proof; and (4) he was deprived of a fair trial due to prosecutorial misconduct.

The State opposed the petition contending, amongst other things, that it was untimely without good cause for the delay, barred under the doctrine of laches, and barred by the doctrine of the law of the case. The district court denied appellant's petition, finding that petitioner failed to establish good cause to excuse his procedural defaults and that the petition was barred under the doctrine of laches. Appellant filed the instant appeal.

Appellant filed the petition at issue more than 9 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.[4] Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions.[5] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[6] Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.[7]

In an attempt to excuse his procedural defects, appellant contends that, like in Lozada v. State,[8] this court's and the district court's

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[3]State v. Simon, Docket No. 28022 (Order of Remand, December 30, 1996).

[4]See NRS 34.726(1).

[5]See NRS 34.810(1)(b)(2); NRS 34.810(2).

[6]See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

[7]See NRS 34.800(2).

[8]110 Nev. 349, 871 P.2d 944 (1994).

failure to recognize the merits of appellant's claim set forth in his first petition is good cause. Specifically, in his first petition, appellant claimed that "[t]rial counsel was ineffective in failing to investigate and present self-defense and consequently in failing to proffer a written charge on self-defense where credible evidence was introduced to warrant such a charge." We conclude that appellant has failed to show good cause and that his claim is barred by the doctrine of the law of the case.[9] This court has already considered the merits of appellant's claims regarding the inadequacy of the jury instructions on self-defense, and concluded that the jury was properly instructed.[10] Accordingly, appellant has failed to demonstrate good cause because neither this court nor the district court overlooked a timely, meritorious claim.

Appellant next contends that he has shown good cause because his trial and appellate counsel were ineffective in failing to raise the issue of whether the jury instructions on self-defense were proper. We conclude that appellant has failed to show good cause and that his claim is barred by the doctrine of the law of the case.[11] This court has already considered the merits of appellant's claim and concluded that his counsel was not ineffective.[12] Accordingly, appellant's contention lacks merit.

Appellant further contends that the district court erred in finding that appellant failed to show a fundamental miscarriage of justice. Particularly, appellant contends that he is actually innocent of second-degree murder because he killed justifiably in self-defense. We conclude that appellant has failed to show a fundamental miscarriage of justice, and his claim that there is insufficient evidence to convict him of murder

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[9]See 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))).

[10]See State v. Simon, Docket No. 28022 (Order of Remand, December 30, 1996) (concluding that the issues raised in appellant's second post-conviction petition, including that the self-defense instructions were inadequate, lacked merit).

[11]See Hall, 91 Nev. at 315, 535 P.2d at 798.

[12]See id.; see also Simon v. State. Docket No. 21447 (Order Dismissing Appeal, October 29, 1990) (concluding that appellant's counsel was not ineffective in failing to present a self-defense theory).

is barred by the doctrine of the law of the case.[13] This court has already considered appellant's assertion that he is innocent, and concluded that the jury's finding that appellant committed second-degree murder with the use of a deadly weapon is supported by substantial evidence.[14]

Finally, appellant contends that this court should review his claims, despite the fact they are procedurally barred, because this court has previously chosen to disregard procedural default rules at its discretion, and he is entitled to "even handed treatment under the law." We conclude that this court has not violated the due process rights of appellant, and that his claims presented were considered on the merits or were procedurally barred under Nevada law.

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

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Maupin

_____, J.
Rose

_____, J.
Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
State Public Defender
Clark County Clerk

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[13]See Hall, 91 Nev. at 315, 535 P.2d at 798.

[14]See Simon v. State, Docket No. 19234 (Order Dismissing Appeal, May 18, 1989) (concluding that the evidence presented at trial supported the second-degree murder conviction).

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APR 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING MOTION

On February 22, 2001, this court entered an order granting appellant's third motion for an extension of time to file the opening brief and appendix. We cautioned counsel for appellant that "no further extensions of time shall be permitted in the absence of extreme and unforeseeable circumstances."

On March 19, 2001, counsel for appellant filed a motion requesting a fourth extension of time to file the opening brief and appendix. The bases for the motion are that one secretary in counsel's office underwent "major surgery" and another secretary had "a major illness in the family." Counsel having demonstrated extreme and unforeseeable circumstances in support of the request for a fourth extension of time, we grant the motion. Appellant shall have until April 18, 2001, to file and serve the opening brief and appendix.

It is so ORDERED.

_____, C.J.

cc: Attorney General
Clark County District Attorney
State Public Defender

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FEB 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION

Appellant has filed a motion requesting a third extension of time to file the opening brief and appendix. Cause appearing, we grant the motion. Appellant shall have to and including March 19, 2001, to file and serve the opening brief and appendix. We admonish appellant's counsel, however, that the court disapproves of repeated requests for extensions of time to brief appeals in criminal cases. Consequently, no further extensions of time shall be permitted in the absence of extreme and unforeseeable circumstances.

It is so ORDERED.

, C.J.

cc: Attorney General
Clark County District Attorney
State Public Defender

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NOV 07 2000

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

O R D E R

The notice of appeal was filed in this matter on August 11, 2000, and this matter was docketed in this court on August 16, 2000. The Nevada State Public Defender filed a notice of appearance as counsel for appellant on August 22, 2000. To date, appellant has failed to file either a transcript request form or a certificate of no transcript request.[1] See NRAP 9(a). Appellant shall, within ten (10) days of the date of this order, file and serve the required document.

It is so ORDERED.

_____, C.J.

cc: Attorney General
Clark County District Attorney
State Public Defender

[1] In the event appellant intends to cite in the opening brief to transcripts which were prepared and filed in the district court prior to the docketing of this appeal, appellant should not file a transcript request form requesting the court reporter to prepare these transcripts. Instead, appellant should file and serve a certificate of no transcript request. See NRAP 9(a). Further, appellant should include copies of the previously prepared transcripts in the appendix to the opening brief. See NRAP 10(b); NRAP 30(b)(1). If, however, appellant desires to order new transcripts which have not yet been prepared or filed in the district court, appellant should file and serve a transcript request form specifying the transcripts which appellant desires to have prepared. See NRAP 9(a).

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