

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENE A. MAUWEE,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, DAVID
MELIGAN,

Respondent.

No. 36709

FILED

MAY 29 2001

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

ORDER OF AFFIRMANCE

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

On January 12, 1990, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in prison without the possibility of parole. This court dismissed appellant's direct appeal.¹

On October 13, 1992, appellant filed a proper person petition for post-conviction relief, contending that he received ineffective assistance of trial and appellate counsel. The State opposed the petition. The district court appointed counsel to represent appellant and conducted an evidentiary hearing. On November 18, 1993, the district court denied the petition. This court dismissed appellant's appeal from that decision.²

On May 30, 1997, appellant filed a petition for a writ of habeas corpus in federal court. Appellant voluntarily

¹Mauwee v. State, Docket No. 21011 (Order Dismissing Appeal, September 30, 1991).

²Mauwee v. State, Docket No. 25090 (Order Dismissing Appeal, July 5, 1996).

withdrew that petition in February 1999, so that he could return to state court to exhaust his claims for relief.

On March 9, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State moved to dismiss the petition as being procedurally barred. The district court appointed counsel to represent appellant. On August 18, 2000, the district court granted the State's motion and dismissed the petition. This timely appeal followed.

Appellant's petition is subject to several procedural bars. First, appellant's petition, which was filed more than seven years after this court issued the remittitur from his direct appeal, was untimely.³ Second, appellant's conviction was the result of a trial and several of the grounds for the petition could have been raised in his direct appeal from the judgment of conviction.⁴ Third, appellant's petition was successive because he had previously filed a petition for post-conviction relief and the instant petition raised claims that had been raised in the prior petition which were rejected on the merits and also raised new grounds that could have been raised in the prior petition.⁵ Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁶ To show "cause" to excuse his procedural defaults, appellant had to

³NRS 34.726(1).

⁴NRS 34.810(1)(b)(2).

⁵Id.; NRS 34.810(2).

⁶NRS 34.726(1); NRS 34.810(3).

show that an impediment external to the defense prevented him from complying with the state procedural default rules.⁷

Appellant argues that ineffective assistance of appellate counsel and post-conviction counsel constitutes cause to excuse his procedural defects. We disagree.

First, we conclude that appellant's claims of ineffective assistance of appellate counsel do not constitute cause to excuse his procedural defects. Appellant could have raised his claims of ineffective assistance of appellate counsel in his prior petition for post-conviction relief. In fact, appellant's prior petition raised several of these claims, but omitted others. The alleged ineffectiveness of appellate counsel does not explain or excuse appellant's delay in filing the petition or his abuse of the writ.

This case is distinguishable from Stewart v. Warden,⁸ cited by appellant. In Stewart, we simply explained that the district court should not dismiss a post-conviction petition on grounds that the petitioner could have raised the issues on direct appeal where the petitioner claimed that his failure to raise the issues on direct appeal was the result of ineffective assistance of appellate counsel.⁹ Stewart did not address the procedural bar to a second or successive petition and nothing in the opinion stands for the general proposition that ineffective assistance of appellate counsel constitutes cause to excuse all procedural defaults.

Second, we conclude that appellant's claim of ineffective assistance of post-conviction counsel does not

⁷Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

⁸92 Nev. 588, 555 P.2d 218 (1976).

⁹Id. at 588-59, 555 P.2d at 219-20.

constitute cause to excuse the procedural defaults. Because no statute mandated the appointment of counsel in the prior post-conviction proceeding, appellant was not entitled to effective assistance of that counsel and cannot rely on a claim of ineffective assistance of that counsel to establish cause to excuse a procedural default.¹⁰

Appellant also argues that even if his petition was procedurally defaulted, the district court nevertheless should have considered his claims because failure to do so would result in a fundamental miscarriage of justice. We disagree.

This court has recognized that even if a petitioner has procedurally defaulted and cannot demonstrate cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrates that failure to consider them would result in a "fundamental miscarriage of justice."¹¹ A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.¹²

Here, appellant's claim of actual innocence is based on an argument that the evidence presented at trial was insufficient to demonstrate that he formed the specific intent required for first-degree murder because he was extremely intoxicated at the time of the killing. In our decision on appeal from the denial of the 1992 post-conviction petition, we observed that the district court had found that there was

¹⁰See Crump, 113 Nev. at 302-03, 934 P.2d at 252-53; McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 257-58 (1996).

¹¹Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹²See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

overwhelming evidence of appellant's guilt presented at trial, including evidence of multiple deliberate acts by appellant in preparing to shoot and in shooting the victim, and that the jury was justified in rejecting appellant's defense of voluntary intoxication. We similarly concluded that there was overwhelming evidence of appellant's guilt.¹³ There is nothing in the record presented by appellant that would change that conclusion. We therefore conclude that appellant has not demonstrated that failure to consider his claims would result in a fundamental miscarriage of justice.

Having considered appellant's contentions and concluded that they lack merit and that the district court did not err in dismissing appellant's petition, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Nathalie Huynh
Washoe County Clerk

¹³Mauwee v. State, Docket No. 25090 (Order Dismissing Appeal, July 5, 1996).