

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MICHAEL PARKER,

No. 36825

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JAN 02 2002

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

ORDER OF AFFIRMANCE

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

On September 2, 1993, the district court convicted appellant Edward Michael Parker, pursuant to a nolo contendere plea,¹ of first-degree murder. The district court sentenced Parker to serve a term of life in prison without the possibility of parole. Parker did not pursue a direct appeal.

On December 10, 1993, Parker filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition on January 10, 1994. This court affirmed that decision on appeal.²

On June 23, 2000, Parker filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing that the petition was untimely and successive. Moreover, the State specifically pleaded laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

¹Parker pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

²Parker v. State, Docket No. 26138 (Order Dismissing Appeal, December 24, 1997).

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represent Parker or to conduct an evidentiary hearing. On September 1, 2000, the district court denied Parker's petition. This appeal followed.

Parker filed his petition more than seven years after entry of the judgment of conviction. Thus, his petition was untimely filed.³ Moreover, Parker's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Parker's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ Further, because the State specifically pleaded laches, Parker was required to overcome the presumption of prejudice to the State.⁶

In an attempt to excuse his procedural defects, Parker argued that he had been pursuing relief in federal court and had to come back to state court to exhaust his state remedies. Based upon our review of the record on appeal, we conclude that this claim does not constitute good cause sufficient to excuse Parker's procedural defects.⁷ It also is not sufficient to overcome the presumption of prejudice to the State.

This court has recognized that claims raised in a procedurally defaulted petition may be considered if the petitioner demonstrates that failure to consider them would result in a "fundamental miscarriage of justice."⁸ A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.⁹

Here, Parker alleged in his petition that he was actually innocent of first-degree murder. To the extent that Parker raised this claim in an attempt to overcome his procedural defaults, we conclude that he has failed to demonstrate that failure to consider the claims in his

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(3); NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(1)(b)(3); NRS 34.810(3).

⁶See NRS 34.800(2).

⁷See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989) (holding that filing of federal habeas petition does not constitute good cause to excuse untimely filing of petition for post-conviction relief).

⁸Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁹See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

petition would result in a fundamental miscarriage of justice. Parker's claim of innocence is not new. He pleaded guilty pursuant to North Carolina v. Alford,¹⁰ which allows a defendant to plead guilty while maintaining his innocence. Parker asserted his innocence of the first-degree murder charge, but pleaded guilty to avoid the possibility of a death sentence. Thus, as we commented in Hargrove v. State, "his claim of innocence is essentially academic."¹¹ Moreover, the evidence offered by the State at the change of plea hearing provided a strong factual basis to support the plea.¹² The fact that Parker's co-defendant elected to go to trial and was convicted of second-degree murder does not undermine the factual basis offered to support Parker's plea.

However, our review of the record revealed that the district court and this court failed to address one of the claims asserted in Parker's first petition. In the first petition, Parker alleged that he was deprived of his right to a direct appeal as a result of trial counsel's failure to inform him of his right to appeal. Because the district court and this court failed to consider that claim, Parker had good cause to raise that claim again in the instant petition.¹³

We now conclude that Parker's claim lacks merit. Because Parker's nolo contendere plea has the same effect as a guilty plea,¹⁴ there is no constitutional requirement that he be informed of his right to pursue a direct appeal unless he inquires about an appeal or he might have benefited from receiving the advice.¹⁵ Although Parker claimed in the instant petition that he asked counsel to file an appeal and counsel failed to do so, Parker failed to make that allegation in the first petition. Parker

¹⁰400 U.S. 25 (1970).

¹¹100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

¹²See Alford, 400 U.S. at 37-38 (allowing trial court to accept guilty plea even in fact of defendant's assertion of innocence, if evidence provides "strong" factual basis).

¹³Cf. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

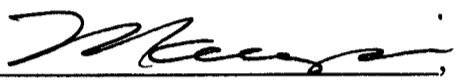
¹⁴See Scott v. State, 928 P.2d 1234, 1237 (Alaska Ct. App. 1996); Commonwealth v. Williams, 660 A.2d 614, 619 & n.1 (Pa. Super. Ct. 1995). See generally 1A Charles Alan Wright, Federal Practice and Procedure § 177, at 286-88 (3d ed. 1999).

¹⁵Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

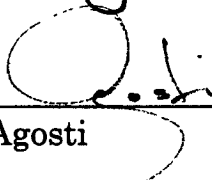
has not demonstrated good cause for his failure to make that allegation in the first petition.¹⁶ Accordingly, we need not consider it. Additionally, the record does not reveal any circumstances that would have required counsel to advise Parker of his right to appeal. We therefore conclude that Parker is not entitled to relief on his claim that he was deprived of his right to a direct appeal as the result of ineffective assistance.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Agosti

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Edward Michael Parker
Clark County Clerk

¹⁶See NRS 34.810(3); see also Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) (holding that allegation that petitioner was deprived of right to appeal due to ineffective assistance of counsel does not constitute good cause to excuse procedural default).

¹⁷See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).