

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT DEAN FULLER,

No. 37068

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

DEC 17 2001

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus.

On February 16, 1996, the district court convicted appellant Robert Dean Fuller, pursuant to a guilty plea, of trafficking in a controlled substance. The district court sentenced Fuller to serve twenty-five years in prison. This court affirmed the conviction on appeal.<sup>1</sup> The remittitur issued on March 18, 1998.

On February 10, 1997, while the direct appeal was pending in this court, Fuller filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In the petition, Fuller alleged that he received ineffective assistance of trial counsel. The district court appointed counsel to represent Fuller in the post-conviction proceedings<sup>2</sup>

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<sup>1</sup>Fuller v. State, Docket No. 28435 (Order Dismissing Appeal, February 27, 1998).

<sup>2</sup>The district court appointed the same counsel who had been appointed as appellate counsel to represent Fuller in the post-conviction proceedings. That counsel did not represent Fuller prior to the direct appeal.

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and conducted an evidentiary hearing. On May 27, 1999, the district court denied the petition. This court affirmed that decision on appeal.<sup>3</sup>

On August 2, 2000, Fuller filed a second, proper person post-conviction petition for a writ of habeas corpus in the district court. In the petition, Fuller alleged that he received ineffective assistance of trial and appellate counsel. The State moved to dismiss the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Fuller or to conduct an evidentiary hearing. On November 7, 2000, the district court dismissed the petition. This appeal followed.

Fuller filed his petition more than two years after this court issued the remittitur from his direct appeal. Thus, Fuller's petition was untimely filed.<sup>4</sup> Moreover, Fuller's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.<sup>5</sup> Fuller's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>6</sup>

In an attempt to excuse his procedural defects, Fuller argued that he could not previously raise his claims that appellate counsel provided ineffective assistance because appellate counsel also represented him in the prior post-conviction proceedings. We agree that Fuller could not raise the ineffective assistance of appellate counsel claims in the first petition, primarily because the petition was filed while the direct appeal was pending and, therefore, any claims regarding appellate counsel's performance were not yet ripe. This situation, combined with appellate counsel representing Fuller in the prior post-conviction proceeding, might

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<sup>3</sup>Fuller v. Warden, Docket No. 34374 (Order Dismissing Appeal, September 24, 1999).

<sup>4</sup>NRS 34.726(1).

<sup>5</sup>NRS 34.810(2).

<sup>6</sup>NRS 34.726(1); NRS 34.810(3).

provide good cause to raise the appellate counsel claims in a second petition. But it does not constitute good cause for Fuller's failure to file that petition within one year after this court issued its remittitur from his direct appeal. It also does not constitute good cause for Fuller to raise ineffective assistance of trial counsel claims that could have been raised in the prior petition.<sup>7</sup>

In a further attempt to excuse his procedural defects, Fuller argued that post-conviction counsel provided ineffective assistance in connection with his first petition. Because the appointment of post-conviction counsel was not required by statute, Fuller had no right to the effective assistance of that counsel and cannot rely on an allegation of ineffective assistance of post-conviction counsel to demonstrate good cause to excuse a procedural default.<sup>8</sup>

As a final argument, Fuller claimed that even if his petition was procedurally defaulted, the district court nevertheless could consider his claims because failure to do so would result in a fundamental miscarriage of justice. Fuller relied on Mazzan v. Warden,<sup>9</sup> but did not otherwise explain how the failure to consider the merits of his petition would result in a fundamental miscarriage of justice. Typically, a "fundamental miscarriage of justice" involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.<sup>10</sup>

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<sup>7</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense).

<sup>8</sup>See Crump v. Warden, 113 Nev. 293, 302-03, 934 P.2d 247, 252-53 (1997); McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 257-58 (1996).

<sup>9</sup>112 Nev. 838, 921 P.2d 920 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

<sup>10</sup>See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

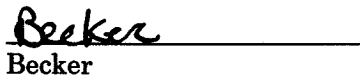
Fuller did not claim that he is actually innocent. Moreover, his statements at the entry of his guilty plea would belie any such claim; Fuller admitted that he committed the charged offense. We therefore conclude that Fuller failed to demonstrate that failure to consider his claims would result in a fundamental miscarriage of justice.

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.<sup>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Steven P. Elliott, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Robert Dean Fuller  
Washoe County Clerk

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<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>12</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.