

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID SCOTT,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
Respondent.

No. 38653

FILED

APR 10 2002

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

ORDER OF AFFIRMANCE

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

On August 21, 1998, the district court convicted Scott, pursuant to a guilty plea, of second-degree murder with a deadly weapon. The district court sentenced Scott to serve two consecutive prison terms of life with the possibility of parole after 10 years. Scott did not file a direct appeal.

On September 11, 2000, Scott filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition and, thereafter, the district court appointed counsel. On November 1, 2000, the district court dismissed Scott's petition as untimely.¹ This appeal followed.

Scott filed his petition more than 2 years after entry of the judgment of conviction. Thus, Scott's petition was untimely filed.² Scott's

¹Initially, the district court ruled that Scott had established good cause for the delay but, thereafter, granted the State's motion for reconsideration and dismissed the petition, finding that Scott failed to make a sufficient showing to excuse the procedural defect.

²See NRS 34.726(1).

petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.³ Good cause for the delay is an impediment external to the defense that prevents the petitioner from bringing the claims earlier.⁴

In an attempt to demonstrate cause for the delay, Scott argues that his bipolar mental illness rendered him incapable of filing a timely petition. Although Scott acknowledges that mental illness, in and of itself, is generally not an impediment external to the defense,⁵ Scott argues that his mental illness coupled with the prison official's delay in providing him mental health counseling established good cause to excuse his procedural default. Alternatively, Scott contends that his failure to show good cause should be excused to avoid a fundamental miscarriage of justice because he is actually innocent of the crime of second-degree murder. Particularly, Scott contends that no reasonable jury would have convicted him of second-degree murder because he killed in self-defense or, at worst, committed voluntary manslaughter.

We conclude that Scott has failed to demonstrate good cause to excuse his procedural default.⁶ We further conclude that Scott has not demonstrated that the failure to consider his petition would result in a

³See id.

⁴Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

⁵See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that organic brain damage and limited intelligence do not constitute cause to excuse procedural default).

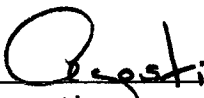
⁶See Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995); Phelps, 104 Nev. at 660, 764 P.2d at 1306.

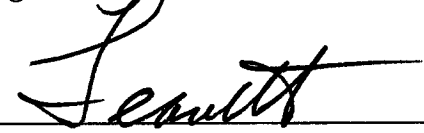
fundamental miscarriage of justice because Scott's claim of actual innocence is not credible.⁷ Accordingly, we conclude that the district court properly denied the petition.

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

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Maupin


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Janet J. Berry, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁷See Mazzan, 112 Nev. at 842, 921 P.2d at 922 (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).