IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL ELWIN ACKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39218

FILED

APR 21 2003

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 Paul Acklin's post-conviction petition for a writ of habeas corpus.

The case arises out of the robbery and fatal shooting of Gary Byrd, a PDQ convenience store clerk, in Reno on July 15, 1989. The State prosecuted appellant for the murder and for robbery with the use of a deadly weapon, burglary, and possession of a firearm by an ex-felon. The State's theory was that hours before the murder, appellant stole a Derringer from Robin McGillivary and went with Jacques Jackson and Jackson's girlfriend, Berlyn Traylor, to the PDQ store, where appellant said he would sell rock cocaine to the store clerk. While Traylor and Jackson stayed in the car, appellant went into the PDQ and robbed and killed Byrd using the stolen Derringer. The State's case depended substantially on the testimony of Traylor and Jackson, who were both users and dealers of rock cocaine and who, along with Elizabeth Fugate, had often sold cocaine to appellant.

The district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, burglary, and ex-felon in possession of a firearm. The district court sentenced appellant to two consecutive terms of life in prison with the possibility of parole for the murder and to various consecutive and concurrent prison terms for the other convictions.

Appellant subsequently filed a motion for a new trial based on newly discovered evidence. In support of the motion, appellant provided the affidavit of Washoe County Jail inmate Claude Cohen. Cohen claimed that Jackson had admitted killing the victim. The district court granted the motion. On appeal, this court remanded.[1] On remand, the district court denied appellant's motion. This court dismissed appellant's direct appeal from the judgment of conviction and his appeal from the district court's order denying his motion for a new trial.[2]

Thereafter, appellant, represented by counsel, filed a timely, first post-conviction petition for a writ of habeas corpus in the district court. Appellant subsequently filed two supplements to the petition. The second supplement raised a claim that newly discovered evidence warranted a new trial. Appellant claimed that Leondrus McBride contacted appellant's trial attorney after trial, alleging that Jackson had told McBride that appellant did not commit the crime and that Jackson had testified falsely against appellant. At his deposition, McBride further alleged that he had written letters to Traylor, on Jackson's behalf, telling her how to testify at appellant's trial. In addition to the newly discovered evidence claim, appellant raised 21 new claims of ineffective assistance of counsel.

The district court dismissed eighteen of the claims in the second supplement pursuant to NRS 34.750(3), conducted an evidentiary hearing on the remaining claims, and denied appellant any relief. On appeal, this court determined that the district court did not clearly apply

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[1]State v. Acklin, Docket No. 23160 (Order of Remand, December 3, 1992).

[2]Acklin v. State, Docket Nos. 22638 and 24278 (Order Dismissing Appeals, March 31, 1994).

the correct standard in assessing the newly discovered evidence and relied on a nonexistent confession in denying the claim. Accordingly, this court reversed that part of the district court's order denying appellant's newly discovered evidence claim and remanded for reconsideration of that issue; this court otherwise affirmed the district court's order denying appellant relief.[3] On remand, the district court again denied appellant's newly discovered evidence claim. This appeal followed.

First, appellant appears to challenge the district court's analysis of the newly discovered evidence claim and to contend that the court erred in failing to grant appellant a new trial. In support, appellant appears to argue that the testimony of Cohen and McBride would have impeached the testimony of Jackson and Traylor. Appellant also appears to contend that a note by a State investigator would have revealed that Fugate told Kathy Smith that Traylor and Jackson tied up the victim and that Traylor shot him.

Appellant is not entitled to relief on this claim. With respect to Cohen's testimony, this court previously affirmed the district court's denial of appellant's motion for a new trial based upon this evidence.[4] This court also affirmed the district court's determination that the substance of the investigative note constituted multiple hearsay and was "too unsubstantiated" to support a claim of ineffective assistance of counsel for failing to make the note the subject of an offer of proof.[5] The law of a first appeal is the law of the case in all later appeals in which the

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[3]Acklin v. State, Docket No. 29996 (Order Affirming in Part, Reversing in Part and Remanding, March 5, 2001).

[4]Acklin v. State, Docket No. 24278 (Order Dismissing Appeal, March 31, 1994).

[5]Acklin, Docket No. 29996 at 4.

facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument.[6] With respect to McBride's testimony, in its earlier order, the district court characterized McBride as a "man of shifting allegiances and convenient memory" and concluded that his testimony was so marginal that it had little tendency to prove the jury verdict wrong. "On matters of credibility this court will not reverse a trial court's finding absent a clear showing that the court reached the wrong conclusion."[7] Appellant has failed to demonstrate that the district court was clearly wrong. Finally, in its order on remand, the district court found that none of appellant's claims "rise to the level where a different result than [appellant's] conviction . . . is probable," the appropriate standard under our case law.[8] We conclude that appellant has failed to establish that the district court abused its discretion in reaching this conclusion.[9]

Appellant next argues that the district court erred in denying appellant's newly discovered evidence claim because the court improperly

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[6]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

[7]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

[8]See, e.g., See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (stating that newly discovered evidence warrants a new trial if, among other things, it would make a different result probable on retrial); cf. Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627 (1995) (applying the same standard to assess newly discovered evidence of perjury based on a recantation).

[9]Cf. Sanborn, 107 Nev. at 406, 812 P.2d at 1284 (providing that the decision to deny a motion for a new trial on the ground of newly discovered evidence is within the discretion of the district court); see also Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument.").

relied upon a theory of aiding and abetting to uphold appellant's conviction while appellant was convicted as a principal pursuant to NRS 195.020. We disagree. At the evidentiary hearing, the district court questioned whether it were not possible for the jury to have found Jackson and Traylor less than completely truthful and yet remained satisfied beyond a reasonable doubt that appellant was the shooter. Similarly, while the district court opined in its order that McBride's statement possibly implicates Jackson and Traylor in the instant crimes, the court found the statement substantially lacking in credibility and concluded that appellant's conviction was supported by sufficient evidence. Thus, we conclude that the district court did not rely upon a theory of aiding and abetting to support appellant's conviction and that appellant's claim therefore lacks merit.

Next, appellant claims that the denial of his petition has prevented him from effectively cross-examining certain State witnesses. Appellant also appears to contend that his counsel was ineffective for failing to adequately cross-examine certain State witnesses. We decline to review these claims because they were not first raised in the district court.[10]

Finally, appellant argues that there has been "ample evidence" of the presentation of perjured testimony to the jury in this case and that he is therefore entitled to a new trial. Appellant appears to argue that the testimony of McBride, in combination with the investigative note, would establish that Jackson and Traylor committed perjury. Appellant also alleges that State witness Detective Gary Eubanks provided perjured testimony and that the prosecutor, Richard A. Gammick, knowingly allowed the presentation of the alleged perjury. We

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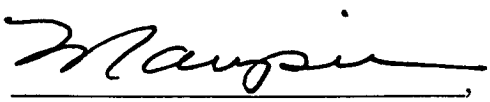
[10]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

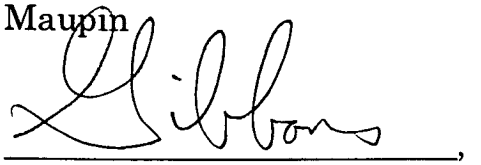
conclude that appellant has failed to demonstrate that Jackson or Traylor provided perjured testimony. With regard to Mr. Eubanks and Mr. Gammick, appellant did not raise this claim in his petition below or discuss this claim at the evidentiary hearing so we decline to consider it.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Charles M. McGee, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[11]See id.