

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL ANTHONY SKINNER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40654

FILED

NOV 05 2003

ORDER OF AFFIRMANCE

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

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

On April 21, 1993, the district court convicted appellant, pursuant to a guilty plea, of one count of sexual assault and one count of robbery. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole for sexual assault and a consecutive term of five years for robbery. No direct appeal was taken.

Appellant pursued a timely post-conviction petition for a writ of habeas corpus, and the district court denied relief. On appeal, this court concluded that the district court should have permitted appellant an opportunity to withdraw his guilty plea, and consequently, this court reversed the order of the district court and remanded the matter for further proceedings.<sup>1</sup> On June 4, 1997, the district court subsequently convicted appellant, pursuant to a jury verdict, of one count of sexual

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<sup>1</sup>Skinner v. State, 113 Nev. 49, 930 P.2d 748 (1997).

assault, one count of attempted sexual assault and one count of robbery.<sup>2</sup> The district court sentenced appellant to serve a term of life in the Nevada State prison with the possibility of parole for sexual assault and consecutive terms totaling thirty years for attempted sexual assault and robbery. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.<sup>3</sup>

On May 29, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to assist appellant, and post-conviction counsel filed a supplement to the petition. On January 18, 2000, after conducting an evidentiary hearing, the district court denied appellant's petition. This court affirmed the order of the district court on appeal.<sup>4</sup>

On October 2, 2002, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 18, 2002, the district court dismissed appellant's petition. This appeal followed.

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<sup>2</sup>On February 25, 1998, the district court entered an amended judgment of conviction correcting a clerical error.

<sup>3</sup>Skinner v. State, Docket No. 31061 (Order Dismissing Appeal, November 12, 1997).

<sup>4</sup>Skinner v. State, Docket No. 35619 (Order of Affirmance, November 22, 2000).

Appellant filed his petition more than five years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>5</sup> Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.<sup>6</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup>

In an attempt to excuse his procedural defects, appellant raised a number of allegations challenging the trial proceedings. Appellant further argued that DNA testing, which was not available at the time he committed his crime, should be performed on a pubic hair found in the victim's vaginal vault during a rape protocol kit.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred. Appellant failed to demonstrate that an impediment external to the defense prevented him from raising his claims challenging the trial proceedings in the 1997 habeas corpus petition.<sup>8</sup> Thus, the district court properly determined that these claims were an abuse of the writ.

Even assuming without deciding that the unavailability of DNA testing may be good cause in certain circumstances to excuse an untimely and successive petition, appellant failed to demonstrate

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<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.810(1)(b)(2), (2). Appellant raised claims in the 2002 petition that had not been raised in the previous petition.

<sup>7</sup>See NRS 34.726(1); NRS 34.810(1)(b), (3).

<sup>8</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

sufficient cause to excuse his procedural defects in the instant case. Although appellant's crime was committed in 1992, appellant's trial occurred in 1997, at a time when DNA testing was available.<sup>9</sup> In fact, appellant's trial counsel referred in closing arguments to the State's failure to conduct DNA testing on the hair found during the rape protocol kit. Thus, the alleged unavailability of DNA testing in 1992 does not explain appellant's delay in waiting to request DNA testing until 2002. Appellant further failed to demonstrate that DNA testing would conclusively establish his innocence.<sup>10</sup> Substantial evidence of appellant's guilt was presented during the trial. This evidence included: (1) the victim's statements to police and a registered nurse about the incident; (2) the victim's identification of appellant as her assailant; (3) photographs of injuries to the victim supporting the victim's statements to the police and the registered nurse; (4) the observations of the police and the registered nurse about the victim's condition; (5) appellant's arrest in the area of the assault shortly after the police were called; (6) the discovery of the victim's property on appellant's person at the time of his arrest; (7) appellant's confession to his cellmate while he was awaiting trial; and (8) the determination that the pubic hair found in the victim's vaginal vault was

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<sup>9</sup>See, e.g., Sheriff v. Middleton, 112 Nev. 956, 921 P.2d 282 (1996) (referring to DNA testing performed in 1995); Developments in the Law—Confronting the New Challenges of Scientific Evidence: DNA Evidence and the Criminal Defense, 108 Harv. L. Rev. 1557, 1571 (1995).

<sup>10</sup>See Sewell v. State, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992) (recognizing that DNA testing is warranted "only where a conviction rested largely upon identification evidence and [testing] could definitively establish the accused's innocence").

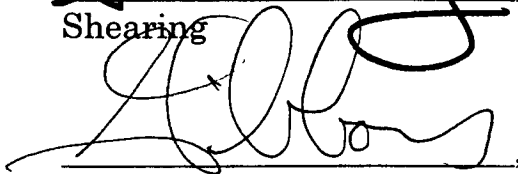
microscopically similar to appellant's pubic hair.<sup>11</sup> Appellant's arguments regarding the victim's alleged prior sexual history are speculative and are without support in the record on appeal. Therefore, we conclude that the district court properly determined that appellant's petition was procedurally barred, and we affirm the order of the district court.

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>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Janet J. Berry, District Judge  
Paul Anthony Skinner  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>11</sup>Identification was not the primary issue in the instant case as appellant conceded at trial that he had taken the victim's property. Instead, the issue at trial, as argued by the defense, was whether there was a reasonable doubt that the victim had actually been sexually assaulted.

<sup>12</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).