

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUPE GUSMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40746

FILED

OCT 21 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 denying appellant's post-conviction petition for a writ of habeas corpus.

On December 30, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced appellant to serve a term of twenty-five years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on August 11, 1998.

On July 12, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant. The State filed a motion to dismiss the petition. Appellant's post-conviction counsel filed a

¹Gusman v. State, Docket No. 31733 (Order Dismissing Appeal, July 21, 1998).

response. On November 29, 1999, the district court dismissed appellant's petition. This court dismissed appellant's subsequent appeal.²

On November 22, 2002, appellant filed a 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 December 20, 2002, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than four years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁶

²Gusman v. State, Docket No. 35297 (Order Dismissing Appeal, September 6, 2000).

³See NRS 34.726(1).

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

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

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Appellant did not attempt to demonstrate good cause or prejudice to excuse the procedural defects. Rather, appellant argued a failure to review his claims would result in a fundamental miscarriage of justice. Specifically, appellant argued that he was actually innocent of the crime of sexual assault. Appellant claimed that there was insufficient evidence to establish that the sex was non-consensual.

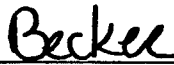
Based upon our review of the record on appeal, we conclude that appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice because appellant's claim of actual innocence was not supported by the record. Appellant's claim of innocence was no more than a rehashing of the testimony presented to the jury during his trial. It was for the jury to determine the weight and credibility to give conflicting testimony.⁷ Furthermore, this court considered and rejected appellant's claim on direct appeal that there was insufficient evidence presented that the sexual encounter was non-consensual. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and focused argument.⁸ Therefore, we conclude that appellant's petition was properly procedurally barred and we affirm the order of the district court denying appellant's petition.


⁷See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

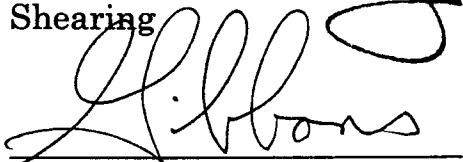
⁸See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Lupe Gusman
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.