IN THE SUPREME COURT OF THE STATE OF NEVADA

FABIAN FUENTES ROSAS, A/K/A OSCAR ARROSA VASQUEZ,
Appellant,
vs.
E.K. MCDANIEL,
Respondent.

No. 57698

FILED

JUN 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant argues that the district court erred in denying the petition as procedurally barred. Appellant filed his petition on November 3, 2008, more than five years after this court's May 28, 2002, issuance of the remittitur from his direct appeal. See Rosas v. State, Docket No. 37152 (Order of Affirmance, December 17, 2001). Appellant's petition was therefore untimely filed. NRS 34.726(1). Appellant's petition was also successive and an abuse of the writ.[1] NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

[1]Rosas v. State, Docket No. 41728 (Order of Affirmance, June 22, 2005).

Appellant first argues that official interference provided good cause to excuse the procedural defects as to ground one of his petition. Appellant had argued below that he was denied due process because the State's prosecution of him in the underlying case violated the written polygraph agreement between him and the State and that the State impeded his earlier efforts to litigate the claim by denying the existence of the written agreement. To constitute good cause to excuse the delay, appellant must demonstrate that the claim was raised within a reasonable time after discovering the written agreement. Cf. Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003); see also Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (holding that seeking relief in federal court does not constitute good cause to excuse a delay). Appellant discovered the original written agreement, which had been placed in a different case file within the Elko County Public Defender's Office, on November 16, 2006, nearly two years before the filing of the instant petition. Appellant offers no explanation for this two-year delay, and we conclude that it was not reasonable. Accordingly, the district court did not err in denying this claim as procedurally barred.

Appellant next argues that the ineffective assistance of trial, appellate, and previous post-conviction counsel provided good cause to excuse the procedural defects as to ground two of his petition. Appellant had argued below that trial counsel was ineffective for failing to move for a change of venue after the jury was empaneled. Appellant offers no cogent argument or authority to support his assertion that the very ineffective assistance of trial counsel that he seeks to litigate can itself be grounds to overcome the procedural bars to litigating the claim. See Maresca v.

State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). Further, appellant's claims that appellate and previous post-conviction counsel were ineffective are themselves time-barred and thus cannot provide good cause to excuse the delay. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Accordingly, the district court did not err in denying this claim as procedurally barred.

Appellant next argues that the State's violations of Brady v. Maryland, 373 U.S. 83 (1963), provided good cause to excuse the procedural defects as to grounds three through five of his petition. Appellant had argued below that he was denied a fair trial when the State failed to disclose witness J. Horner's prior felony conviction, that the State destroyed exculpatory evidence collected during that prosecution, and that trial counsel was ineffective for failing to investigate J. Horner as a potential suspect. A Brady analysis is comprised of three components, and as a general rule, "[g]ood cause and prejudice parallel the second and third Brady components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Evidence is material where there is a reasonable probability that the omitted evidence would have affected the outcome at trial. Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996). This court has only been provided with trial transcripts for portions of days two, seven, and eight of the guilt phase of the jury trial so that we cannot review the district court's conclusion that the evidence was not material. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on

appellant."). Accordingly, appellant fails to demonstrate that the district court erred in denying these claims

Appellant next argues that this court should reverse the district court's conclusion as to ground six below and allow him the opportunity to litigate the sufficiency of the evidence. Appellant does not claim that he has good cause to excuse the procedural defects and offers no argument or authority in support of his request. See Maresca, 103 Nev. at 672-73, 748 P.2d at 6. Further, this claim was litigated and rejected on direct appeal, Rosas v. State, Docket No. 37152 (Order of Affirmance, December 17, 2001), and is thus barred by the doctrine of the law of the case, Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Finally, appellant argues that he is actually innocent such that a failure to consider his claims on the merits would result in a fundamental miscarriage of justice. To demonstrate actual innocence, appellant must show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In reviewing the district court's conclusion, this court must review all of the evidence, old and new. Schlup, 513 U.S. at 328. However, appellant failed to provide this court with the complete trial transcripts so that we cannot determine whether the evidence is newly presented nor review the district court's conclusion that appellant failed to demonstrate that he was actually innocent. See Greene, 96 Nev. at 558, 612 P.2d at

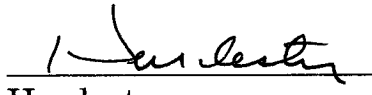
688. Accordingly, the district court did not err in denying the petition as procedurally barred.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Saitta

_____, J.
Pickering



_____, J.
Hardesty

cc: Fourth Judicial District Court Dept. 1, District Judge
Federal Public Defender/Las Vegas
Elko County District Attorney
Attorney General/Reno
Elko County Clerk