


IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86163

**FILED**

APR 19 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Steven Floyd Voss filed the instant postconviction habeas petition over twenty years after the remittitur issued on his direct appeal. *Voss v. State*, No. 32830 (Nev. May 24, 2000) (Order Vacating in Part and Affirming in Part) (affirming convictions for first-degree kidnapping and first-degree murder but striking deadly weapon enhancement). Thus, the district court determined that Voss's petition was untimely filed. *See* NRS 34.726(1). Because Voss previously sought postconviction relief and some of the claims raised were new and different from those raised in prior petitions, the district court also found that the petition was successive and constituted an abuse of the writ. *See* NRS 34.810(1)(b)(2), (3); *Voss v. State*, No. 77697, 2019 WL 5491339 (Nev. Oct. 24, 2019) (Order of Affirmance); *Voss v. State*, No. 73468, 2018 WL 367926 (Nev. Ct. App. Jan. 9, 2018) (Order of Affirmance); *Voss v. Warden*, No. 69900 (Nev. Ct. App. Aug. 17, 2016) (Order Denying Rehearing and Vacating Prior Order and Corrected Order of Affirmance); *Voss v. Warden*, No. 66508, 2015 WL 1359626 (Nev. Ct. App. March 18, 2015) (Order of Affirmance); *Voss v. State*, No. 62746, 2013 WL 7156274 (Nev. Dec. 17,

2013) (Order of Affirmance); *Voss v. State*, No. 54033, 2010 WL 3855253 (Nev. Sep. 29, 2010) (Order of Affirmance).

Voss's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b). Good cause "may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available" to be raised in a timely petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotation marks omitted). Prejudice requires a showing that errors caused actual and substantial disadvantage to the petitioner. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). Further, because the State specifically pleaded laches, Voss was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous and review the application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Voss argues that he demonstrated good cause and prejudice by showing that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, Voss alleges that the State failed to disclose that a potential alternate suspect, Gary Plank, lied about his alibi when questioned by police. In support of this claim, Voss proffered a declaration from Gary Shawn Lewis in which Lewis averred, contrary to Plank's statement and trial testimony, that Lewis did not spend the day of the victim's disappearance with Plank and that Lewis was never contacted by police to confirm Plank's alibi.

Generally, showing that the State withheld evidence in violation of *Brady* parallels the good cause showing required to overcome

procedural bars, and establishing that the evidence was material under *Brady* can demonstrate prejudice. *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Lewis averred in his declaration that officers never spoke to him about Plank's whereabouts. Thus, Voss did not demonstrate that the State possessed any evidence that called Plank's alibi into doubt at the time of trial. Although the prosecution may be in constructive possession of evidence gathered by investigating agencies, *State v. Bennett*, 119 Nev. 589, 603, 81 P.3d 1, 10 (2003), Voss cites no authority that suggests that the State could be in constructive possession of evidence that the police never gathered. Further, Voss did not claim that the failure to verify Plank's alibi was the result of "negligence, gross negligence, or a bad faith attempt to prejudice [Voss's] case." *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Additionally, Voss did not allege nor demonstrate that an impediment external to the defense prevented the defense from contacting Lewis before trial or the filing of Voss's first postconviction petition. *See Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) (recognizing that "a *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information"). Therefore, the district court did not err in denying this claim as procedurally barred and barred by laches.

Next, Voss argues that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. Voss contends that no reasonable juror would have convicted him had they known that Plank had lied about his alibi on the day of the victim's disappearance.

To demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, a petitioner must make a colorable showing of actual innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d

519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018); *see also Bousley v. United States*, 523 U.S. 614, 623 (1998). Actual innocence requires a showing that “it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. This “standard is demanding and permits review only in the extraordinary case.” *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

Given the evidence supporting the verdict, Voss failed to meet the demanding burden of showing that no reasonable juror would have convicted him even if Lewis had impugned Plank’s alibi. Voss was seen with a woman matching the victim’s description on the day the victim disappeared. Voss possessed and attempted to deposit a check issued to the victim and to cash a forged check from the victim’s account immediately after her disappearance. And lastly, Plank had an alibi for later in the evening on the day of the disappearance, which Voss has not alleged could be impeached. Because Voss did not meet his burden of demonstrating actual innocence, we cannot conclude that the district court’s conclusion was clearly erroneous. Therefore, the district court did not err in denying the petition as procedurally barred and barred by laches.

Voss also argues that the district court erred in denying leave to supplement the petition after granting an evidentiary hearing. We disagree. Generally, counsel may file and serve supplemental pleadings when appointed by the district court to represent an indigent petitioner. NRS 34.750(3). Because the court did not appoint counsel to represent Voss,

NRS 34.750(3) did not mandate that counsel be permitted to file supplemental pleadings. It was within the district court's discretion whether to allow supplemental pleadings shortly before a limited evidentiary hearing and Voss has not demonstrated that the court exercised that discretion in an arbitrary or capricious manner. NRS 34.750(5) (granting district courts broad discretion to permit supplemental pleadings to postconviction petitions); see *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."). Moreover, Voss was not prejudiced given that the district court liberally construed the *pro se* pleadings and evaluated the claim under *Brady*, as argued in the proposed supplemental pleadings.

Lastly, Voss argues that the district court erred in denying the motion to permit Lewis to testify remotely. We disagree. In granting the evidentiary hearing, the court indicated that it was solely concerned with the good cause allegation and was not looking at the merits of the petition. Lewis's testimony was not relevant to the question of whether *Brady* was violated and whether that violation explained the over twenty-year delay in pursuing claims that counsel should have investigated Plank's alibi and the prosecutor engaged in misconduct in arguing that Plank had an alibi. To the extent that Lewis's testimony may have been relevant to Voss's gateway actual innocence claim, Voss further failed to demonstrate that the district court abused its discretion. See *LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018) (reviewing denial of motion for remote testimony for an abuse of discretion). The factors Voss argued—Lewis's reluctance to fly, increased travel time, and the burden on his wife's

work schedule—related to individual convenience and did not “further[ ] an important public policy.” SCR Part IX-A(B) Rule 4(1).

Having considered Voss’s contentions and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



\_\_\_\_\_,  
Herndon

J.



\_\_\_\_\_,  
Lee

J.



\_\_\_\_\_,  
Bell

J.

cc: Hon. Connie J. Steinheimer, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk