

SUPREME COURT OF NEVADA

Joel Cardenas v. Renee Baker, Warden

No. 82364 (Nev. Nov. 1, 2021) · No. 82364 · Decided November 10, 2021

SUMMARY

The Supreme Court of Nevada affirmed the denial of Joel Cardenas's postconviction petition for a writ of habeas corpus. The court held that the petition was untimely, successive, and barred by laches, and that Cardenas had not shown good cause based on *McCoy v. Louisiana* or alleged ineffective assistance of postconviction counsel. The court also concluded that trial counsel had not conceded Cardenas's guilt in violation of *McCoy*.

CASE DETAILS

COURT	Supreme Court of Nevada
WRITING FOR THE COURT	C.J. Hardesty; J. Cadish; Senior Justice Mark Gibbons
JURISDICTION	Nevada
DECIDED	November 10, 2021
DOCKET	82364
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a district court order denying a postconviction petition for a writ of habeas corpus as procedurally barred.
STANDARD OF REVIEW	The court reviewed whether the district court correctly applied Nevada's mandatory procedural bars and laches to the postconviction petition.
PRECEDENTIAL VALUE	Published Nevada Supreme Court order; precedential status is identified as published in the supplied metadata.
PARTIES	Joel Cardenas v. Renee Baker, Warden

TOPICS

state post-conviction relief successive petitions habeas corpus ineffective assistance appellate procedure

PRACTICE AREAS

state post-conviction relief criminal procedure habeas corpus appellate procedure

QUESTIONS PRESENTED

1. Whether Cardenas established good cause to overcome the untimeliness and successive-petition bars based on *McCoy v. Louisiana*.
2. Whether alleged ineffective assistance of postconviction counsel established good cause to overcome the procedural bars.
3. Whether the district court correctly applied Nevada's laches bar and the presumption of prejudice to the State.

HOLDINGS

1. McCoy did not provide good cause because trial counsel did not concede Cardenas's guilt, and McCoy was distinguishable on the facts.
2. Alleged ineffective assistance of postconviction counsel did not establish good cause because a noncapital postconviction petitioner is not entitled to effective assistance of postconviction counsel.
3. The petition was untimely and successive, and it was procedurally barred because Cardenas did not demonstrate good cause and actual prejudice.
4. The district court correctly determined that the petition was barred by laches because the State pleaded laches, prejudice was presumed after more than five years, and Cardenas did not overcome the presumption.

KEY QUOTATIONS

“We conclude that the district court correctly applied the mandatory procedural bars and did not err in determining the petition was barred by laches.” (at 4)

“We therefore ORDER the judgment of the district court AFFIRMED.” (at 4)

FACTUAL BACKGROUND

Cardenas was convicted following a sexual encounter that he characterized as consensual. In his later postconviction petition, he argued that trial counsel conceded guilt by asserting that the victim's intoxication affected her memory and by arguing that, in a worst-case scenario, the jury should find him guilty only of attempted sexual assault. The Nevada Supreme Court concluded that counsel's arguments were consistent with Cardenas's testimony and did not concede guilt.

PROCEDURAL HISTORY

Cardenas filed a postconviction habeas petition seven years after remittitur issued in his direct appeal and after previously litigating a postconviction habeas petition. The district court denied the petition as untimely, successive, and barred by laches. The Nevada Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Cardenas v. State, Docket No. 58595 (Order of Affirmance, Apr. 11, 2012)
- Cardenas v. State, Docket No. 65222 (Order of Affirmance, Jan. 15, 2015)
- Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)
- McCoy v. Louisiana, 138 S. Ct. 1500, 1508-09 (2018)
- Florida v. Nixon, 543 U.S. 175, 186-92 (2004)
- Armenta-Carpio v. State, 129 Nev. 531, 534, 306 P.3d 395, 397 (2013)
- Edwards v. Vannoy, Edwards v. Vannoy, 141 S. Ct. 1547, 1562 (2021)
- Brown v. McDaniell, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014)
- Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001)
- State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005)

OPINION

Cardenas (Joel) Vs. Warden

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL CARDENAS, No. 82364

Appellant, vs. FILED

RENEE BAKER, WARDEN,

Respondent. NOV 1 Q 2021

ELIZABETH A. BROWN

CLERK OF SUPREME COURT

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ORDER OF AFFIRMANCE OE' CLERX

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. Appellant Joel Cardenas argues that the district court erred in denying his petition as procedurally barred. We affirm. Cardenas filed the petition seven years after remittitur issued on his direct appeal. *Cardenas v. State*, Docket No. 58595 (Order of Affirmance, April 11, 2012). Thus, his petition was untimely filed. See NRS 34.726(1). The petition was also successive because he had previously litigated a postconviction petition for a writ of habeas corpus. See NRS 34.810(1)(b), (2); *Cardenas v. State*, Docket No. 65222 (Order of Affirmance, January 15, 2015). Accordingly, Cardenas petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (3). 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). Further, as the State specifically pleaded laches, Cardenas had to overcome the presumption of prejudice to the State. See NRS 34.800(2).

SUPREME COURT

OF

NEVADA

iv47A oti-32 3 (et Cardenas argues that the Supreme Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides good cause because his trial counsel contradicted his defense and thus conceded guilt. He is mistaken, as *McCoy* is distinguishable. *McCoy* holds that an attorney may not concede a defendant's guilt of a charged crime where the defendant expressly objects or insists on maintaining his or her innocence. 138 S. Ct. at 1509. *McCoy* did not hold that a defendant must expressly consent to a concession or that a canvass must precede a concession. See *id.*; see also *Florida v. Nixon*, 543 U.S. 175, 186-92 (2004) (rejecting notion that concession strategy requires express consent or that it is the functional equivalent of a guilty plea)." Here, the record repels Cardenas claims that trial counsel conceded his guilt. Cardenas expressed his intent to maintain his innocence when he testified that the sexual encounter was consensual. Counsel, however, did not concede guilt in opening statement or closing argument when counsel represented that the victim was drunk during the incident, such that her memory was purportedly unreliable. Not only did this argument accord with Cardenas' testimony, but any slight discrepancy would fall within counsel's province and would not amount to infringing on Cardenas' broader decision to maintain his innocence. See *McCoy*, 138 S. Ct. at 1508 (distinguishing counsers trial management including deciding what arguments to make from a defendant's decision whether to maintain innocence). Moreover, the record belies Cardenas' argument that counsel conceded guilt by arguing or implying that the victim was too intoxicated to 'Notably, *McCoy* did not alter the holding in *Nixon*. *McCoy*, 138 S. Ct. at 1509.

SUPREME COURT

Of

NEVADA

2 consent, as counsel did not. And Cardenas argument that counsel conceded his guilt when counsel stated if the jury found Cardenas guilty, it should only find him guilty of attempted sexual assault also fails.² In context, counsel never conceded that the evidence showed that Cardenas was guilty of attempted sexual assault; to the contrary, he argued the opposite mere seconds earlier. Counsel's argument did not relieve the State of its burden to demonstrate Cardenas' guilt beyond a reasonable doubt when taken in context. See *Arrnenta-Carpio v. State*, 129 Nev. 531, 534, 306 P.3d 395, 397

(2013) (recognizing "that conceding guilt relieves the State of its burden of proof for an offense"). Because *McCoy* is distinguishable, we need not resolve Cardenas' argument that *McCoy* applies retroactively. Cf. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021) ([N]ew procedural rules apply to cases pending in trial courts and on direct review. But new procedural rules do not apply retroactively on federal collateral review."). Accordingly, Cardenas has not shown that *McCoy* provides good cause. Next, Cardenas argues that ineffective assistance of postconviction counsel provides good cause. We disagree. Cardenas was not entitled to the

effective assistance of postconviction counsel in a noncapital case. See *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (concluding that claims of ineffective assistance of postconviction 2Specifically, counsel argued— You have to look at this sexual assault—guilty or not guilty—or attempt sexual assault—guilty or not guilty. I would respectfully submit to you that based upon the evidence that you've heard in this courtroom, the appropriate verdict is not guilty. However, in a worst, worst, worst scenario, this was at best an attempt sexual assault.

SUPREME COURT

OF

NEVADA

3 1 ,n7A counsel in noncapital cases do not constitute good cause for a successive petition because there is no entitlement to appointed counsel). We decline Cardenas request to overrule or reconsider *Brown*. Further, Cardenas has not demonstrated the district court erred in determining the petition was barred by laches. The State sufficiently pleaded laches, and prejudice was presumed based on the more- than-five-year period from the decision on direct appeal. NRS 34.800(2). Cardenas has not overcome the presumption of prejudice to the State. See NRS 34.800(1) (requiring a petitioner to demonstrate a fundamental miscarriage of justice when the State is prejudiced in its ability to conduct a retrial and lack of knowledge or exercise of reasonable diligence when the State is prejudiced in responding to the petition); see also *Pellegrini v. State*,

117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (recognizing that fundamental miscarriage of justice requires a showing of actual innocence). We conclude that the district court correctly applied the mandatory procedural bars and did not err in determining the petition was barred by laches. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005). We therefore ORDER the judgment of the district court AFFIRMED.3 / , C.J. Hardesty J. Cadish 3The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

SUPREME COURT

OF

NEVADA

4 .0, 1947A cc: Hon. Robert W. Lane, District Judge Federal Public Defender/Las Vegas Attorney General/Carson City Nye County District Attorney Nye County Clerk 5