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Berry v. State, 131 Nev. Adv. Op. No. 96 (Dec. 24, 2015)

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CRIMINAL LAW: PETITION FOR WRIT OF HABEAS CORPUS

Summary

The issue before the Court was an appeal from a district court order dismissing a post-conviction petition for writ of habeas corpus. The Court reversed and remanded holding that the district court improperly discounted the declarations in support of the appellant's petition, which included a confession of another suspect, whom the petitioner implicated as the real perpetrator at trial. The Court held that these declarations were sufficient to merit discovery, and an evidentiary hearing on Petitioner Berry's gateway actual innocence claim.

On an actual innocence claim a post-conviction petitioner would be entitled to an evidentiary hearing if he or she presents specific factual allegations that, if true, show that it is likely a reasonable juror would not have convicted them beyond a reasonable doubt based upon the new evidence. In order to determine whether an evidentiary hearing is appropriate the district court must evaluate whether the new evidence presents specific factual allegations that are not belied by the record. If it does not, then in order to meet the actual innocence test the court must determine that no reasonable juror would have convicted the petitioner beyond a reasonable doubt in light of all the evidence.

In this case, the Court held that the district court judge incorrectly determined that the new evidence was not belied by the record. The Court conducted an in-depth examination of the facts of the case, and found that the new evidence would likely support a conclusion that the petitioner has met the actual-innocence test. The Court emphasized that a district court must assume the new evidence is true, and should also examine the evidence that led to the original conviction, especially if the new evidence diminishes the strength of the trial evidence.

Background

In April of 1994, a Carl's Jr. fast-food restaurant manager was murdered in the course of a robbery. Witnesses reported that an African-American male entered the restaurant and pulled a gun on the cashier demanding that she open the cash registers. The robber then moved behind her, and the cashier ran out of a side door where she encountered another employee on a cigarette break. The two ran into the neighboring bar to call the police. Witnesses saw the robber leave in a waiting black Cadillac. The manager of the Carl's Jr. was found dead in the back of the restaurant with a single gunshot wound in the back of his left shoulder. Another employee who hid in the restaurant through-out the incident reported hearing two gun shots, and two bullets were found at the scene.

¹ By Brittany L. Shipp.

The police received information that identified appellant Demarlo Berry as a possible suspect. At least one eye-witness identified him as a suspect right way, and while others were less sure initially they positively identified him as the perpetrator at trial. After he was arrested and charged with the crime his cellmate, Richard Iden, also testified against him reporting that Berry confessed to him that he committed the crime. However, his cellmate's stories were inconsistent, at trial he could not even confirm if the crime happened at a restaurant. Berry denied confessing to his cellmate, and testified in his own defense at trial. Berry testified that he had witnessed the crime, and recognized the robber as Steven "Sindog" Jackson, (hereinafter "Jackson") the leader of the San Bernardino Crips gang. However, the jury did not believe Mr. Berry's story and Berry was convicted 11-1 of burglary, robbery, and first-degree murder with the use of a deadly weapon.

Procedural History

Berry timely filed a notice of appeal, and the Court affirmed his conviction.² Berry then filed a timely post-conviction petition for a writ of habeas corpus asserting that his trial counsel had been ineffective at counseling him to stipulate to a non-unanimous verdict, which was denied and affirmed by this court.³ In September of 2008, Berry filed a second post-conviction petition for a writ of habeas corpus asserting that the jury received flawed instructions on the elements of first-degree murder.⁴ This petition was denied and again affirmed.⁵ In 2012, the Rocky Mountain Innocence Center (RMIC) agreed to take on Berry's case, and in 2014, filed a third post-conviction petition for a writ of habeas corpus on Berry's behalf, at issue here.

Discussion

Berry filed the third petition for writ of habeas corpus underlying the appeal at issue in this case in May 2014, which was more than 15 years after the issuance of remittitur from his direct appeal. This made the petition untimely and successive,⁶ and since the State affirmatively pleaded laches Berry had to overcome the presumption of prejudice to the state.⁷

² Berry v. State, Docket No. 27585 (Order Dismissing Appeal, June 17, 1997), and the remittitur issued on February 9, 1998.

³ Berry v. State, Docket No. 35201 (Order of Affirmance, April 6, 2001).

⁴ Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992) (a decision retreated from by this Court in Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000)).

⁵ Berry v. State, Docket No. 52905 (Order of Affirmance, September 23, 2009).

⁶ See NEV. REV. STAT. § 34.810(2).

⁷ See NEV. REV. STAT. § 34.800(2).

In order to overcome this presumption, Berry had to prove that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.⁸ The Court used the *Mann* standard in determining whether Berry was entitled to the evidentiary hearing on the gateway issue of actual innocence.⁹

Berry's third post-conviction writ of habeas corpus filed in May of 2014 asserted nine new claims. Among them was that there was new evidence demonstrating that Berry was actually innocent, and evidence that the State prompted and did not correct perjured testimony, from Richard Iden, and failed to disclose transcripts of meetings where the cell-mate was coached. There were four declarations offered to support Berry's petition.

The first declaration was a confession statement from Jackson, whom Berry had implicated at trial. In the declaration Jackson described the crime in detail confessing to committing it and asserting that Demarlo Berry had no involvement. Jackson admitted to shooting the manager when he was having trouble opening the safe. The Second declaration was from Richard Iden which recanted his testimony against Berry at trial and states that Berry never confessed to him. In addition, he stated that the details of the crime were given to him by the detectives, and in exchange for his testimony the State paid for his airfare, hotel and meals during the course of the trial. The third declaration was from the RMIC attorney who conducted the interview of Jackson. Jackson was serving life in prison in California and had recently become a Jehovah's witness; he wanted to confess in order to "clear his conscience." The fourth declaration was from a woman by the name of Maisha Mack who was acquaintances with Jackson during the time period in which the crime took place, and reported that Jackson confessed to her that he and his brother had committed the crime.

The district court dismissed Berry's petition without allowing discovery or conducting an evidentiary hearing determining that the declarations were belied by the record. The district court was troubled by the omissions in Jackson's declaration in that it did not mention the cashier, or the type of car in which he fled. In addition, the court was concerned that Jackson reported shooting the manager near the safe when his body was found some distance away with no blood trail. The district court did not acknowledge or address the RMIC attorney's declaration, and dismissed the Iden's and Mack's declaration as "naked allegations."

Berry requested an evidentiary hearing on whether he is actually innocent. This Court using the *Mann* standard determined that the district court improperly dismissed this claim. The

⁸ See *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995); *Mitchell v. State*, 122 Nev. 1269, 1274, 149 P.3d 33, 36 (2006); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

⁹ *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (Internal quotations omitted) "[This court] has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."

Court noted that this is a highly factual inquiry, and a district court must make its determination in light of all of the evidence which includes a review of “both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction.”¹⁰ In order to do this, “the district court should “assess how reasonable jurors would react to the overall, newly supplemented record.”¹¹

“A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made.”¹² The Court determined that the district court improperly ruled that Jackson’s declarations were “belied by the record” because the omissions did not result in contradictions in the record, nor prove any of the record false. For example, Jackson’s failure to mention the black Cadillac was not contradictory to the record, because it was explainable by the RMIC attorney’s declaration in which Jackson refused to implicate anyone else in the crime. In addition, Jackson’s statement that he shot the manager near the safe, when the body was found in the back away from the safe with no blood trail, could be explainable by there not being an exit wound on the victim. Therefore, even though the declarations contain factual disputes within the record they do not contradict it and thus, an evidentiary hearing is appropriate in this case.¹³

In addition, the Court noted that the district court incorrectly dismissed as naked allegations, Iden and Mack’s declarations despite the fact that they both contained specific factual assertions which were not belied by the record.¹⁴ In fact, the material portions of the declarations were not without evidentiary support which would at the very least require an evidentiary hearing. The Court also noted that the district court’s concern with the fact that it took 20 years for the declarants to come forward and exonerate Berry was not valid, because a district court’s inquiry into the delay is limited as to how the delay affects the reliability of the evidence or why it prevented the defendant from meeting the high standard of actual innocence. For example, when waiting would put a prisoner at advantage the timing should be considered.¹⁵ There were no such concerns here, and in fact in 2005, Berry had attempted to secure a confession from Jackson through an investigator, but was unsuccessful.

¹⁰ See *House v. Bell*, 547 U.S. 518, 538 (“Schlup makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial. Based on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do.”) (internal quotations omitted).

¹¹ *Id.*

¹² *Mann*, 118 Nev. at 354, 46 P.3d at 1230.

¹³ See *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974) (“Where. . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing.”).

¹⁴ See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (noting that a petitioner's allegation that certain witnesses could establish his innocence “was not accompanied by the witness fee names or descriptions of their intended testimony” and thus was just a bare or naked claim without any specific factual assertions).

¹⁵ The court uses the example of a prisoner lying in wait for his key witness to die and thus unable to testify against the new evidence. See *McQuiggin v. Perkins*, 133 S. Ct. 1934, 1936 (2013).

Finally, the court determined that Berry met his burden of due diligence, given that his petition depended largely on Jackson's confession. Since he attempted to secure a confession in 2005, and Jackson did not become a Jehovah's Witness until 2013. Thus, the State's argument regarding Berry's failure to exercise due diligence did not have merit.

Conclusion

In order to determine whether the appellant is entitled to an evidentiary hearing when an appellant presents specific factual allegations of his innocence that are not belied by the record, a district court must determine what a hypothetical jury would have done. And it must do so with the assumption that the evidence is true and reliable. At trial the jury was presented with several eye witness accounts alleging that Berry was the perpetrator, but no physical evidence. Thus, a hypothetical jury would now hear the confession by Jackson whom Berry identified at trial as the real perpetrator; testimony of an uninterested witness, Maisha Mack, that Jackson confessed to her that he committed the crime; and a recantation of testimony that Berry confessed to the crime from his cellmate Richard Iden. The Court determined that "a jury considering such a record . . . would likely have reasonable doubt that Berry committed the murder."