

IN THE UTAH COURT OF APPEALS

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Rodney A. Vessey II,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20030823-CA
v.)	
)	
State of Utah,)	F I L E D
)	(December 22, 2005)
)	
Respondent and Appellee.)	2005 UT App 548

Fifth District, St. George Department, 020500141
The Honorable G. Rand Beacham

Attorneys: Rodney A. Vessey II, Hurricane, Appellant Pro Se
Mark L. Shurtleff and Christopher D. Ballard, Salt
Lake City, for Appellee

Before Judges Billings, Orme, and Thorne.

THORNE, Judge:

Rodney A. Vessey II appeals from an order denying his post-conviction relief petition. We affirm.

Vessey was originally convicted of one count of rape of a child. See Utah Code Ann. § 76-5-402.1 (2003). Having exhausted multiple claims on direct appeal,¹ Vessey filed a post-conviction relief petition on the grounds of ineffective assistance of counsel, denial of due process, and newly discovered evidence. The post-conviction court granted summary judgment in favor of the State on Vessey's first two claims, but ordered an evidentiary hearing on the newly discovered evidence contention, relying upon affidavits filed by the victim purporting to recant her previous trial testimony. After conducting a hearing, the court found that the victim's recantation was not credible and that Vessey failed to satisfy the standard for obtaining relief on a claim of newly discovered evidence. See Utah Code Ann. § 78-35a-104(1)(e) (2002).

¹See State v. Vessey, 2000 UT App 220 (mem.) (Vessey 2); State v. Vessey, 967 P.2d 960 (Utah Ct. App. 1998) (Vessey 1); State v. Vessey, 957 P.2d 1239 (Utah Ct. App. 1998).

Vessey now appeals to this court, arguing that the post-conviction court erred in refusing to grant his petition for relief. "In deciding habeas appeals, we review conclusions of law for correctness, according 'no deference to the lower court's conclusions.'" Parsons v. Barnes, 871 P.2d 516, 518 (Utah 1994) (citation omitted).

Vessey first claims that the post-conviction court erred when it denied his claim of ineffective assistance of counsel. We disagree. A person is not eligible for relief under the Post-Conviction Remedies Act (PCRA), see Utah Code Ann. §§ 78-35a-101 to -304 (2002), upon any ground that "was raised or addressed at trial or on appeal." Id. § 78-35a-106(1)(b). "This rule applies to all claims, including constitutional questions." Rudolph v. Galetka, 2002 UT 7, ¶5, 43 P.3d 467.

In Vessey 2, this court reiterated that

in Vessey[1], we concluded that facts on the record did not support Defendant's ineffective assistance of counsel claim, and that Defendant failed to "allege[] specific facts outside the record to support his claim." Thus Defendant's claim was adjudicated in Defendant's first appeal to this court, and Defendant is not entitled to relitigate the issue on this second appeal.

State v. Vessey, 2000 UT App 220 (mem.) (alteration in original) (citation omitted). Because Vessey's ineffective assistance of counsel claim has already been addressed by this court, the post-conviction court correctly determined that this claim was procedurally barred.² See Pascual v. Carver, 876 P.2d 364, 366

²Vessey also argues that his ineffective assistance claim may avoid this procedural bar based on an exception to the law of the case doctrine. The law of the case doctrine provides that "when a legal decision is made on an issue during one stage of a case, that decision is binding in successive stages of the same litigation." Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶67, 82 P.3d 1076 (alteration omitted) (citations and quotations omitted). An exception to the doctrine allows a judge to fix mistakes and reconsider prior rulings in the same case before a final decision has been entered. See Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1310-11 (Utah Ct. App. 1994). The doctrine is inapplicable to this case because a final decision has already been entered.

The law of the case doctrine recognizes that it may be proper to review an issue previously decided by a co-equal court

(continued...)

(Utah 1994) (explaining that claims of ineffective assistance of counsel cannot be asserted in petition for habeas corpus where the claims either could have been raised on direct appeal, or were fully and fairly adjudicated on direct appeal).

Vessey also claims that the post-conviction court abused its discretion by not allowing Vessey to present evidence of an alleged violation of the exclusionary order at his trial. Vessey raised this issue on his direct appeal and this court refused to address the issue, stating that "defendant failed to object to these alleged errors during the trial and has not demonstrated on appeal that they were plain error." State v. Vessey, 967 P.2d 960, 965 (Utah Ct. App. 1998). As with Vessey's claim of ineffective assistance of counsel, his claimed error regarding the exclusionary order had already been decided on direct appeal, and therefore was procedurally barred. See Pascual, 876 P.2d at 366.

Finally, Vessey argues that he is entitled to relief on a claim of newly discovered evidence based on four affidavits filed by the victim, allegedly recanting her prior trial testimony. Vessey's only argument for relief under the newly discovered evidence prong of the PCRA was that "viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received." Utah Code Ann. § 78-35a-104(1)(e)(iv). The post-conviction court held a hearing on Vessey's claims relating to the credibility of the affidavits and recantation, and determined that the victim's affidavits and evidentiary hearing testimony were not credible and that "substantial evidence contradicts, refutes, or otherwise casts doubt on [the victim's] affidavits and evidentiary hearing testimony."

We see no error in the post-conviction court's determination. Given the overwhelming amount of evidence pointing towards Vessey's guilt, particularly in light of the post-conviction court's finding concerning the credibility of the victim's recantation, it is impossible to say that the affidavits

²(...continued)
when the matter is presented in a "different light" or under "different circumstances," as Vessey now claims. State v. O'Neil, 848 P.2d 694, 697 n.2 (Utah Ct. App. 1993) (quotations omitted). Here, again, the law of the case doctrine is inapplicable because the post-conviction court was not reviewing a decision of a co-equal court, but was following the express ruling of this court that Vessey was not entitled to relitigate his claim of ineffective assistance of counsel.

demonstrate that no reasonable trier of fact could have found Vessey guilty of the offense. Significant evidence was presented at the post-conviction hearing that refuted the victim's affidavits and evidentiary hearing testimony. Further, testimony at the hearing corroborated the victim's earlier trial testimony and allegations. Based on these findings, the affidavits do not warrant a new trial and Vessey's post-conviction relief petition was properly denied. See State v. Hoffhine, 2001 UT 4, ¶28, 20 P.3d 265 (holding that victim's recantation was not sufficient as new evidence to warrant a new trial); State v. Loose, 2000 UT 11, ¶18, 994 P.2d 1237 (holding that trial court did not abuse its discretion in denying a motion for new trial based on a letter written by the victim which allegedly recanted her trial testimony). Affirmed.

William A. Thorne Jr., Judge

WE CONCUR:

Judith M. Billings,
Presiding Judge

Gregory K. Orme, Judge