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AND NEBRASKA COURT OF APPEALS
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March 27, 2018

Juan L. Leonor #54664
Penitentiary
PO Box 22500
Lincoln, NE 68542-2500

IN CASE OF: A-17-000153, Leonor v. Frakes

The following internal procedural submission: Submitted to Court without Oral Argument
Submitted on 03/12/18

Has been reviewed by the court and the following order entered:

Affirmed. Riedmann, Judge. See memorandum opinion.

A certified copy of the Memorandum Opinion is attached.

Respectfully,

Acting Clerk of the Supreme
Court and Court of Appeals

"APPENDIX A"

CERTIFIED COPY

Page Document
1 Memo Opinion

Date

I, Erika Schafer, Acting Clerk of the Nebraska Supreme Court, certify that I have compared the following 8 page(s) to be a full, true, and correct copy of the original record on file.

Court of Appeals No: A-17-0153
Caption: Leonor v. Frakes
Trial Court: Lancaster County District Court
Trial Court No: CI17-248



IN TESTIMONY WHEREOF, I have placed my signature and seal of said court.

Date: March 27, 2018

BY THE COURT:

ACTING CLERK

FILED

MAR 27 2018

NEBRASKA SUPREME COURT
COURT APPEALS

IN THE NEBRASKA COURT OF APPEALS

NOTICE: THIS OPINION IS NOT DESIGNATED FOR
PERMANENT PUBLICATION AND MAY NOT BE CITED
EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

Juan L. Leonor,)
v.)
Appellant,)
))
Scott Frakes,)
Appellee.)
No. A-17-153.
MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

RIEDMANN and BISHOP, Judges, and INBODY, Judge, Retired.

RIEDMANN, Judge.

INTRODUCTION

Juan L. Leonor appeals the order of the district court for Lancaster County which denied his petition for writ of habeas corpus and motion to proceed in forma pauperis. We conclude, for reasons different than those relied on by the district court, that Leonor was not entitled to habeas relief and therefore affirm.

BACKGROUND

In 2000, Leonor was convicted of two counts of second degree murder and two counts of use of a weapon to commit a felony. He was sentenced to consecutive terms of imprisonment of 20 years to life, 20 years to life, 5 to 10 years, and 5 to 10



years, respectively. The Nebraska Supreme Court affirmed the convictions and sentences on direct appeal. See *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

In 2015, Leonor filed his first petition for writ of habeas corpus, arguing in part that the second degree murder statute under which he had been convicted, Neb. Rev. Stat. § 28-304 (Reissue 2016), was facially unconstitutional. The district court denied his petition as frivolous. In January 2017, Leonor filed a second petition for writ of habeas corpus. He again argued that the second degree murder statute was facially unconstitutional, but alleged that the recent decisions of *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016) and *Montgomery v. Louisiana*, --- U.S. ---, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), apply retroactively to allow collateral review of his convictions and sentences. The district court denied the petition, finding it to be frivolous because Leonor previously raised the issue of the constitutionality of § 28-304 in 2015. The district court also denied his motion to proceed in forma pauperis on the grounds that the petition was frivolous. (T44). It is from these denials that Leonor has appealed.

ASSIGNMENTS OF ERROR

Leonor assigns that the district court erred in denying habeas corpus relief and in denying his motion to proceed in forma pauperis.

STANDARD OF REVIEW

On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

ANALYSIS

Leonor argues that he is entitled to habeas corpus relief based on newly established rules of law since he filed his 2015 petition. He claims that the U.S. Supreme Court held in *Montgomery v. Louisiana*, --- U.S. ---, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires that state collateral review courts give retroactive effect to that rule. Therefore, he argues, Nebraska state courts are compelled to allow him to challenge the constitutionality of the statute under which he was convicted, despite the fact that his convictions are final. Along these lines, Leonor asserts, as he must, that the changes related to the crimes of second degree murder and manslaughter enunciated in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011) (*State v.*

Ronald Smith), constitute a new substantive rule of constitutional law such that under *Montgomery v. Louisiana, supra*, he is permitted to collaterally attack his now final convictions via the present habeas corpus action.

In *State v. Ronald Smith*, the Nebraska Supreme Court clarified that both the statutory crimes of second degree murder and sudden quarrel manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. See also, *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012) (*State v. William Smith*). If the provocation exists, it lessens the degree of the homicide from murder to manslaughter. *State v. Ronald Smith, supra*; *State v. William Smith, supra*. Thus, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation. *State v. Ronald Smith, supra*; *State v. William Smith, supra*.

The Nebraska Supreme Court recently addressed whether the holding of *State v. Ronald Smith* constitutes a new substantive constitutional rule. In *State v. Glass*, 298 Neb. 598, 905 N.W.2d 265 (2018), the Nebraska Supreme Court recognized that the U.S.

Supreme Court in *Montgomery v. Louisiana*, *supra*, and other cases, has set forth a test for determining when a new rule of constitutional law will be applied to cases on collateral review, and Nebraska adopted the retroactivity test in *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014). The *Glass* court observed that when one of its decisions results in a new rule, that rule applies to criminal cases still pending on direct review, because they are not final, but as to convictions that are already final, the rule applies only in limited circumstances. *State v. Glass*, *supra*. It also observed that new substantive rules of constitutional law for criminal cases generally apply retroactively, whereas new constitutional rules of criminal procedure generally do not apply retroactively. *Id.* Citing the definitions of substantive rules versus procedural rules, the Nebraska Supreme Court concluded that the holding in *State v. Ronald Smith* was a procedural rule change, and not a new substantive constitutional rule, because it was a change to the acceptable method for the jury to deliberate and was a procedural rule regulating only the manner of determining the defendant's culpability. Therefore, it does not apply retroactively in a collateral attack on a final conviction.

In the present case, Leonor's convictions are final, and he is attempting to collaterally attack them by way of a petition

for writ of habeas corpus. And he argues that he is permitted to do so because of a new substantive constitutional rule announced in *State v. Ronald Smith*. However, based on the Nebraska Supreme Court's holding in *State v. Glass*, the changes announced in *State v. Ronald Smith* do not apply retroactively to final convictions, and thus, Leonor is precluded from collaterally attacking his convictions.

The district court determined that the petition for writ of habeas corpus was frivolous because it was a second attempt to raise issues that had been previously rejected; however, as outlined above, Leonor was asserting that a new substantive rule of constitutional law controls the outcome of the case, and that the Constitution requires state collateral review courts give retroactive effect to that rule. While the argument proved meritless, it was not frivolous. Therefore, albeit for different reasons, the district court's order denying habeas corpus relief was correct.

Leonor also assigns that the district court erroneously denied his motion to proceed in forma pauperis. No person or officer shall have the right to demand the payment in advance of any fees in proceedings on habeas corpus in a criminal case. Neb. Rev. Stat. § 29-2824 (Reissue 2016). Thus, Leonor was able to file his habeas petition without the need to prepay the

· filing fee. The Nebraska Supreme Court noted that where, as here, there is no statutory requirement for prepayment of fees or costs to file or proceed with a matter, a trial court should consider whether it may be appropriate to defer ruling on an application for in forma pauperis status either until such time as it appears that some payment of fees, costs, or security may be necessary to proceed or until a judgment or final order is entered. See *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017). This is the procedure the district court followed in the instant case; at the same time the court ruled on the merits of Leonor's habeas petition, it denied his motion to proceed in forma pauperis. Because we conclude that the underlying habeas action has no merit, we need not address the question of whether the district court erred in denying the in forma pauperis motion. See *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018) (appellate court is not obligated to engage in analysis not necessary to adjudicate the case and controversy before it).

CONCLUSION

We conclude that Leonor is precluded from collaterally attacking his final convictions, and thus, the district court did not err in denying his request for habeas corpus relief. We therefore affirm.

AFFIRMED.

IN THE DISTRICT COURT FOR LANCASTER COUNTY, NEBRASKA

JUAN LUIS LEONOR,)
Petitioner,) Case No. CI17-248
v.) ORDER DENYING PETITION
SCOTT FRAKES,) FOR A WRIT OF HABEAS CORPUS
Respondent.)

This matter came before the court on January 20, 2017 on a "Petition for Writ of Habeas Corpus". The petitioner also filed a motion and an affidavit in support of motion to proceed in forma pauperis. Upon review of the petition, the court determines that the allegations set forth in the petition are not the proper subject matter of a petition for writ of habeas corpus and that the allegations are frivolous.

In this petition for writ of habeas corpus, the petitioner alleges that Neb.Rev.Stat. §28-304 is unconstitutional. This issue was previously raised and denied in Case # CI15-12. It is the conclusion of the court that these allegations are frivolous. Therefore, it is the determination of the court that the Petition for Writ of Habeas Corpus is frivolous and should be denied, and the motion to proceed in forma pauperis should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the "Petition for Writ of Habeas Corpus" and the "Motion to proceed in forma pauperis" are overruled and denied. Pursuant to Neb.Rev.Stat. §25-2301.02(1) the petitioner shall have thirty days to proceed with this action upon payment of fees and costs, or appeal.

1
LANCASTER COUNTY
2017 JAN 23 AM 10 00
CLERK OF THE
DISTRICT COURT

"APPENDIX B"



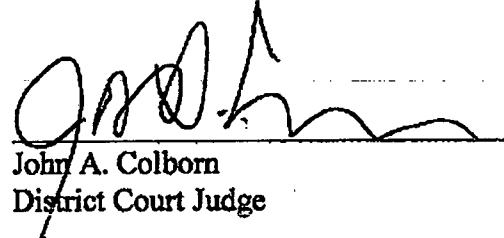
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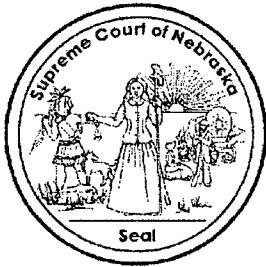
A copy of this order is sent to the Petitioner.

DATED this 20 day of January, 2017.

BY THE COURT:



John A. Colborn
District Court Judge



**CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS**

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June 1, 2018

Juan L. Leonor #54664
Penitentiary
PO Box 22500
Lincoln, NE 68542-2500

IN CASE OF: A-17-000153, Leonor v. Frakes

The following filing: Petition Appellant for Further Review
Filed on 04/23/18
Filed by appellant Juan L. Leonor #54664

Has been reviewed by the court and the following order entered:

Petition for further review denied.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

"APPENDIX C"

**Additional material
from this filing is
available in the
Clerk's Office.**