

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE WADE BLAIR,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
MICHAEL BUDGE,
Respondent.

No. 47172

FILED

MAY 17 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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 Bruce Wade Blair was convicted, pursuant to a jury verdict, of one count each of burglary and attempted sexual assault with the use of a deadly weapon and two counts of sexual assault with the use of a deadly weapon. He was sentenced to serve concurrent terms totaling 20 years to life in prison with the possibility of parole. This court dismissed Blair's direct appeal from the judgment of conviction and sentence.¹

Blair filed a postconviction petition for a writ of habeas corpus alleging ineffective assistance of trial and appellate counsel, prosecutorial misconduct at trial, and an improper jury instruction on reasonable doubt.

¹Blair v. State, Docket No. 21382 (Order Dismissing Appeal, June 27, 1991).

The petition was denied, and this court dismissed Blair's appeal of the denial.²

Blair then sought postconviction relief in federal court. He voluntarily withdrew his federal habeas petition to pursue unexhausted state claims. He filed in this court a petition for an extraordinary writ, seeking review of the unexhausted claims. This court denied the petition and advised Blair that the proper procedure was to file a habeas petition in the district court.³ Rather than doing so, in March 2004 Blair returned to federal court, raising new claims. He again voluntarily withdrew the petition to pursue unexhausted state claims. He filed a second habeas petition in the district court in June 2005. The district court granted the State's motion to dismiss the petition as procedurally barred. This appeal followed.

Blair's petition was filed approximately 14 years after this court issued its remittitur in his direct appeal. Thus, the petition was untimely.⁴ To overcome the bar to untimely petitions, Blair was required to demonstrate good cause for the delay and prejudice.⁵

²Blair v. State, Docket No. 25349 (Order Dismissing Appeal, November 7, 1996).

³Blair v. Crawford, Docket No. 33593 (Order Denying Petition, February 10, 1999).

⁴See NRS 34.726(1).

⁵See id.

The district court dismissed Blair's claims one (ineffective assistance of counsel), two (unconstitutional reasonable doubt instruction), four (ineffective assistance of appellate counsel), and seven (unconstitutional identification procedure) as time-barred and successive. We conclude the district court did not err. Blair cites but fails to explain how the law-of-the-case doctrine is relevant to overcoming a procedural bar. He argues good cause based on the ineffectiveness of his appellate and postconviction counsel, but good cause must be the result of "an impediment external to the defense,"⁶ and Blair was not entitled to effective assistance of postconviction counsel.⁷ This court has consistently applied procedural default rules, and Blair's argument to the contrary, even if true, would not establish good cause.⁸ Blair refers in passing to actual innocence and a fundamental miscarriage of justice, but does not make a sufficient showing that he is factually innocent.⁹

The district court also dismissed as untimely Blair's claim three, that his appellate counsel should not have been appointed to represent him due to a conflict of interest. Before trial, the Washoe

⁶Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001).

⁷McKague v. Whitley, 112 Nev. 159, 162, 912 P.2d 255, 257 (1996).

⁸See State v. District Court (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005).

⁹See Bousley v. U.S., 523 U.S. 614, 623-24 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

County Public Defender was removed as counsel due to a conflict. After trial, the Public Defender was appointed to represent Blair on appeal. We conclude the district court did not err in ruling that Blair failed to establish good cause and prejudice. Although good cause may be shown where the factual or legal basis for a claim was unavailable during the statutory time period,¹⁰ good cause does not exist when the claim was "reasonably available to the petitioner during the statutory time period."¹¹ Here, the order dismissing the Public Defender was part of the court record, and Blair knew or had the opportunity to learn who was representing him at trial and on appeal. He also had the opportunity to determine what, if any, conflict existed at the time of his direct appeal. Thus this claim was reasonably available to Blair during the statutory time period, and his failure to discover it does not constitute good cause for his failure to raise it in a timely fashion. Resort to postconviction counsel's alleged ineffectiveness is unavailing, since Blair did not have the right to effective assistance of postconviction counsel.¹² This court's order dismissing Blair's extraordinary writ petition and advising Blair that he could file a habeas petition in the district court did not absolve Blair of the duty to do so in a timely fashion. Blair cites but fails to explain how the law-of-the-case doctrine would assist him in establishing good cause.

¹⁰Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537.

¹¹See Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003).

¹²See McKague, 112 Nev. at 162, 912 P.2d at 257.

The district court also dismissed as untimely Blair's claim five, that the State improperly destroyed exculpatory fingerprint evidence. Blair claims that he only recently discovered that this evidence was destroyed in approximately 2000 and therefore could not timely file this claim. A petitioner learning of a claim that was not available to him during the statutory period must file his petition raising that claim within a reasonable time of learning of it.¹³ Blair's counsel learned of the destruction in 2001 and filed a federal habeas petition raising this claim in March 2004, but Blair did not file this claim in a state habeas petition until June 2005. This delay was not reasonable. Moreover, Blair has not explained how he was prejudiced by the destruction of evidence. Accordingly, we conclude the district court did not err in dismissing this claim.

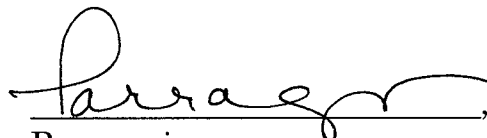
The district court also dismissed as untimely Blair's claim six, that the State failed to disclose the results of Blair's polygraph examination and statements by the victim describing her assailant. We conclude that the district court did not err. These claims were reasonably available within the statutory time period. Blair knew he had been given a polygraph examination and could have requested the results at any time. The State's disclosure of witness statements to the defense was the subject of pretrial motions. Any discrepancy between the victim's initial description of the suspect to police and her and the detective's trial

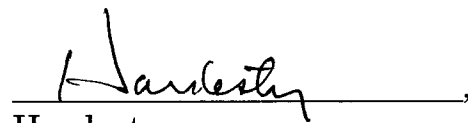
¹³See, e.g., Hathaway, 119 Nev. at 254-55, 71 P.3d at 507-08.

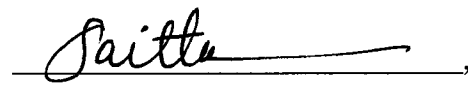
testimony about that description was subject to exploration on cross-examination at trial. Accordingly, we conclude the district court did not err in dismissing these claims as untimely.

Having reviewed Blair's contentions and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

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