

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEWAN BLACKBURN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54941

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingosa*
DEPUTY CLERK

ORDER OF AFFIRMANCE

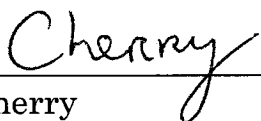
This is an appeal from a district court order denying appellant Dewan Blackburn's untimely, second post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.


Blackburn contends that the district court erred by finding that he failed to demonstrate good cause to excuse the filing of his untimely and successive post-conviction petition for a writ of habeas corpus. We disagree. Blackburn's petition was procedurally barred because the petition was filed more than three years after the remittitur had issued in his direct appeal, see NRS 34.726(1), and because he could have raised the issue presented on direct appeal or in his prior petition for a writ of habeas corpus, see NRS 34.810(1)(b). The district court properly determined that Blackburn failed to show good cause for his delay and for not raising his claim in his previous petition. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887-88, 34 P.3d 519, 538-39 (2001). Therefore, we conclude that the district court did not err by denying the petition as procedurally barred.


Blackburn also contends that the district court erred by determining that his claim of a fundamental miscarriage of justice was insufficient to overcome the procedural bar. This claim lacks merit because the district court properly determined that Blackburn failed to demonstrate that he was actually innocent of kidnapping. See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003) (a fundamental miscarriage of justice claim requires a petitioner to make a colorable claim of actual innocence); Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (“Actual innocence means factual innocence, not mere legal insufficiency.” (internal quotation marks and alteration omitted)); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (“[A] petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.”).

Having considered Blackburn’s contentions and concluded they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Law Offices of Cynthia Dustin, LLC
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk