

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK BENSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57175

FILED

NOV 17 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant filed his petition on March 19, 2009, five years after issuance of the remittitur on direct appeal on February 24, 2004. Benson v. State, Docket No. 40463 (Order of Affirmance, January 28, 2004). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ to the extent he raised claims new and different from those raised in his previous petition.¹ See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the

¹Benson v. State, Docket No. 44932 (Order of Affirmance, June 16, 2005).

State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice to the State. NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant argues that his Fourteenth Amendment equal protection rights were violated. Specifically, he contends that the Eighth Judicial District Court refused to appoint post-conviction counsel to assist appellant in litigating his first post-conviction petition, while a similarly situated litigant in any other judicial district in Nevada would have been more likely to receive the assistance of counsel. He further argues that had he received the assistance of appointed counsel, he would have presented all of his procedurally defaulted claims in a timely and cogent manner. We conclude that appellant's argument lacks merit. Appellant was not entitled to the appointment of post-conviction counsel as a fundamental right, nor has he established membership in a suspect class, indicating that his claim is subject to rational-basis review. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). The decision of the district court to deny appellant's request for counsel in this case is rationally related to the legitimate government interest of allocating scarce funds to the appointment of counsel in those cases where the need for post-conviction counsel is the highest. See NRS 34.750 (outlining factors for the district court to consider when determining whether to appoint post-conviction

counsel). Accordingly, appellant failed to demonstrate good cause to overcome the procedural bar.²

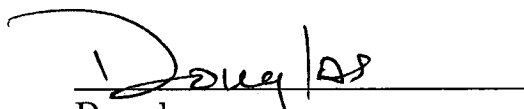
Appellant also argues that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. Appellant did not demonstrate a fundamental miscarriage of justice because he failed to demonstrate that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Accordingly, the district court did not err in denying this claim.


Finally, appellant fails to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Because more than five years had passed between the issuance of remittitur on direct appeal and the filing of the instant petition, and the State specifically pleaded laches, the burden shifted to appellant to overcome the presumption of prejudice to the State. NRS 34.800(2). The State was not required, as appellant implies, to affirmatively demonstrate that “the State has been prejudiced by any delay,” or that “transcripts, records, evidence, and witnesses are

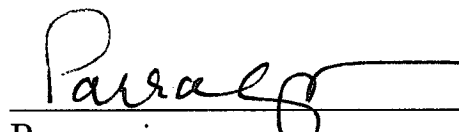
²Appellant’s claim that the ineffective assistance of trial and appellant counsel constituted good cause to excuse his procedural defects also lacked merit, as a claim of ineffective assistance of counsel that is in itself procedurally barred cannot establish good cause. See Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003).

unavailable.” Therefore, the district court did not err in denying appellant’s petition as procedurally barred pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Douglas

 J.
Hardesty

 J.
Parraguirre

cc: Hon. Jennifer P. Togliatti, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk