

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN DEAN COMSTOCK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58260

FILED

FEB 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Stephen Dean Comstock's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The district court summarily denied Comstock's petition after finding that he had previously raised three of the four grounds for relief in his first habeas petition and his failure to raise the remaining ground constituted an abuse of the writ. See NRS 34.745(4); NRS 34.810(2).¹ On appeal, Comstock contends that the district court erred by denying his petition because there was good cause to excuse the procedural bars and he made a colorable showing of actual innocence.

In his petition, Comstock argued that there was good cause to excuse the procedural bars because post-conviction counsel was ineffective for failing to present grounds one, two, and four on appeal from the order

¹We note that Comstock's petition was also untimely because it was filed nearly four years after the direct appeal remittitur issued. See NRS 34.726(1).

denying his first habeas petition and he would be prejudiced if they were not exhausted for purposes of federal review. However, because Comstock was not entitled to post-conviction counsel, ineffective assistance of post-conviction counsel does not constitute good cause to excuse the procedural bar. See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

Comstock also argued that there was good cause to excuse the procedural bars because appellate counsel was ineffective for failing to raise the sufficiency of the evidence ground (ground three) on direct appeal and he was prejudiced because it is a “constitutional issue that probably resulted in the conviction of one who is actually innocent.” However, because Comstock raised this ineffective assistance of appellate counsel claim in his first habeas petition and the district court denied the claim on its merits, we conclude that it is procedurally barred, see NRS 34.810(2), and does not constitute good cause to excuse the procedural bars to this petition, see Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Comstock further argued that he was actually innocent because there was insufficient evidence to support his conviction. However, Comstock has not established his factual innocence, see Bousley v. United States, 523 U.S. 614, 623 (1998) (“actual innocence’ means factual innocence, not mere legal insufficiency”), or demonstrated that, “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him,” id. (internal quotation marks omitted); therefore, he has not shown that he has suffered a fundamental miscarriage of justice, see Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Having determined that Comstock failed to demonstrate good cause or a fundamental miscarriage of justice sufficient to overcome the procedural bars, we conclude that the district court did not err in summarily denying Comstock's successive and untimely petition, see State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory), and we ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Brent T. Adams, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²Because Comstock's habeas petition was procedurally barred, we decline to reach the merits of the claims raised in the petition.