

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTEBAN HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60246

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Appellant filed his petition on November 28, 2011, approximately 12 years after entry of the judgment of conviction on October 12, 1999. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed three post-conviction petitions for a writ of habeas corpus,²

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²See Hernandez v. State, Docket No. 40117 (Order of Affirmance, June 25, 2003); Hernandez v. State, Docket No. 36916 (Order of *continued on next page...*

and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. See NRS 34.810(1)(b)(2); 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(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of laches. NRS 34.800(2). Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally barred for the reasons discussed below.


In an attempt to excuse his procedural defects, appellant argued that he was actually innocent and that newly discovered evidence, in the form of a transcript of his plea canvass, which he contended was sealed, demonstrated that his plea was invalid. Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was actually innocent. As the transcripts were available as part of the record on appeal since appellant's conviction, they could not be considered new evidence. See House v. Bell, 547 U.S. 518, 537 (2006) (opining that actual innocence exception requires new evidence demonstrating innocence); Schlup v. Delo, 513 U.S. 298, 316 (1995) (same). Further, the transcripts, which appellant contended demonstrated that his


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Affirmance, November 15, 2001); Hernandez v. State, Docket No. 35462 (Order of Affirmance, November 21, 2000).

guilty plea was legally invalid, were not sufficient to demonstrate actual innocence. See Bousley v. United States, 523 U.S. 614, 623-24 (1998) (“It is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency.” (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992))).³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

³To the extent that appellant asserted that the purported sealing of his transcripts provides good cause for failing to raise this claim in an earlier petition, we conclude that he failed to demonstrate good cause as the record on appeal contains the transcripts he contended were sealed. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (stating that a claim reasonably available during the statutory time period would not constitute good cause for delay in filing petition).

⁴We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jerome T. Tao, District Judge
Esteban Hernandez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk