


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MILTON DAVID PLUMMER,
Appellant,
vs.
RENEE BAKER, WARDEN, ELY STATE
PRISON,
Respondent.

No. 67310

FILED

JUN 16 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Appellant Milton David Plummer filed his petition on September 11, 2012, more than nine years after issuance of the remittitur on direct appeal on August 5, 2003. *Plummer v. State*, Docket Nos. 40170 and 40185 (Order of Affirmance, July 9, 2003). Thus, Plummer's petition was untimely filed. *See* NRS 34.726(1). Moreover, Plummer's petition was successive because he had previously filed two post-conviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude 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).

previous petitions.² See NRS 34.810(2). Plummer's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

First, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), Plummer claimed ineffective assistance of post-conviction counsel excused his procedural defects. Ineffective assistance of post-conviction counsel is not good cause in the instant case because the appointment of counsel in the prior post-conviction proceedings was not statutorily or constitutionally required. See *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Further, the Nevada Supreme Court held *Martinez* does not apply to Nevada's statutory post-conviction procedures, see *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014), and thus, *Martinez* does not provide good cause for this late and successive petition.

Second, Plummer asserted the procedural bars did not apply because the district court lacked subject matter jurisdiction to convict him. Plummer asserted the district court lacked jurisdiction to convict him because Plummer did not enter a knowing and intelligent guilty plea. Plummer's claim failed to overcome the procedural bars because his claim did not implicate the jurisdiction of the courts. See Nev. Const. art. 6, § 6;

²*Plummer v. State*, Docket Nos. 48910 and 48911 (Orders of Affirmance, August 14, 2007); *Plummer v. State*, Docket Nos. 44619 and 44621 (Order of Affirmance, June 14, 2005).


NRS 171.010. In addition, Plummer failed to demonstrate good cause because this claim was reasonably available to be raised in a timely petition. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

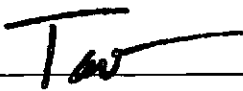
Third, Plummer appeared to assert good cause due to his pursuit of federal court relief and because he had to exhaust state court remedies in order to proceed in federal court. Plummer failed to demonstrate that his pursuit of federal court relief provided an impediment external to the defense that should excuse the procedural bars. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506; *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. ___, ___, n.2, 275 P.3d 91, 95 n.2 (2012).

Fourth, Plummer asserted he is actually innocent because the State did not possess sufficient evidence to prove he committed the offenses and because the State coerced him into pleading guilty. These claims were reasonably available to be raised in a timely petition. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show “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)). Plummer’s claims failed to meet that narrow standard. We

therefore conclude the district court did not err in dismissing Plummer's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Scott N. Freeman, District Judge
Milton David Plummer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³We have reviewed all documents Plummer has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Plummer has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.