

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY L. FRANKLIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67755

**FILED**

AUG 04 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Jeffrey Franklin filed his petition on November 21, 2014, more than five years after issuance of the remittitur on direct appeal on January 22, 2008. *Franklin v. State*, Docket No. 48848 (Order of Affirmance, December 27, 2007). Thus, Franklin's petition was untimely filed. See NRS 34.726(1). Moreover, Franklin's petition was successive because he had previously filed four 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 previous petitions.<sup>2</sup> See NRS

<sup>1</sup>This 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 *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>*Franklin v. State*, Docket No. 67295 (Order of Affirmance, May 20, 2015); *Franklin v. State*, Docket No. 65231 (Order of Affirmance, July 23, 2014); *Franklin v. State*, Docket No. 63352 (Order of Affirmance, continued on next page . . .

15-900858

34.810(1)(b)(2); NRS 34.810(2). Franklin'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, Franklin was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, Franklin claimed he had good cause because he was illegally sentenced as a habitual criminal. Franklin's challenge to his adjudication as a habitual criminal did not constitute good cause because it 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). Moreover, Franklin failed to demonstrate his sentence was facially illegal or the district court lacked jurisdiction. See *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

Second, Franklin claimed appellate and post-conviction counsels' ineffectiveness provided good cause to excuse his procedural defects. A procedurally barred claim of ineffective assistance of appellate counsel cannot constitute cause for additional claims of ineffective assistance of counsel. See *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Franklin's claim of ineffective assistance of appellate counsel was procedurally barred because it was reasonably available to be raised in a timely petition, and therefore, did not constitute cause for this untimely and successive petition.

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... continued


December 12, 2013); *Franklin v. State*, Docket No. 52422 (Order of Affirmance, December 11, 2009).


In addition, Franklin was not entitled to the effective assistance of post-conviction counsel, *see McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), and therefore, his claim of ineffective assistance of post-conviction counsel did not demonstrate good cause. *See Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 871-72 (2014) (explaining post-conviction counsel's performance does not constitute good cause to excuse the procedural bars unless the appointment of post-conviction counsel was mandated by statute).

Third, Franklin appeared to claim federal equitable tolling standards should excuse the procedural bars. However, the Nevada Supreme Court has rejected federal tolling standards. *See id.* at \_\_\_, 331 P.3d at 874. Therefore, Franklin did not demonstrate this claim constituted good cause.

Finally, Franklin failed to overcome the presumption of prejudice to the State. Therefore, the district court properly denied the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Jessie Elizabeth Walsh, District Judge  
Jeffrey L. Franklin  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk