


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN H. ROSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68220

FILED

FEB 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Appellant John Rosky filed his petition on November 21, 2014, more than 6 years after issuance of the remittitur on direct appeal on March 11, 2008. *Rosky v. State*, Docket No. 47407 (Order of Affirmance, January 24, 2008). Thus, Rosky's petition was untimely filed. See NRS 34.726(1). Moreover, Rosky's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Rosky'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, Rosky was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).


In an attempt to demonstrate good cause to overcome the procedural bars, Rosky argued he discovered his claims raised in the instant petition in 2013. He then asked his postconviction counsel to file a second petition raising these claims. Postconviction counsel declined to do so.

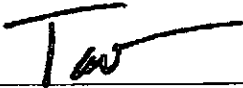
Rosky failed to demonstrate good cause. The legal bases for his new claims were reasonably available to be raised in a timely petition and Rosky failed to demonstrate an impediment external to the defense prevented him from complying with the procedural bars. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, to the extent Rosky claimed counsel was ineffective for refusing to file a second petition, Rosky's claim lacked merit because he was not entitled to the effective assistance of postconviction counsel. 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); see also *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014).


²*Rosky v. State*, Docket No. 60145 (Order of Affirmance, June 12, 2013).

Rosky also failed to overcome the presumption of prejudice to the State because he failed to demonstrate any fundamental miscarriage of justice to overcome the procedural bars. *See Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elliott A. Sattler, District Judge
John H. Rosky
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³We have reviewed all documents Rosky has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Rosky 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.