

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARRY BAILEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69799

FILED

SEP 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Larry Bailey filed his petition on September 18, 2015, more than 5 years after issuance of the remittitur on direct appeal on December 29, 2009. *Bailey v. State*, Docket No. 52444 (Order of Affirmance, December 4, 2009). Thus, Bailey's petition was untimely filed. See NRS 34.726(1). Bailey's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.* Moreover, because the State specifically pleaded laches, Bailey was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Bailey argues the district court erred by denying his petition because he is actually innocent. He claims the district court gave an incorrect instruction at trial regarding aiding and abetting, which may

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

have allowed the jury to convict him when he did not have the specific intent to commit first-degree murder and attempted murder. In order to demonstrate a fundamental miscarriage of justice to overcome the procedural bar, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Bailey's jury instruction claim relates to legal error rather than factual error. Further, the Nevada Supreme Court already decided there was sufficient evidence "for a rational juror to conclude that the State had proved the intent elements of both attempted murder and first-degree murder (under the theories of aiding and abetting, see *Sharma v. State*, 118 Nev. 648, 656, 56 P.3d 868, 872-73 (2002), and vicarious coconspirator liability, see *Bolden v. State*, 121 Nev. 908, 922-23, 124 P.3d 191, 201 (2005))." *Bailey v. State*, Docket No. 52444 (Order of Affirmance, December 4, 2009), at 4. Therefore, Bailey failed to demonstrate he was actually innocent.


Bailey also claimed he had good cause because he was unable to file a timely petition because of an impediment external to the defense. Specifically, he claimed he received bad information from the law library regarding where he needed to file his petition and then received incorrect advice regarding an untimely petition. Bailey failed to demonstrate an impediment external to the defense prevented him from filing a timely petition. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding lack of legal knowledge and relying on inmate law clerks do not constitute an impediment external to the defense). Further, even were the bad information and advice to be considered an

impediment external to the defense, Bailey failed to demonstrate good cause for the entire length of his delay in filing the instant petition. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Therefore, the district court did not err in denying this good cause claim.

Bailey also failed to overcome the presumption of prejudice to the State. Accordingly, we conclude the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Larry Bailey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk