

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK GOURLEY, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70242

FILED

OCT 19 2016

ELIZABETH A. BROWN
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; Jennifer P. Togliatti, Judge.

Appellant Frank Gourley, II filed his petition on January 13, 2016, almost 14 years after entry of the judgment of conviction on February 4, 2002.² Thus, Gourley's petition was untimely filed. See NRS 34.726(1). Gourley'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, Gourley was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, Gourley argues he has good cause because he suffers from mental illness. However, this issue did not demonstrate there was

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

²Gourley did not pursue a direct appeal.

an impediment external to the defense preventing Gourley from complying with the procedural bars. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding petitioner's claim of organic brain damage, borderline mental retardation and reliance on the assistance of an inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive postconviction petition).

Second, Gourley argues the district court erred in declining to appoint postconviction counsel to represent him. The appointment of postconviction counsel was discretionary in this matter. *See NRS 34.750(1)*. After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel.


Third, Gourley argues the district court erred by denying his petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations that are not belied by the record, and if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). The district court concluded Gourley's claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper. Therefore, the district court properly denied the petition without conducting an evidentiary hearing.

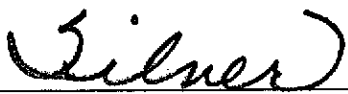
Fourth, Gourley argues the district court erred by concluding the petition was barred by laches. However, Gourley failed to overcome the rebuttable presumption of prejudice to the State because he did not

demonstrate a fundamental miscarriage of justice has occurred. See NRS 34.800(1)(b). Therefore, 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. Jennifer P. Togliatti, District Judge
Frank Gourley, II
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk