

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REYNALDO J. AGAVO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70008

FILED

JAN 19 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Reynaldo J. Agavo appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Agavo filed his petition on October 24, 2014, more than four years after issuance of the remittitur on direct appeal on November 3, 2009. *Agavo v. State*, Docket No. 48444 (Order of Affirmance, May 29, 2009). Thus, Agavo's petition was untimely filed. *See* NRS 34.726(1). Moreover, Agavo'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 from those raised in his previous petition.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Agavo's petition was procedurally barred absent a demonstration of good cause

¹*Agavo v. State*, Docket No. 60300 (Order of Affirmance, May 13, 2013).

and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Agavo argued he has good cause because the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264, 269 (1959) by withholding evidence related to payments made to the victim's mother and failing to correct the mother's allegedly false testimony regarding not receiving money in exchange for her testimony.²

Agavo asserted that in 2014, he discovered the State had made payments to the victim's mother and only discovered such payments due to newspaper articles relating to a witness payment program conducted by the Clark County District Attorney's Office. Agavo acknowledged NRS 50.225 permits certain witnesses to receive fees related to their costs associated with testifying and that the victim's mother would qualify for such fees, but asserted any fee payments should have been disclosed to the defense and it is likely the State paid the victim's mother more than she would have been legally entitled to receive. Agavo further argues this information would have been of particular importance for impeachment of the victim's mother, because she testified

²The challenged testimony occurred when the victim's mother, through an interpreter, testified that she had not received money for testifying and further stated the only thing she received was "[j]ust the help for being here" and "the help they're giving me in my daughter's case, because if not this never would have been brought to light."

at trial that she had not received a financial benefit in exchange for testifying.

“To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.” *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012) (internal quotation marks omitted). When a claim alleging withheld exculpatory evidence is raised in an untimely postconviction petition for a writ of habeas corpus, “establishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense, and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely.” *Id.* (citing *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003)). “We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo.” *Id.*

The district court concluded this information was not withheld by the State because the payments occurred pursuant to NRS 50.225, Agavo had notice pursuant to that statute of the witness fees the victim's mother could receive, and the victim's mother was not paid more than she was legally entitled to receive. Notably, Agavo also utilized this statute to provide fees for one of his witnesses, demonstrating he was aware of the witness fee program, yet did not investigate or request information regarding the State's use of such a program for more than four years after

the issuance of the remittitur on the direct appeal and approximately eight years after the conclusion of the trial.

Given Agavo's knowledge and use of this program, he failed to demonstrate an impediment external to the defense prevented him from discovering that the State also used the witness fee program because this information could have been reasonably discovered by the defense with sufficient time to raise any related claims in his prior petition. *See Rippo v. State*, 113 Nev. 1239, 1258, 946 P.2d 1017, 1029 (1997) (explaining that a statement was not withheld because the defense could have inspected the State's case files and discovered the statement itself); *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) ("*Brady* does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense."); *see also United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) ("Since suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails." (internal citation omitted)). Because Agavo could reasonably have discovered this information in a timely manner, he failed to demonstrate an impediment external to the defense prevented him from complying with the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, we conclude the district court properly concluded Agavo did not demonstrate good cause sufficient to overcome the procedural bars.

We further conclude the district court properly concluded this information was not material to his defense, and therefore, Agavo did not

demonstrate actual prejudice. Because Agavo did not make a specific request for this information prior to trial, he must demonstrate a reasonable probability the result of his trial would have been different had the fees paid to the victim's mother been disclosed, see *State v. Bennett*, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003), or that there is any reasonable likelihood the allegedly false portions of the victim's mother's testimony could have affected the jury's verdict, *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

A review of the trial record reveals the child victim, who was eight when the abuse occurred, made multiple statements to multiple persons regarding the sexual abuse and her mother was not the only source for testimony regarding the abuse allegations. Those persons included a senior investigator for child protective services and a police officer, who both testified they had been trained in interview techniques with respect to child sexual abuse victims. The child victim also discussed the abuse allegations with a nurse. Notably, the child victim herself also testified at trial and asserted Agavo had touched her genitals and forced her to touch his. Accordingly, even excluding the victim's mother's testimony, there was significant evidence presented at trial regarding the victim's allegations.

We also note the district court reviewed the evidence submitted by Agavo regarding the witness fees paid to the victim's mother and concluded the victim's mother was not paid in excess of that authorized by NRS 50.225. The district court's conclusion is further supported by Agavo's petition, in which he asserted an investigator

interviewed the victim's mother during the postconviction proceedings and she acknowledged receiving reimbursements for food and mileage; the type of reimbursement provided for by NRS 50.225.³ The district court's factual findings with respect to the witness fees the victim's mother received are entitled to deference and we conclude substantial evidence supports the district court's conclusion in this regard.

As the witness fees at issue in this matter are authorized pursuant to NRS 50.225, the persuasive value of the fee evidence is lessened. Recognizing that "[t]he materiality test is a high bar," *Huebler*, 128 Nev. at 203, 275 P.3d at 99, and given multiple witnesses who testified regarding the child victim's statements concerning the abuse, the victim's own testimony, and the unpersuasive nature of the witness fee evidence, we conclude Agavo fails to demonstrate a reasonable probability of a different outcome at trial had the State disclosed the witness fees to the victim's mother. In addition, given the unpersuasive nature of the payment evidence and the brief statement the mother made where she denied receiving money in exchange for her testimony, Agavo does not


³Agavo's acknowledgment that he questioned the victim's mother regarding the witness fees and she answered questions regarding those fees further demonstrates that the information regarding those fees could have been reasonably discovered by Agavo by simply interviewing the victim's mother in a timely manner. Accordingly, such information was not withheld by the State and an impediment external to the defense did not prevent him from raising any related claims in his prior, timely-filed petition. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506.


demonstrate that there is any reasonable likelihood the allegedly false portions of the victim's mother's testimony could have affected the jury's verdict.

Therefore, we conclude the district court properly concluded Agavo failed to demonstrate good cause and actual prejudice sufficient to overcome the procedural bars. Because the district court properly concluded the petition was procedurally barred and without good cause, the district court did not err in declining to conduct an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). Accordingly, the district court properly denied the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kerry Louise Earley, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk