

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER BARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70642

FILED

MAR 23 2017

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

ORDER OF AFFIRMANCE

Appellant Christopher Barker appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Barker argues the district court erred in denying his petition as procedurally barred. Barker filed his petition on April 8, 2016, more than 17 years after entry of the judgment of conviction on November 13, 1998.² Thus, Barker's petition was untimely filed. *See* NRS 34.726(1). Barker'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, Barker was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

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

²No direct appeal was taken.

First, Barker argued he had good cause because he was housed in the prison's mental health care unit years ago and because he recently learned how to pursue postconviction relief. However, Barker's mental health issues, prior housing in the mental health care unit, and lack of legal knowledge did not constitute an impediment external to the defense that prevented him from complying with the procedural time bar.³ *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 assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive postconviction petition).

Second, Barker argued he is actually innocent because he had consensual sex with the victim while they were both intoxicated. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*,

³Barker also appeared to argue he had good cause pursuant to application of *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012). However, the Nevada Supreme Court has held *Martinez* does not apply to Nevada's statutory postconviction procedures, *see Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 87172 (2014), and thus, *Martinez* did not provide good cause for this untimely petition.

513 U.S. 298, 327 (1995)). Barker's claims failed to meet that narrow standard because they were not based on new evidence. Therefore, the district court did not err in dismissing Barker's petition as procedurally barred.

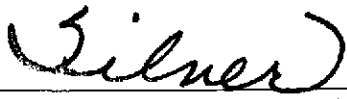
Next, Barker argues the district court erred in dismissing the petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations that are not belied by the record, and if true, would entitle him to relief. *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 Barker'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 dismissed the petition without conducting an evidentiary hearing.

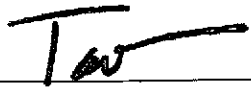
Next, Barker appears to argue the State improperly filed a motion to dismiss his petition, rather than an answer or a response. Barker appears to assert the district court should not have considered the petition without a proper response from the State. However, NRS 34.750(4) discusses the procedure when the State files a motion to dismiss, and Barker fails to demonstrate the district court erred in considering whether Barker was entitled to postconviction relief following the submission of the motion to dismiss.

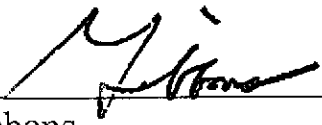
Finally, Barker appears to argue the district court erred in declining to appoint postconviction counsel to represent him. The appointment of postconviction counsel was discretionary in this matter.

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. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Christopher Barker
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk