

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MOISES BARRAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70277

FILED

FEB 23 2017

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

ORDER OF AFFIRMANCE

Appellant Moises Barragan appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and an amended petition. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Barragan argues the district court erred in denying his petition as procedurally barred. Barragan filed his petition on June 26, 2013, more than three years after issuance of the remittitur on direct appeal on June 2, 2010.¹ *Barragan v. State*, Docket No. 53803 (Order of Affirmance, May 7, 2010). Thus, Barragan's petition was untimely filed. See NRS 34.726(1). Barragan's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.*

Barragan argued he had cause for the delay because his appellate counsel did not communicate with him following completion of

¹Barragan also filed an amended petition in the district court on November 18, 2015.

the direct appeal. Barragan also asserted he believed appellate counsel would file a postconviction petition, and his appellate counsel improperly failed to pursue postconviction relief or otherwise inform Barragan regarding postconviction procedures. A review of the record reveals Barragan is not entitled to relief. In April of 2011, Barragan mailed a letter in which he asserted he knew he had to file a postconviction petition for a writ of habeas corpus soon and his appellate counsel had not filed a petition. Despite Barragan's own acknowledgment a petition had to be filed in 2011, he waited until 2013 to file a petition. Accordingly, Barragan was aware he needed to pursue postconviction relief in a timely manner, yet he chose not to do so. Under these circumstances, Barragan did not demonstrate an impediment external to the defense prevented him from filing a petition in a timely manner. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

Further, Barragan's claims of ineffective assistance of appellate counsel are procedurally barred because they were reasonably available to be raised at an earlier time, and therefore, cannot constitute cause for additional procedurally barred claims. *See id.* at 252, 71 P.3d at 506 ("[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally barred."). To the extent Barragan claimed his counsel was ineffective during the postconviction proceedings and thus constituted good cause for this petition, that assertion also lacked merit as Barragan had no statutory right to postconviction counsel, and therefore, had no right to the effective assistance of counsel during the postconviction proceedings. *See Crump v. Warden*, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997); *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014); *see also Miranda*

v. Castro, 292 F.3d 1063, 1066-68 (9th Cir. 2002) (explaining a defendant has no right to advice regarding habeas relief from direct appeal counsel).


Second, Barragan argued he had cause for the delay because he has limited legal knowledge and is not proficient in the English language. Barragan's limited legal knowledge is not an impediment external to the defense which prevented him from complying with the procedural time bar. *See generally Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of an inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive postconviction petition). In addition, Barragan's alleged language barrier does not provide cause for the delay in this case as Barragan did not attempt to demonstrate he was unable to procure either legal materials in his own language or translation assistance during the timely filing period despite his diligent efforts. *See Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996) ("an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense").


Third, Barragan argued imposition of the time bar to this petition would not further the legislative intent of NRS 34.726(1), which Barragan asserted was to bar successive petitions which clogged the court system. However, requiring a petitioner to pursue postconviction relief in a timely manner "helps to ensure that claims are raised before evidence is lost or memories fade." *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). As Barragan did not timely pursue postconviction relief and it is mandatory for the district court to apply the procedural bars, the

district court properly applied NRS 34.726(1) and denied the petition as procedurally barred. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Fourth, Barragan argues the procedural time bar should not apply because failure to consider his claims on the merits would result in a fundamental miscarriage of justice. 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*, 513 U.S. 298, 327 (1995)). Barragan’s claim failed to meet that narrow standard. Therefore, the district court did not err in denying Barragan’s petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Gibbons

²The Honorable Jerome T. Tao, Judge, did not participate in the decision in this matter.

cc: Hon. Eric Johnson, District Judge
Law Office of Lisa Rasmussen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk