

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN LEWIS WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71115

FILED

MAY 17 2017

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN
CLERK OF DISTRICT COURT
BY *Amulca*
DEPUTY CLERK

Shawn Lewis White appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

White filed his petition on May 4, 2016, almost ten years after issuance of the remittitur on direct appeal on June 21, 2006. *White v. State*, Docket Nos. 46518 and 46521 (Order of Affirmance, May 26, 2006). Thus, White's petition was untimely filed. *See* NRS 34.726(1). Moreover, White's petition was successive because he had previously filed two postconviction petitions 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 petitions.² *See* NRS 34.810(2). White's petition was procedurally barred absent a demonstration of good cause and actual

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

²*White v. State*, Docket No. 57220 (Order of Affirmance, November 18, 2011). White also filed a postconviction petition for a writ of habeas corpus in the district court on August 3, 2006, but he did not appeal the denial of that petition.

prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, White was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

First, White appeared to claim he had good cause because the Nevada Supreme Court disapproved of the natural-and-probable-consequences doctrine regarding the aiding-and-abetting theory of liability. The Nevada Supreme Court reached that conclusion in *Sharma v. State*, 118 Nev. 648, 654, 56 P.3d 868, 871-72 (2002), and claims stemming from the *Sharma* decision were reasonably available to be raised in White's first petition. White provided no explanation for his delay in raising this claim, and therefore, he did not demonstrate an impediment external to the defense prevented him from raising this claim in his first petition. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Second, White argued he had good cause due to the ineffective assistance of counsel during the guilty plea proceedings. "In order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." *Id.* White's ineffective-assistance-of-counsel claim was itself procedurally barred because it was raised in an untimely and successive petition. Because his claim of ineffective assistance of counsel was itself procedurally barred, White failed to demonstrate it constituted good cause for his additional claims.


Third, White argued he had good cause due to the failure to appoint postconviction counsel to represent him for his first postconviction petition. However, the appointment of postconviction counsel in this matter was not statutorily or constitutionally required. See *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014); *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). Because the appointment of postconviction counsel was not required in this matter, the

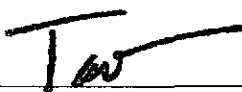
failure to appoint postconviction counsel did not provide good cause for this late and successive petition.

Fourth, White argued the procedural bars should not apply because failure to consider his claims on the merits would result in a fundamental miscarriage of justice because he is actually innocent. White supported his actual-innocence claim with assertions that he suffered from the ineffective assistance of counsel.

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)). White’s claim failed to meet that narrow standard because it was not based upon an assertion of factual innocence. Therefore, the district court did not err in denying White’s petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Silver, C.J.


Tao, J.


Gibbons, J.

cc: Hon. Douglas Smith, District Judge
Shawn Lewis White
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk