

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71025

**FILED**

JUL 12 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kevin Devon Sutton appeals from a district court order denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Sutton claims the district court erred by denying his petition as procedurally barred. We disagree.

Sutton filed his petition on May 18, 2016, nearly 15 years after issuance of the remittitur on direct appeal on July 9, 2001. *See Sutton v. State*, Docket No. 34165 (Order of Affirmance, June 11, 2001). Thus, Sutton's petition was untimely filed. *See* NRS 34.726(1). Moreover, Sutton's petition was successive because he had previously filed numerous postconviction petitions for a writ of habeas corpus.<sup>2</sup> *See* NRS 34.810(2).

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

<sup>2</sup>*See Sutton v. State*, Docket No. 67584 (Order of Affirmance, December 18, 2015); *Sutton v. State*, Docket No. 65121 (Order of Affirmance, September 18, 2014); *Sutton v. State*, Docket No. 64244 (Order of Affirmance, June 11, 2014); *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010); *Sutton v. State*, Docket No. 40477 (Order of Affirmance, July 8, 2004).

Sutton's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Sutton was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).


Sutton claimed he had good cause to overcome the procedural bars because, pursuant to the law change that occurred in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000) regarding jury instructions for first-degree murder, he is actually innocent. Sutton asserted there was a constitutional error in his plea colloquy because the district court did not inform him, if he went to trial, the State would have to prove he killed the victim in a willful, deliberate, and premeditated manner in order to convict him of first-degree murder. He further asserted he is factually innocent because the evidence simply shows he shot the victim and the victim died; the facts do not demonstrate Sutton attempted to murder the victim.


The district court concluded Sutton's claim of actual innocence was essentially a challenge to the validity of his plea and because the Nevada Supreme Court had previously ruled Sutton's plea was knowingly and voluntarily entered, see *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010), Sutton's challenge to the validity of the plea was precluded by the law of the case, see *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798-99 (1975). The court further concluded neither *Byford* nor *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008) established good cause for the untimely filing of the petition and found, even if these cases could establish good cause, Sutton did not file this petition within one year of either of these cases and he did not demonstrate good cause to explain the total length of the delay. The district also concluded Sutton

failed to overcome the procedural bars because he did not provide any new evidence of his innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) (to demonstrate actual innocence, a petitioner would have to establish that “it is more likely than not that no reasonable juror would have convicted him” (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995))); *Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 875 (2014). Finally, the district court found Sutton failed to overcome the presumption of prejudice to the State.

We conclude the district court did not err by finding Sutton failed to overcome the procedural bars and denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Susan Johnson, District Judge  
Kevin Devon Sutton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>3</sup>We conclude the district court did not abuse its discretion by denying Sutton’s request for the appointment of counsel. *See NRS 34.750(1); Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391 P.3d 760, 760-61 (2017).