

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL L. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73133

FILED

APR 11 2018

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

ORDER OF AFFIRMANCE

Michael L. Smith appeals from a district court order denying the petition for a writ of habeas corpus he filed on August 30, 2016, and the supplemental petition for a writ of habeas corpus he filed on November 30, 2016. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Smith's petition was untimely because it was filed more than five years after the remittitur on direct appeal was issued on February 25, 2011,¹ and it was successive because his previous postconviction petition for a writ of habeas corpus was denied on the merits.² See NRS 34.726(1); NRS 34.810(2). Consequently, Smith'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, Smith was required to overcome the rebuttable presumption of prejudice to the State. See NRS 3.800(2).

¹See *Smith v. State*, Docket No. 54397 (Order of Affirmance, January 31, 2011).

²See *Smith v. State*, Docket No. 60388 (Order of Affirmance, December 12, 2012).

First, Smith claimed he had good cause because the State improperly interfered with the motion for postconviction counsel he filed with his first postconviction habeas petition. However, Smith failed to explain how the State's arguments against granting the motion were improper. Moreover, Smith failed to explain why the State's "interference" prevented him from filing the instant petition for more than five years. Therefore, Smith failed to demonstrate good cause to overcome the procedural bars to his petition. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (petitioner bears the burden of pleading and proving specific facts that establish good cause and prejudice to overcome the procedural bars).

Second, Smith claimed he had good cause because the district court erred by denying the motion for postconviction counsel he filed with his first postconviction habeas petition. However, Smith was not entitled to postconviction counsel and he failed to demonstrate the district court abused its discretion by denying his motion for postconviction counsel. *See NRS 34.750(1); Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 762 (2017); *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). Moreover, Smith failed to explain why the district court's denial of his motion prevented him from filing the instant petition for more than five years. Therefore, Smith failed to demonstrate good cause to overcome the procedural bars to his petition. *See Bennett*, 119 Nev. at 599, 81 P.3d at 8.

Third, Smith claimed he had good cause because the State failed to disclose exculpatory evidence regarding its plea agreement with a material witness and misrepresented the terms of that agreement to the jury. To this end, Smith argued the State would not have recommended probation for the witness and the district court would not have granted


probation for the witness unless there was some further, undisclosed agreement with the witness. However, Smith did not establish that the State withheld evidence of a further plea agreement with the witness, let alone the existence of such evidence. *See generally State v. Huebler*, 128 Nev. 192, 197-98, 275 P.3d 91, 94-95 (2012) (discussing the relationship between good cause for an untimely habeas petition and the test for a claim raised under *Brady v. Maryland*, 373 U.S. 83 (1963)). Moreover, the basis for Smith's argument had been available since the witness's sentencing hearing in 2010, and Smith did not explain why he could not have raised this argument in his previous petition. Therefore, Smith failed to demonstrate good cause to overcome the procedural bars to his petition. *See Bennett*, 119 Nev. at 599, 81 P.3d at 8.

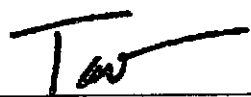
Fourth, Smith claimed laches does not apply because the State did not make a sufficient showing of prejudice and any delay in filing his petition was reasonable in light of the circumstances of his case. However, it was Smith's burden to rebut the presumption of prejudice to the State. *See* NRS 34.800(2). Smith failed to show his petition was based on grounds he "could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred; or . . . that a fundamental miscarriage of justice [had] occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1). Therefore, Smith failed to overcome the procedural bar to his petition.

Smith also argues the district court's decision to adopt the State's proposed order verbatim violated his constitutional right to a neutral and detached magistrate. However, the record demonstrates the district court announced its findings of fact and conclusions of law "to the parties with sufficient specificity to provide guidance to the prevailing party

in drafting a proposed order,” *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007), and Smith has not provided us with any “reason to doubt that the findings issued by the District Court represent the judge’s own considered conclusions,” *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Therefore, we conclude the district court did not err by adopting the State’s draft order verbatim. *See id.* at 572-73.

Having concluded Smith is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk