

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY MERWIN STONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72141

FILED

FEB 13 2018

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

ORDER OF AFFIRMANCE

Randy Merwin Stone appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on September 16, 2016.¹ Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Stone's petition was untimely because it was filed more than ten years after the remittitur on direct appeal was issued on January 17, 2006,² and it was successive because he had previously filed three postconviction petitions for writs of habeas corpus.³ See NRS 34.726(1);

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

²See *Stone v. State*, Docket No. 42738 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, December 20, 2005).

³See *Stone v. State*, Docket No. 63380 (Order of Affirmance, September 16, 2014); *Stone v. State*, Docket No. 48710 (Order of Affirmance and Directing Correction of Judgment of Conviction, February 8, 2008).

NRS 34.810(2). Consequently, Stone's petition was procedurally barred absent a demonstration of good cause and actual prejudice or that failure to consider his claims would result in a fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(3); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Moreover, because the State specifically plead laches, Stone was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

First, Stone claimed he had good cause to overcome the procedural bars because prison officials and law clerks withheld information and denied him access to the legal materials necessary to bring forth his claims. However, the factual basis for Stone's claims was reasonably available before Stone filed his first postconviction habeas petition; therefore, he failed to demonstrate good cause to excuse the procedural bars to his petition. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (explaining that good cause may be demonstrated when the factual basis for a claim was not reasonably available to be raised in a timely petition).

Second, Stone claimed he had good cause to overcome the procedural bars because he was not served with a copy of the amended judgment of conviction until July 29, 2016, and his postconviction claims

Stone did not pursue an appeal from the district court order denying his second petition for a writ of habeas corpus.

relate to the clerical error the amended judgment of conviction corrected.⁴ However, Stone's postconviction claims challenge the pretrial withdrawal of his guilty plea and these claims could have been raised before the judgment of conviction was amended; therefore, he has not demonstrated good cause to overcome the procedural bars to his petition. *See Sullivan v. State*, 120 Nev. 537, 540-41, 96 P.3d 761, 763-64 (2004).

Third, Stone claimed he had good cause to overcome the procedural bars because two of his claims challenged the jurisdiction of the district court. However, Stone's claims do not implicate the jurisdiction of the district court; therefore, he has not demonstrated good cause to overcome the procedural bars to his petition. *See Nev. Const. art. 6, § 6; NRS 171.010; United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[T]he term jurisdiction means the court's statutory or constitutional *power* to adjudicate the case." (internal quotation marks omitted)).

Fourth, Stone claimed the procedural bars should not apply because he is actually innocent of his sentence. A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. However, "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[A] claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v.*


⁴The original judgment of conviction incorrectly stated Stone was convicted pursuant to a guilty plea.

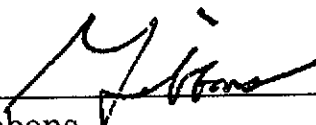
Delo, 513 U.S. 298, 324 (1995)). And the petitioner must show “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence’ presented in his habeas petition.” *Id.* (quoting *Schulp*, 513 U.S. at 327). We conclude Stone did not make a colorable showing of actual innocence.

We conclude Stone failed to demonstrate good cause or a fundamental miscarriage of justice sufficient to excuse the procedural bars to his petition and the State’s specific plea of laches. Therefore, the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁵We also conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

cc: Hon. Michael Villani, District Judge
Randy Merwin Stone
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk