IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAWRENCE E. SCHWIGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74330

ORDER OF AFFIRMANCE

Lawrence E. Schwiger appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on July 3, 2017.[1] Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Schwiger's petition was untimely because it was filed more than 12 years after the remittitur on direct appeal was issued on September 21, 2004,[2] and it was successive because his previous postconviction habeas petition was denied on the merits.[3] *See* NRS 34.726(1); NRS 34.810(2). Consequently, Schwiger'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,

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

[2]*See Schwiger v. State*, Docket No. 39007 (Order of Affirmance, August 24, 2004).

[3]*See Schwiger v. State*, Docket Nos. 48483 & 48579 (Order of Affirmance, July 18, 2007).

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537 (2001). Moreover, because the State specifically plead laches, Schwiger was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

First, Schwiger claims he has good cause because the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding the audio recordings or transcripts of three interviews. He argues the State withheld transcripts of a January 25, 2001, police interview of the victim; a January 29, 2001, police interview of his daughter; and a February 2, 2001, Child Protective Services interview of his daughter. And he asserts he specifically requested the transcripts or recordings of these interviews and they were exculpatory.

The record demonstrates Schwiger's preliminary hearing was conducted on March 13, 2001. During the hearing, a Child Protective Services investigator testified the victim and Schwiger's daughter did not disclose any inappropriate touching during their police interviews, the victim disclosed inappropriate touching during her CPS interview, and the daughter did not confirm any of the victim's disclosures during her CPS interview. The preliminary hearing carried over into March 14, 2001, at which time, defense counsel requested discovery of the police and CPS interview transcripts and the State agreed to provide this discovery. Thereafter, on July 20, 2001, Schwiger entered an *Alford*[4] plea to one count of lewdness on a child under the age of 14 and two counts of solicitation to commit murder.

This record does not demonstrate the State failed to disclose *Brady* evidence, *see Lisle v. State*, 131 Nev. 356, 359-60, 351 P.3d 725, 728

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[4]*North Carolina v. Alford*, 400 U.S. 25 (1975).

(2015), and it proves Schwiger waived any discovery defects by entering an *Alford* plea, *see Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). Accordingly, we conclude Schwiger failed to demonstrate good cause.

Second, Schwiger appears to claim the procedural bars should not apply because he is actually innocent. A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). However, "actual innocence means factual innocence, not mere legal insufficiency," *Bousley v. United States*, 523 U.S. 614, 623 (1998), 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," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 327 (1995)). Schwiger has not made a colorable showing of actual innocence, and, therefore, he has not demonstrated a fundamental miscarriage of justice sufficient to excuse the procedural bars to his petition.

Third, Schwiger also claims the district court erred by adopting the State's proposed order verbatim. He argues that the State's proposed order was not consistent with the district court's oral pronouncement. And he requests that we strike the grounds for denial of his petition that are inconsistent with the district court's oral pronouncement. However, Schwiger 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.

We conclude the district court did not err by denying Schwiger's procedurally-barred postconviction habeas petition without an evidentiary hearing. *See* NRS 34.770(2); *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1974 (2005); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Lawrence E. Schwiger
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[5]We have reviewed all documents Schwiger has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Schwiger has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.