

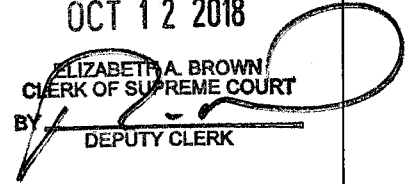
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID AUGUST KILLE, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75403

FILED

OCT 12 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

David August Kille, Sr., appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 13, 2017.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Kille's petition challenged the validity of his judgment and sentence because it claimed the State breached the guilty plea agreement and it sought an order vacating the guilty plea agreement and the judgment of conviction. See NRS 34.720(1). Consequently, it was subject to the procedural bars set forth in NRS 34.726, NRS 34.800, and NRS 34.810. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.").

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

Kille's petition was untimely because it was filed more than 13 years after the remittitur on direct appeal was issued on March 30, 2004,² and it was successive because he had previously filed two postconviction petitions for writs of habeas corpus and the first one was decided on the merits.³ See NRS 34.726(1); NRS 34.810(2). Therefore, his 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, Kille was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Kille did not explicitly allege good cause in his petition. To the extent he claimed the legal basis for his claim was not reasonably available before the Nevada Supreme Court decided *Williams v. State Department of Corrections*, 133 Nev. ___, 402 P.3d 1260 (2017), he failed to show good cause because *Williams* concerned a challenge to the computation of time served and did not provide a legal basis for a challenge to the validity of the judgment or sentence. See generally *Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006) (recognizing good cause may be established where the legal basis for a claim was not reasonably available). To the extent he claimed the factual basis for his claim did not exist until ten years after his judgment of conviction was entered,⁴ he failed to show good cause because

²See *Kille v. State*, Docket No. 42254 (Order of Affirmance, March 5, 2004).

³See *Kille, Sr. v. State*, Docket No. 62741 (Order of Affirmance, November 13, 2013); *Kille v. State*, Docket No. 45216 (Order of Affirmance, October 11, 2005).

⁴The district court entered the judgment of conviction on September 19, 2003.

he did not raise this claim within a reasonable time after the alleged breach occurred. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (explaining good cause may be demonstrated when the factual basis for a claim was not reasonably available to be raised in a timely petition and the good cause claim itself is not procedurally defaulted). And to the extent he claimed his petition was not subject to procedural bars because it “escapes” the Antiterrorism and Effective Death Penalty Act’s one-year time limit, he failed to show good cause because ADEPA is a federal statute and does not govern the application of state procedural default rules. *See generally Brown v. McDaniel*, 130 Nev. 565, 575, 331 P.3d 867, 874 (2014) (explaining that “[t]he state procedural bars to post-conviction habeas relief . . . exist to implement policies [that are] independent from those animating the federal doctrine of procedural default” (internal quotation marks and brackets omitted)).

We conclude Kille 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.



, C.J.

Silver



, J.

Tao



, J.

Gibbons

cc: Hon. Douglas W. Herndon, District Judge
David August Kille, Sr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk