IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VITALY ZAKOUTO, A/K/A WILLIAM V. MOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73489

ORDER OF AFFIRMANCE

Vitaly Zakouto appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on March 21, 2017, the supplement he filed on April 22, 2017, and the motion to retest DNA evidence he filed on March 21, 2017. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Postconviction petition and supplement

Zakouto filed his petition nearly 12 years after issuance of the remittitur on direct appeal on June 14, 2005. *See Zakouto v. State*, Docket No. 41709 (Order Affirming in Part, Reversing in Part, and Remanding, March 3, 2005). Thus, Zakouto's petition was untimely filed. *See* NRS 34.726(1). Moreover, Zakouto's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.[1] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Zakouto's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

[1]*Zakouto v. State*, Docket No. 67793 (Order of Affirmance, September 16, 2016).

Zakouto claims he can overcome the procedural bars because he has new evidence that demonstrates he is actually innocent. Specifically, he claims new DNA testing revealed an unidentified Y allele in two of the DNA samples retrieved from the crime scene. The district court found Zakouto failed to demonstrate he was actually innocent. The district court determined Zakouto's DNA was not found at the crime scene and this was already presented to the jury at trial. Therefore, the fact an unidentified Y allele was found in two of the DNA samples did not demonstrate "it [was] more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008).

Further, to the extent Zakouto claims he had good cause to overcome the procedural bars because the State violated *Brady*[2] by failing to properly test and disclose the DNA evidence, this claim was reasonably available to be raised in his prior petition, and therefore, it does not provide good cause to overcome the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, the district court did not err by denying this claim without holding an evidentiary hearing. *See Rubio*, 124 Nev. at 1046 & n.53, 194 P.3d at 1233-34 & n.53.

---

[2]*Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, Zakouto claims he had good cause to overcome the procedural bars because his trial counsel was ineffective for failing to independently test the DNA evidence. However, this claim was reasonably available to be raised in his prior petition, and therefore, it does not provide good cause to overcome the procedural bars. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Therefore, the district court did not err by denying this claim without holding an evidentiary hearing. *See Rubio*, 124 Nev. at 1046 & n.53, 194 P.3d at 1233-34 & n.53.

Based on the foregoing, we conclude the district court did not err by denying the petition as procedurally barred.

Motion to retest DNA

Zakouto also appeals from the portion of the district court's order denying his motion to retest DNA. He claims the district court erred by denying his motion because there was a reasonable possibility the outcome of trial may have been different had genetic marker testing been done and/or the genetic marker testing done was inconclusive and new testing is necessary.

Zakouto's motion below was not filed on the correct form, *see* NRS 176.0918(1), (2); he failed to include the required declaration, *see* NRS 176.0918(3); and he failed to address with any specificity the requirements set forth in NRS 176.0918(3).[3] Therefore, we conclude the district court did not err by denying Zakouto's motion to retest DNA. *See* NRS 176.0918(4) (the district court may "[e]nter an order dismissing the petition without a hearing if the court determines, based on the information contained in the

[3]Zakouto has provided much more detailed information on appeal, this information was not presented in the district court below.

petition, that the petitioner does not meet the requirements set forth in this section").

District Court's Order

Finally, Zakouto argues the district court's order was improperly entered because he was not present at the hearing where his petition and motions were denied, the district court violated the separation of powers doctrine by ordering the State to prepare the proposed findings, and he was not given an opportunity to object to the proposed findings of fact.

First, Zakouto's presence at the hearing denying his petition and motions was not necessary because it does not appear the district court took argument or evidence from the State. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002). It appears from the record, the district court stated it was denying the petition and motions and ordered the State to write the order.

Second, we conclude Zakouto fails to demonstrate the district court's decision to have the State write a proposed order violated the separation of powers doctrine. While the district court delegated its duty to the State, the district court was free to accept or reject the proposed order by the State. Therefore, there was no separation of powers violation.

Finally, while Zakouto should have been given an opportunity to review the proposed order prepared by the State before the district court adopted the order and filed it, *see Byford v. State*, 123 Nev. 67, 69-70, 156 P.3d 691, 692 (2007), this does not warrant automatic reversal. The district court's order was sufficiently detailed as to allow this court to review the bases of the district court's decision, and Zakouto has had the opportunity in this appeal to challenge any factual or legal errors in the written order.

Having concluded Zakouto is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[4]

_____, J.
Tao

_____, J.
Gibbons

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

---

[4]We also conclude Zakouto failed to demonstrate the district court abused its discretion by denying his motion to appoint counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

The Honorable Abbi Silver did not participate in the decision in this matter.