

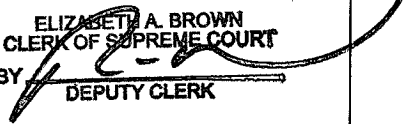
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH RUBEN SANCHEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73653

FILED

SEP 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Joseph Ruben Sanchez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 11, 2017.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sanchez contends the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. Sanchez filed his petition 15 years after issuance of the remittitur on direct appeal on April 2, 2002, *see Sanchez v. State*, Docket No. 36051 (Order of Affirmance, March 8, 2002), and 13 years after entry of the amended judgment of conviction on March 11, 2004. Sanchez' petition was therefore untimely filed. *See* NRS 34.726(1). It was also successive as he has previously filed postconviction petitions for a writ of habeas corpus.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Sanchez' petition was therefore

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

²*See Sanchez v. State*, Docket No. 46492 (Order of Affirmance, April 21, 2006); *Sanchez v. State*, Docket No. 41397 (Order of Affirmance, July 23, 2004).

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). Further, because the State specifically pleaded laches, Sanchez was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). To warrant an evidentiary hearing, Sanchez had to raise claims supported by specific factual allegations that, if true and not repelled by the record, would have entitled him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) (applying the standard in the context of overcoming procedural bars).

Sanchez' underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He argued the United States Supreme Court's decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse his procedural bars because they changed the framework under which retroactivity is analyzed. However, Sanchez' conviction was not yet final when *Byford* was decided, see *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); see also U.S. Sup. Ct. R. 13, such that retroactivity was not at issue in Sanchez' case. Accordingly, any new retroactivity case law could not constitute cause for the delay.

Moreover, Sanchez cannot demonstrate undue prejudice. Sanchez had to demonstrate not just that the lack of a *Byford* instruction "created a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1972)).

The evidence adduced at trial is as follows: Sanchez and his codefendant kidnapped the victim in order to rob him; they took him to a deserted road where Sanchez' codefendant shot the victim execution style; and they then drove the victim's car to another deserted location, removed and took the car's rims, and burned the car. In light of this evidence, we are confident the outcome of the trial would have been the same even if the jury been instructed in accord with *Byford* and, accordingly, that the lack of the instruction did not work to Sanchez' actual and substantial disadvantage.

Sanchez also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because "there is a significant risk that [he] stands convicted of an act that the law does not make criminal." A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Sanchez claimed below that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not factual innocence.³ Accordingly, Sanchez failed to demonstrate he is actually innocent such that failing to consider his claims on the merits would result in a fundamental

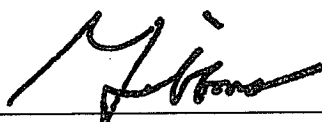
³On appeal, Sanchez changes his assertion to his crime being "less than second-degree murder." As this argument was not raised below, we need not consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). We note, however, that even were Sanchez' statement accurate, it still would not represent factual innocence for the same reason that guilt of second-degree murder does not.

miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Gibbons

cc: Elissa F. Cadish, District Judge
Joseph Ruben Sanchez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴We 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).

The Honorable Jerome T. Tao did not participate in the decision in this matter.