

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONY R. AMATI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73577

FILED

JUL 31 2018

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

ORDER OF AFFIRMANCE

Tony R. Amati appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Amati argues the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. He filed his petition more than 15 years after issuance of the remittitur on direct appeal on October 30, 2001. *See Amati v. State*, Docket No. 35794 (Order of Affirmance, October 5, 2001). Amati's petition was therefore untimely filed.¹ *See* NRS 34.726(1). Amati's petition was also successive.² NRS 34.810(2). Amati's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). To warrant an evidentiary hearing, a petitioner must raise

¹Amati's petition was also untimely from his amended judgment of conviction, filed on March 28, 2002, which Amati did not appeal.

²*See Amati v. State*, Docket No. 58248 (Order of Affirmance, January 16, 2013); *Amati v. State*, Docket No. 40604 (Order of Affirmance, February 10, 2004).


claims supported by specific factual allegations that, if true and not repelled by the record, would entitle 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).

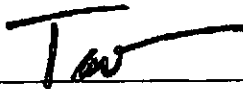
Amati's underlying, substantive claim was that he was entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He argues the holdings in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), provide good cause to overcome the procedural bars because those cases changed the framework under which retroactivity is analyzed. However, Amati's 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 is not at issue in Amati's case. Accordingly, the retroactivity cases cannot provide good cause to excuse the procedural bars.


Amati also claims the decision in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), provided good cause to overcome the procedural bars and he is actually innocent such that he will suffer a fundamental miscarriage of justice if the procedural bars are applied. Amati did not raise these arguments below, and we therefore need not consider them on appeal in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Moreover, neither claim would excuse the procedural bars. Amati's petition was not filed within a reasonable time of the decision in *Riley*, see *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (holding a good-cause argument must not itself be untimely), and the Nevada Supreme Court has expressly disagreed with *Riley*, see *Leavitt v. State*, 132 Nev. ___,

386 P.3d 620 (2016). Further, Amati bases his actual-innocence claim on his belief that *Welch* and *Montgomery* dictate the outcome in his case, but as discussed above, they do not apply here. Because Amati failed to demonstrate good cause to overcome the procedural bars, we conclude the district court did not err by denying his petition as procedurally barred without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk