

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY LAMAR BAGLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73617

FILED

JUL 27 2018

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

ORDER OF AFFIRMANCE

Anthony Lamar Bagley appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 21, 2017, and supplemental petition filed on May 16, 2017.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Bagley filed his petition more than 15 years after issuance of the remittitur on direct appeal on July 10, 2001. *See Bagley v. State*, Docket No. 35100 (Order of Affirmance, June 12, 2001). Bagley's petition was therefore untimely filed. *See* NRS 34.726(1). Bagley's petition was also successive and an abuse of the writ.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Bagley's petition was therefore procedurally barred absent a

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

²*See Bagley v. State*, Docket No. 55087 (Order of Affirmance, June 10, 2010); *Bagley v. State*, Docket No. 43587 (Order of Affirmance, January 25, 2005).

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Bagley claimed 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), provided good cause to overcome the procedural bars. A claim of good cause must be raised within a reasonable time, *Hathaway v. State*, 119 Nev. 248, 251, 71 P.3d 503, 505 (2003), but Bagley's petition was filed more than one year from when *Welch* and *Montgomery* were decided. Bagley offered no explanation for this delay and thus failed to demonstrate good cause.³

Moreover, as a separate and independent ground to deny relief, *Welch* and *Montgomery* are inapplicable to Bagley's underlying substantive claims. First, Bagley claimed he was entitled to the retroactive application of the 2007 amendments to NRS 193.165. *Welch* and *Montgomery* address situations in which a court interpreted a statute or made a constitutional determination. See *Welch*, ___ U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery v. Louisiana*, ___ U.S. at ___, 136 S. Ct. at 726. The Legislature's changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension. See *State v. Second Judicial Dist. Court*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008).

³To the extent Bagley contended the decision in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), provided good cause, we note that Bagley's petition was filed more than a year after *Riley* was decided. Further, the Nevada Supreme Court has expressly disagreed with *Riley*. See *Leavitt v. State*, 132 Nev. ___, 386 P.3d 620 (2016). Accordingly, *Riley* would not provide good cause to overcome the procedural bars.


Second, Bagley claimed he was entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), because *Welch* and *Montgomery* changed the framework under which retroactivity is analyzed. However, Bagley'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 Bagley's case. Further, Bagley could not demonstrate actual prejudice because the Nevada Supreme Court applied *Byford* to his case and concluded "beyond a reasonable doubt" that the giving of the erroneous jury instruction "did not contribute to the verdict obtained." *Bagley v. State*, Docket No. 55087 (Order of Affirmance, June 10, 2010). This holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). For the foregoing reasons, *Welch* and *Montgomery* do not provide good cause to reach Bagley's underlying claims.


Bagley 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). Bagley claimed below that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not factual innocence. Accordingly, Bagley failed to demonstrate he is actually innocent such that

failing to consider his claims on the merits would result in a fundamental miscarriage of justice. We therefore conclude the district court did not err by denying Bagley's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Anthony Lamar Bagley
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).