

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY EDWARD PETTY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74305

FILED

JUL 27 2018

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

ORDER OF AFFIRMANCE

Anthony Edward Petty appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 18, 2017.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Petty filed his petition more than 15 years after issuance of the remittitur on direct appeal on July 2, 2002. *See Petty v. State*, Docket No. 37405 (Order of Affirmance, June 5, 2002). Thus, Petty's petition was untimely filed. *See* NRS 34.726(1). Petty's petition was also successive because he had previously filed four postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Petty's petition was procedurally barred

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

²*See Petty v. State*, Docket No. 67192 (Order of Affirmance, May 19, 2015); *Petty v. State*, Docket No. 56071 (Order of Affirmance, November 8, 2010); *Petty v. State*, Docket No. 41918 (Order of Affirmance, May 28, 2004). Petty did not appeal from the denial of a postconviction petition for a writ of habeas corpus he filed on February 6, 2013.

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

Petty 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 Petty's petition was filed more than one year from when *Welch* and *Montgomery* were decided. Petty claimed he was delayed in raising the good-cause argument because prison law-library practices prevented his learning of *Welch*. "until early August." Yet Petty still waited one year to file his petition, and he offered no explanation for this delay. Petty thus failed to demonstrate good cause to excuse his entire delay. See *id.*

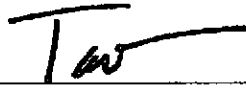
Further, *Welch* and *Montgomery* are inapplicable to Petty's underlying substantive claim. Petty claimed he was entitled to the retroactive application of the 2007 amendments to NRS 193.165. *Welch* and *Montgomery* address situations where a court interpreted a statute or made a constitutional ruling. See *Welch*, ___ U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery v. Louisiana*, ___ U.S. at ___, 136 S. Ct. at 726. The changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension. *State v. Second Judicial Dist. Court*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008). Accordingly, *Welch* and *Montgomery* would not provide good cause to reach Petty's underlying claim.

Petty also attempted to overcome the procedural bars by arguing he would suffer a fundamental miscarriage of justice. Such a claim can overcome the procedural bars only if a petitioner demonstrates he is

actually innocent of the crime. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Petty did not demonstrate actual innocence because he failed to show that “it is 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*, 117 Nev. at 887, 34 P.3d at 537 (2001). We therefore conclude the district court did not err by denying Petty’s petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Anthony Edward Petty
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk