

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAYOMASHELL DAVID AGUILAR,
A/K/A DAVID DAYOMASSHE
AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73759

FILED

JUL 17 2018

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

ORDER OF AFFIRMANCE

Dayomashell David Aguilar appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017.¹ Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Aguilar filed his petition more than 17 years after issuance of the remittitur on direct appeal on January 18, 2000. *See Aguilar v. State*, Docket Nos. 31595, 31811 (Order Dismissing Appeals, December 20, 1999). Aguilar's petition was therefore untimely filed. *See* NRS 34.726(1). His petition was also successive because he had previously filed two postconviction petitions for a writ of habeas corpus.² NRS 34.810(1)(b)(2); NRS 34.810(2). Aguilar's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1);

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

²*See Aguilar v. State*, Docket No. 64560 (Order of Affirmance, October 16, 2014); *Aguilar v. State*, Docket Nos. 57356, 57357 (Order of Affirmance, May 9, 2012).

NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, Aguilar was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Aguilar's underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He claimed the United States Supreme Court's decisions 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 excuse his procedural bars because they changed the framework under which retroactivity is analyzed. However, Aguilar'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 Aguilar's case. Accordingly, new retroactivity case law does not constitute good cause to overcome the procedural bars to Aguilar's petition.

Aguilar 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). Aguilar claimed below that "[t]he facts in this case established that [he] only

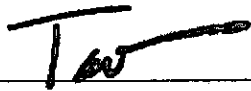
committed a second-degree murder.”³ This is not factual innocence. Accordingly, Aguilar failed to demonstrate he is actually innocent such that failing to consider his claims on the merits would result in a fundamental miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800. We therefore conclude the district court did not err by denying Aguilar’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. Kathleen E. Delaney, District Judge
Dayomashell David Aguilar
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³On appeal, Aguilar claims he is “completely innocent” because “all evidence proves [he] killed no-one.” First, this is new argument and contrary to his claim below. Accordingly, 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). Second, Aguilar’s bare contention would not have entitled him to relief. See *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (requiring a showing that “it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of . . . new evidence.” (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))).

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).