

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONY RAY HINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74539-COA

FILED

JAN 25 2019

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

ORDER OF AFFIRMANCE

Tony Ray Hines appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 14, 2017.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Hines filed his petition nearly 34 years after issuance of the remittitur on direct appeal on October 18, 1983, *see Hines v. State*, Docket No. 14025 (September 27, 1983), and more than 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Hines' petition was therefore untimely filed. *See* NRS 34.726(1). Hines' petition was also successive and an abuse of the writ.² *See*

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

²*See Hines v. State*, Docket Nos. 35049 and 35448 (Order of Affirmance, December 14, 2001); *Hines v. State*, Docket No. 27709 (Order Dismissing Appeal, April 16, 1999). Hines did not appeal the district court's denial of his postconviction petition for a writ of habeas corpus filed on

NRS 34.810(1)(b)(2); NRS 34.810(2). Hines' petition was therefore 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, Hines was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Hines claimed 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. *Welch* was decided in April 2016 and *Montgomery* in January 2016, and Hines' petition was not filed within a reasonable time of these decisions. See *Rippo v. State*, 134 Nev. ___, ___, 423 P.3d 1084, 1097 (2018) (holding a good cause argument must be raised within a year of when the claim becomes available). Hines claimed he was delayed in raising the good-cause argument because prison law-library practices prevented his learning of *Welch* until August 2016. Yet Hines still waited an additional year to file his petition, and he offered no explanation for this delay. Hines thus failed to demonstrate good cause to excuse his entire delay. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (“[A]n adequate allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period.”).

Hines also claimed he could demonstrate a fundamental miscarriage of justice. 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*,

January 7, 1985. See *Hines v. State*, Docket Nos. 35049 and 35448 (Order of Affirmance, December 14, 2001) (noting that the file stamp indicating the petition was filed in 1984 must have been a clerical error).


117 Nev. at 887, 34 P.3d at 537. Hines 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)); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800.


Finally, Hines contends the district court abused its discretion by failing to provide him an opportunity to reply to the State’s arguments in favor of dismissing Hines’ petition. Hines submitted a timely reply, see NRS 34.750(4); NRS 34.800(2); NRS 178.482, which the district court improperly refused to consider. However, for the reasons discussed above, we conclude none of the arguments in Hines’ reply overcome his procedural bars. We therefore conclude Hines is not entitled to relief on this ground.

For the foregoing reasons, we conclude the district court did not err by denying Hines’ petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

³We 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. 75, 76, 391 P.3d 760, 760-61 (2017).

cc: Hon. Stefany Miley, District Judge
Tony Ray Hines
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk