

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75988-COA

FILED

MAR 14 2019

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

ORDER OF AFFIRMANCE

Kevin Devon Sutton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 9, 2018.¹ Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Sutton filed his petition more than 17 years after issuance of the remittitur on direct appeal on July 9, 2001. *See Sutton v. State*, Docket No. 34165 (Order of Affirmance, June 11, 2001). Sutton's petition was therefore untimely filed. *See* NRS 34.726(1). His petition was also successive.² *See* NRS 34.810(2). Sutton's petition was therefore

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

²*See Sutton v. State*, Docket No. 73651-COA (Order of Affirmance, April 25, 2018); *Sutton v. State*, Docket No. 71025-COA (Order of Affirmance, July 12, 2017); *Sutton v. State*, Docket No. 67584 (Order of Affirmance, December 18, 2015); *Sutton v. State*, Docket No. 65121 (Order of Affirmance, September 18, 2014); *Sutton v. State*, Docket No. 64244 (Order of Affirmance, June 11, 2014); *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010); *Sutton v. State*, Docket No. 40477 (Order of Affirmance, July 8, 2004). Sutton filed a postconviction petition for a writ of habeas corpus on September 16, 2004, that appears has not

procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, Sutton was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Sutton did not allege he could overcome the procedural bars by demonstrating good cause and actual prejudice. Rather, he attempted to overcome his procedural defects by arguing he is actually innocent such that denying consideration of his substantive claim would result in a fundamental miscarriage of justice. See *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Sutton argues the district court erred by denying him an evidentiary hearing on the actual-innocence claim. To warrant an evidentiary hearing, Sutton had to raise claims supported by specific factual allegations that, if true and not repelled by the record, would have demonstrated he could overcome the procedural bars. See *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). Even assuming Sutton's new evidence is true, it does not show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)) (setting out the test for a gateway claim of actual innocence); see also *Mazzan*, 112 Nev. at 842, 921 P.2d at 922.

Further, Sutton failed to overcome the presumption of prejudice to the State. To do so, he had to demonstrate both a fundamental miscarriage of justice and that he could not have known of the grounds by exercise of reasonable diligence. See NRS 34.800(1). Even if he could have demonstrated a fundamental miscarriage of justice, he could not have met

been resolved and another one on January 5, 2016, from which Sutton did not appeal the district court's denial.

the second requirement. Sutton's underlying substantive claim is that a certain opinion by the Nevada Supreme Court applies to him, but as Sutton acknowledges, that opinion was issued before Sutton's conviction became final. *See Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Sutton further admits that all of his "new" evidence was available in his discovery and was thus known to him before he entered his guilty plea. For the foregoing reasons, we conclude the district court did not err by denying Sutton's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Tao



_____, J.
Gibbons



_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Kevin Devon Sutton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk