

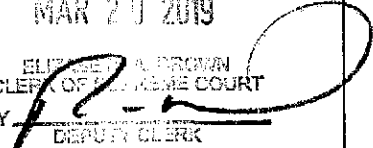
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HECTOR CASTELLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73459-COA

FILED

MAR 20 2019

ELIZABETH A. BROWN
CLERK OF APPEALS COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Hector Castellon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 1, 2017.¹ Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Castellon filed his petition more than 30 years after issuance of the remittitur on direct appeal on January 13, 1987, *see Castellon v. State*, Docket No. 16103 (Order Dismissing Appeal, December 23, 1986), and 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). Castellon's petition was therefore untimely filed. *See* NRS 34.726(1). Castellon's petition was also successive and an abuse of the writ.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Castellon's petition was therefore procedurally barred absent a

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

²*See Castellon v. State*, Docket No. 24933 (Order Dismissing Appeal, February 4, 1994).

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, Castellon was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Castellon claimed the 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 the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).

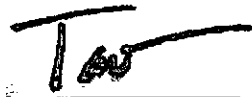
Castellon also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Castellon claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Castellon thus failed to overcome the procedural bars. See *Bousley v. United States*, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”). And because he failed to demonstrate a fundamental miscarriage of justice, Castellon failed to overcome the presumption of prejudice to the State. See NRS 34.800.

Castellon’s claim on appeal that the district court did not give him sufficient time to respond to the State’s request to dismiss is belied by the record. The State pleaded laches in a document filed and served on May

23, 2017. Castellon had 15 days to file a response, *see* NRS 34.750(4), but he did not. The district court did not rule on Castellon's petition until June 26, 2017.

Finally, we 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). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Tao


_____, J.
Gibbons


_____, J.
Bulla

³We have reviewed all documents Castellon has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Castellon has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. William D. Kephart, District Judge
Hector Castellon
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk