

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICKEY DENNIS COOPER,
Appellant,
vs.
JO GENTRY, WARDEN,
Respondent.

No. 74159-COA

FILED

MAR 20 2019

ELIZABETH STOWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Rickey Dennis Cooper appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 17, 2017. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Cooper filed his petition more than 30 years after issuance of the remittitur on direct appeal on June 3, 1986, *see Cooper v. State*, Docket No. 15653 (Order Dismissing Appeal, May 15, 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 Ripppo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Cooper's petition was therefore untimely filed. *See* NRS 34.726(1). Cooper's petition was also successive.¹ *See* NRS

¹*See Cooper v. State*, Docket No. 44764 (Order of Affirmance, March 2, 2006); *Cooper v. State*, Docket No. 31667 (Order of Remand, July 24, 2000); *Cooper v. Warden*, Docket No. 22086 (Order Dismissing Appeal, June

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


Cooper 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).


Cooper 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. Cooper claimed that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not actual innocence, and Cooper 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

27, 1991); *Cooper v. State*, Docket No. 18679 (Order Dismissing Appeal, September 21, 1988).

insufficiency.”). And because he failed to demonstrate a fundamental miscarriage of justice, Cooper failed to overcome the presumption of prejudice to the State. See NRS 34.800. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, J.
Gibbons


_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk