

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARY JAMES PLUMLEE,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 75739-COA

FILED

JUN 25 2019

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

ORDER OF AFFIRMANCE

Lary James Plumlee appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Plumlee filed his petition nearly 22 years after entry of the issuance of the remittitur on direct appeal on May 16, 1995, *see Plumlee v. State*, Docket No. 24089 (Order Dismissing Appeal, April 27, 1995), 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., Adv. Op. 53, *22 n.12, 423 P.3d 1084, 1097 n.12 (2018). Plumlee's petition was therefore untimely filed. *See* NRS 34.726(1). The petition was

also successive.¹ See NRS 34.810(1)(b)(2). Plumlee'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).

Plumlee 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). This court has recently held that *Welch* and *Montgomery* do not provide good cause to overcome the procedural bars to a *Byford* claim. See *Branham v. Warden*, 134 Nev., Adv. Op. 99, *6-7, 434 P.3d 313, 316 (Ct. App. 2018).

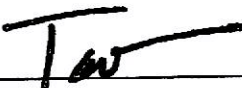
Plumlee also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. As Plumlee concedes in his opening brief, there was evidence of second-degree murder. This is not actual innocence, and Plumlee thus failed to overcome the procedural bars. See *Bousley v. United States*, 523 U.S. 614, 623 (1998)

¹See *Plumlee v. Warden*, Docket No. 31785 (Order Dismissing Appeal, November 18, 1999).

("[A]ctual innocence' means factual innocence, not mere legal insufficiency."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Federal Public Defender/Las Vegas
Washoe County District Attorney
Attorney General/Carson City
Washoe District Court Clerk

²The district court acknowledged the State argued the petition was procedurally barred but nevertheless "decided to address the *Petition* on the merits." This was error. Application of the procedural bars is mandatory. *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). We nevertheless affirm the district court's decision for the reasons stated above. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).