

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEREMIE MICHAEL JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71034

FILED

FEB 23 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Jeremie Michael Johnson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Johnson argues the district court erred in denying his petition as procedurally barred. Johnson filed his petition on July 1, 2016, more than three years after entry of the judgment of conviction on November 30, 2012.² Thus, Johnson's petition was untimely filed. See NRS 34.726(1). Moreover, Johnson's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.³ See NRS 34.810(1)(b)(2); NRS

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

²Johnson did not pursue a direct appeal.

³*Johnson v. State*, Docket No. 66872 (Order of Affirmance, April 15, 2015).

34.810(2). Johnson's petition was 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).

First, Johnson argued he had good cause because he is uneducated, mentally challenged, and has to rely upon inmate law clerks. However, this issue did not demonstrate there was an impediment external to the defense preventing Johnson from complying with the procedural bars. See *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding petitioner's claim of organic brain damage, borderline mental retardation and reliance on the assistance of an inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive postconviction petition).

Second, Johnson argued he had good cause because he had been held in administrative segregation, and lacked access to legal materials, the law library, prison staff, or avenues to request help with legal matters. Johnson failed to demonstrate lack of access to the legal materials, the law library, or prison staff deprived him of meaningful access to the courts. See *Lewis v. Casey*, 518 U.S. 343, 351 (1996) ("an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense").

Johnson filed a previous postconviction petition for a writ of habeas corpus and additional documents in the district court, which indicated his access to the court was not improperly limited by restrictions on access to the legal materials, the prison law library, or prison staff. See *id.* (a prisoner must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal

claim.”). Moreover, Johnson did not demonstrate any of his claims could not have been raised in his prior petition, and therefore, he failed to demonstrate official interference caused him to be unable to comply with the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Third, Johnson argued he had good cause because his trial counsel abandoned him by failing to pursue a direct appeal and because counsel failed to provide him a copy of his case file. However, this court has already considered and rejected these good-cause claims. *Johnson v. State*, Docket No. 66872 (Order of Affirmance, April 15, 2015). The doctrine of the law of the case prevents further litigation of these issues and “cannot be avoided by a more detailed and precisely focused argument.” *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, Johnson is not entitled to relief for this claim.

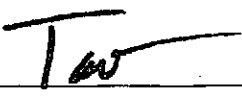
Fourth, Johnson appeared to argue failure to consider his claims on the merits would result in a fundamental miscarriage of justice because he is actually innocent. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show “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)). Johnson’s claims failed to meet that narrow standard. Therefore, the district court did not err in denying Johnson’s petition as procedurally barred.

Next, Johnson appears to argue the district court erred in declining to appoint postconviction counsel to represent him. The appointment of postconviction counsel was discretionary in this matter. See NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel.

Finally, Johnson argues Judge Polaha should not have considered his postconviction petition because he also acted as the trial judge. However, NRS 34.730(3)(b) provides that a postconviction petition for a writ of habeas corpus should be assigned to the original judge or court and Johnson fails to demonstrate assignment to Judge Polaha in compliance with that statute was improper. To the extent Johnson asserts Judge Polaha was biased against him due to Judge Polaha's participation in the trial, "rulings and actions of a judge during the course of official judicial proceedings do not establish" bias sufficient to disqualify a district court judge from presiding over a particular matter. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988); *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jerome M. Polaha, District Judge
Jeremie Michael Johnson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk