

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRET HENRY KELLER,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 70343

FILED

DEC 28 2016

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

ORDER OF AFFIRMANCE

Appellant Bret Keller appeals from an order of the district court granting a motion to dismiss his postconviction petition for a writ of habeas corpus filed on November 16, 2015.¹ Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Keller filed his petition on November 16, 2015, more than three years after issuance of the remittitur on direct appeal on August 21, 2012. *Keller v. State*, Docket No. 59931 (Order of Affirmance, July 25, 2012). Thus, Keller's petition was untimely filed. See NRS 34.726(1). Moreover, Keller'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.² See NRS 34.810(2). Keller's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²*Keller v. State*, Docket No. 67278 (Order of Affirmance, June 17, 2015).

First, Keller claimed he had good cause to overcome the procedural bars because he did not receive all of the discovery or police reports. Keller failed to explain how the inability to access his entire file or discovery prevented him from raising his claims in his first postconviction petition. *See Hood v. State*, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995) (holding “[c]ounsel’s failure to send appellant his files did not prevent appellant from filing a timely petition, and thus did not constitute good cause for appellant’s procedural default”).

Second, Keller claimed he had good cause because the procedural bars are not mandatory and the State would not be prejudiced because he only wants a new sentencing hearing. Keller failed to demonstrate good cause because the procedural bars are mandatory, *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and the fact the State may not be prejudiced by granting the petition does not overcome the procedural bars, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (recognizing good cause must be a legal excuse).

Third, Keller claimed he had good cause because he lacked adequate access to the law library. Keller fails to demonstrate lack of access to the law library 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”). Keller previously filed a postconviction petition for a writ of habeas corpus which indicated his access to the court was not improperly limited by restrictions on access to the prison law library. *See id.* (a prisoner must “demonstrate that the alleged shortcomings in the library or legal assistance hindered his efforts to pursue a legal claim”). Moreover, Keller 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*, 119 Nev. at 252, 71 P.3d at 506.

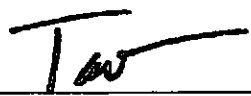
Fourth, to the extent Keller claimed the remittitur from his appeal from his first postconviction petition restarted the one-year time period to file a postconviction petition, this claim lacked merit. The one-year time period starts from the date the judgment of conviction was entered or the date the remittitur was issued from a timely filed appeal from the judgment of conviction. See NRS 34.726(1).

Finally, Keller claimed he had good cause because he received ineffective assistance of postconviction counsel. Ineffective assistance of postconviction counsel did not establish good cause in the instant case because the appointment of counsel in the prior postconviction proceedings was not statutorily or constitutionally required. *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014); *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

We conclude the district court did not err by dismissing Keller's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jerome M. Polaha, District Judge
Bret Henry Keller
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk