

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KOO KWANG JUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70302

FILED

OCT 11 2017

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

ORDER OF AFFIRMANCE

Koo Kwang Jung appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Koo Kwang Jung argues the district court erred in denying his petition. Koo Kwang Jung filed his petition¹ on September 23, 2014, more than ten years after the Nevada Supreme Court issued its order granting the voluntarily dismissal of his direct appeal on June 28, 2004. *Koo Kwang Jung v. State* (Order Dismissing Appeal, June 28, 2004). Thus, Koo Kwang Jung's petition was untimely filed. *See* NRS 34.726(1). Moreover, Koo Kwang Jung'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

¹The record before this court does not contain a copy of Koo Kwang Jung's postconviction petition as required by NRAP 30(b)(2), (b)(3). We remind Koo Kwang Jung it is his burden as the appellant to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009).

his previous petition.² See NRS 34.810(2). Koo Kwang Jung's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Koo Kwang Jung was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). "We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

The district court found Koo Kwang Jung had good cause because he was not proficient in the English language and lacked access to Korean-language legal materials or law clerks. See *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006) (finding non-English-speaking petitioner may demonstrate an excuse for a delay in pursuing postconviction relief under certain circumstances). The record supports the district court's factual findings regarding Koo Kwang Jung's language barrier and, given those factual findings, we conclude the district court did not err in finding good cause.

Next, the district court concluded Koo Kwang Jung's underlying claims lacked merit and Koo Kwang Jung argues the district court erred in reaching that conclusion. To determine if Koo Kwang Jung can establish actual prejudice sufficient to overcome the procedural bars, we consider his underlying claims to ascertain whether any of his alleged claims of error

²*Koo Kwang Jung v. State*, Docket No. 66087 (Order of Affirmance, December 10, 2014).

“worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). For the reasons discussed below, we conclude the district court properly concluded Koo Kwang Jung’s underlying claims lacked merit, and therefore the district court should have also concluded he did not establish actual prejudice sufficient to overcome the procedural bars contained in NRS 34.726(1) and NRS 34.810(3).

Koo Kwang Jung’s underlying claims involved ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate his counsel’s performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel’s errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the court’s factual findings if supported by substantial evidence and not clearly erroneous but review the court’s application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Koo Kwang Jung argues his counsel improperly caused him to voluntarily withdraw his direct appeal. Koo Kwang Jung fails to demonstrate the district court erred in denying this claim. The district court concluded the testimony and evidence presented at the evidentiary hearing demonstrated Koo Kwang Jung requested his counsel to withdraw his direct appeal. The district court further concluded Koo Kwang Jung’s

testimony to the contrary was not credible. The district court concluded counsel acted appropriately in moving to voluntarily withdraw the direct appeal and the record supports the district court's conclusions in this regard. Therefore, this claim would not have entitled Koo Kwang Jung to relief.

Second, Koo Kwang Jung argues his counsel improperly failed to ensure the Korean consulate was contacted following his arrest. Koo Kwang Jung asserts he did not understand the legal proceedings because of the failure to contact the Korean consulate. Koo Kwang Jung fails to demonstrate the district court erred in denying this claim. Following the evidentiary hearing, the district court concluded Koo Kwang Jung's testimony regarding his requests to contact the consulate to be incredible. Substantial evidence supports the district court's conclusions in this regard. In addition, the Nevada Supreme Court has already concluded that violations related to the treaty regarding a foreign national's contact with the consulate of his home country do not result in dismissal of the criminal case against that person; rather "the only remedies are diplomatic or political or exist between states under international law." *Garcia v. State*, 117 Nev. 124, 128, 17 P.3d 994, 997 (2001). Accordingly, the district court properly concluded Koo Kwang Jung failed to demonstrate prejudice related to this issue. Therefore, this claim would not have entitled Koo Kwang Jung to relief.³

³Koo Kwang Jung also raises an independent claim asserting the State improperly failed to contact the Korean consulate. We conclude the district court properly concluded Koo Kwang Jung was not entitled to relief. This claim was not based upon an allegation that Koo Kwang Jung's plea was involuntarily or unknowingly entered or that his plea was entered

Third, Koo Kwang Jung argues his counsel improperly failed to ensure an adequate Korean-language interpreter aided in the trial-level proceedings. Koo Kwang Jung acknowledges an interpreter was present during those proceedings, but asserts that interpreter was not qualified. Koo Jung Jung argues he did not enter a knowing and intelligent plea due to the failure to obtain the services of a qualified interpreter. Koo Kwang Jung fails to demonstrate the district court erred in denying this claim. The district court concluded Koo Kwang Jung failed to identify any portion of the trial-level proceedings where the interpreter did not correctly interpret those proceedings, and thus, failed to meet his burden to prove this claim had merit. The record supports the district court's conclusions in this regard. Therefore, this claim would not have entitled Koo Kwang Jung to relief.⁴

Because Koo Kwang Jung's claims would not have entitled him to relief, he failed to demonstrate actual prejudice sufficient to overcome the procedural bars contained in NRS 34.726(1) and NRS 34.810(3). In addition, Koo Kwang Jung did not overcome the presumption of prejudice to the State under statutory laches because he did not demonstrate a


without the effective assistance of counsel, and therefore, was not within the scope of Koo Kwang Jung's postconviction petition. See NRS 34.810(1)(a).

⁴Koo Kwang Jung also raises an independent claim asserting the district court erred in failing to appoint a qualified interpreter. We conclude the district court properly concluded Koo Kwang Jung was not entitled to relief. This claim was not based upon an allegation that Koo Kwang Jung's plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, was not within the scope of Koo Kwang Jung's postconviction petition. See NRS 34.810(1)(a).

fundamental miscarriage of justice has occurred. See NRS 34.800(1)(b). Therefore, the district court should have denied the petition based upon the mandatory application of the procedural bars. See *Riker*, 121 Nev. at 231, 112 P.3d at 1074. Nevertheless, the district court reached the correct result in denying relief and we therefore affirm the district court's order. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Scott N. Freeman, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk