

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON KALE HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69486

FILED

DEC 28 2016

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

ORDER OF AFFIRMANCE

Appellant Brandon Kale Harris appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Harris argues the district court erred in denying his petition as procedurally barred. Harris filed his petition on June 5, 2015, more than four years after entry of the judgment of conviction on November 8, 2010.² Thus, Harris' petition was untimely filed. *See* NRS 34.726(1). Moreover, Harris' petition 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(2). Harris' petition was procedurally barred absent a

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

²No direct appeal was taken.

³*Harris v. State*, Docket No. 64721 (Order of Affirmance, May 13, 2014).

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

Harris first argued he had good cause because his counsel misadvised him regarding when he must submit a postconviction petition, withdrawal of his plea, and the pursuit of a direct appeal. However, these claims of ineffective assistance of counsel are procedurally barred because they were raised in an untimely manner and in a successive petition, and, therefore, cannot constitute good cause for additional procedurally barred claims. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (“[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally barred.”).

Second, Harris argued he had good cause because his counsel delayed sending him a portion of his case file until March 2013, counsel improperly sent him another client’s case file, and he has yet to receive his entire file. Harris failed to demonstrate good cause. The Nevada Supreme Court has previously held that counsel’s failure to send a petitioner his case files does not constitute good cause because it does not “prevent [the petitioner] from filing a timely petition.”⁴ *Hood v. State*, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995); see also *Hathaway*, 119 Nev. at 254 n.13, 71 P.3d at 507 n.13 (stating “trial counsel’s failure to send a petitioner his or her file does not constitute good cause to excuse a procedural default.”).

Third, Harris argued he had good cause because he only had access to the law library one day per week and the law library is

⁴We also note Harris requests this court to order his counsel to send him the entire case file. However, we decline to consider this issue in the first instance.

occasionally closed. Harris also asserted he had good cause because the prison was locked down for two weeks in May 2013 due to a stabbing incident and he could not access the law library at that time. Harris did not allege how these incidents prevented him from complying with the procedural bars, and thus, made only a bare claim. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief and Harris did not demonstrate failure to have more time to use the law library constituted an impediment external to the defense that prevented him from raising his claims in a timely manner. *See Hargrove v. State*, 100 Nev. 498, 502-03 686 P.2d 222, 225 (1984); *Hathaway*, 119 Nev. at 252-53 71 P.3d at 506.

Fourth, Harris argued the State waived application of the procedural bars because it filed untimely oppositions to a previous petition and to this petition. "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). In addition, a petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). As application of the procedural bars is mandatory and Harris had the burden of demonstrating good cause, he failed to demonstrate the district court should have waived the procedural bars due to untimely oppositions from the State.

Fifth, Harris argued he had good cause because the clerk of the district court did not file a reply brief he submitted in 2013 during the litigation of his previous petition and the clerk mailed correspondence with the wrong inmate number. However, any issues regarding the filing of a reply brief or mailing of correspondence did not explain why Harris

waited until 2015 to file the instant petition. Accordingly, this claim did not excuse Harris' entire delay or explain why Harris could not raise his claims in a timely-filed petition. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506.

Sixth, Harris argues the district court erred by not applying federal equitable tolling rules to his petition, he has good cause because he has difficulty reading, and he is actually innocent. Harris did not raise these issues before the district court and we decline to consider them in the first instance on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).


Next, Harris argues the district court erred by declining to construe a petition filed on November 25, 2015, as a supplement to the instant petition. A petitioner may raise claims in his initial petition and, if the district court appoints postconviction counsel, in a supplement. NRS 34.724(1); NRS 34.750(3). All other pleadings may only be filed if ordered by the district court and the district court has broad authority with respect to permitting supplemental pleadings during postconviction proceedings. NRS 34.750(5); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006). Because the district court did not appoint postconviction counsel to represent Harris, he had no right to file a supplemental petition. Given the district court's broad authority to permit or decline a petitioner to file a supplemental petition, Harris does not demonstrate the district court erred by declining to construe the November 25, 2015, petition as a supplement to the instant petition.

Next, Harris argues the district court was biased against him. Harris asserts the evidence for this bias comes from the adverse rulings the district court made during his case and the failure to admonish the

State when a prosecutor made inappropriate sexual comments. However, "rulings and actions of a judge during the course of official judicial proceedings do not establish" bias sufficient to disqualify a district court judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). Therefore, Harris fails to demonstrate this claim has merit.

Having concluded Harris is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Kerry Louise Earley, District Judge
Brandon Kale Harris
Attorney General/Carson City
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk