

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69536

FILED

MAY 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellant Douglas Harry Warenback filed his petition on September 14, 2015, more than one year after entry of the judgment of conviction on December 17, 2013.² Thus, Warenback's petition was untimely filed. See NRS 34.726(1). Moreover, Warenback's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus and the prior petition was denied on the merits.³ See NRS 34.810(2). Warenback'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. NRAP 34(f)(3).

²No direct appeal was taken.

³*Warenback v. State*, Docket No. 66294 (Order of Affirmance, April 14, 2015).

Warenback first argues the district court erred in concluding there was no external impediment to excuse his delay in raising a claim regarding discrepancies in transcripts involving his recorded message to the victim's mother. Warenback asserts he recently discovered the discrepancies during review of the transcript of his sentencing hearing and did not raise it earlier due to confusion regarding the postconviction process. Warenback fails to demonstrate he is entitled to relief.

Warenback's underlying claim was reasonably available to be raised at an earlier time, and therefore, Warenback fails to demonstrate an impediment external to the defense provided good cause to overcome the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Moreover, Warenback's confusion regarding the postconviction proceedings does not constitute an impediment external to the defense that prevented him from raising this claim at an earlier time. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).


Next, Warenback argues the State waived application of the procedural bars because it filed an untimely opposition to Warenback's 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 Warenback had the burden of demonstrating good cause, he fails to

demonstrate that the district court should have waived the procedural bars due to an untimely opposition from the State. Therefore, the district court did not err in denying the petition as procedurally barred.

Finally, Warenback argues the district court erred by adopting the State's proposed order denying his petition. Warenback does not identify any legal reason why the district court should not have adopted the proposed draft order. Moreover, Warenback does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review. Therefore, Warenback is not entitled to relief based on this argument.

Having concluded Warenback is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁴We have reviewed all documents Warenback has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Warenback has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. William D. Kephart, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk