

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY DWAYNE DIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70273

FILED

MAY 16 2017

ABE BROWN
CLERK OF SUPERIOR COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

Terry Dixon appeals from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Dixon filed his petition on March 19, 2014, nearly three years after issuance of the remittitur on direct appeal on April 11, 2011. *Dixon v. State*, Docket No. 53700 (Order of Affirmance, March 17, 2011). Thus, Dixon's petition was untimely filed. See NRS 34.726(1). Moreover, Dixon'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.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Dixon'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).

¹*Dixon v. State*, Docket No. 61172 (Order of Affirmance, April 10, 2013).

Dixon argued he had good cause because he was not appointed counsel in the first postconviction proceeding. We conclude this argument lacked merit.² The appointment of counsel in this matter was not statutorily or constitutionally required. See *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (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); see also NRS 34.750(1). The state postconviction statutes do not permit the failure to appoint counsel for an initial petition in a non-capital case to provide good cause for a later petition. *Brown*, 130 Nev. at ___, 331 P.3d at 873. Thus, the failure to appoint postconviction counsel would not provide good cause for this late and successive petition.


Dixon also argued he could overcome the procedural bars because he was actually innocent. Dixon claimed he has an expert who will state Dixon lacked the intent to kill the officers because he could not see them. Dixon failed to demonstrate actual innocence because he failed to 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)); see also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Dixon failed to demonstrate the expert could negate his intent because while he

²The district court erroneously concluded Dixon failed to request counsel to be appointed in his first postconviction proceeding because Dixon filed a motion along with his petition requesting counsel to be appointed. Nevertheless, because the district court correctly denied relief, we affirm the denial of this claim. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

may not have been able to see the officers, he knew where they were located based on the trajectory of his shots and he continued to shoot in their general direction. Further, Dixon's claim involved legal innocence rather than factual innocence. See *Calderon*, 523 U.S. at 559; see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence). Therefore, we conclude the district court did not err in denying Dixon's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk