


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELIAS G. MONTALVO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78231-COA

FILED

NOV 27 2019

ELIZABETH J. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Elias G. Montalvo appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 12, 2018. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Montalvo filed his petition more than one year after issuance of the remittitur on direct appeal on February 14, 2017. *See Montalvo v. State*, Docket No. 69310-COA (Order of Affirmance, January 19, 2017). Thus, Montalvo's petition was untimely filed. *See* NRS 34.726(1). Moreover, Montalvo'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). Montalvo'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), or that he was actually prejudiced such that it would result in a fundamental

¹*Montalvo v. State*, Docket No. 73667 (Order of Affirmance, July 20, 2018).

miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

First, Montalvo claims the district court erred by denying his actual innocence claim. Montalvo's petition merely alleged he was actually innocent but did not provide any specific facts or allegations regarding this claim. Therefore, this was a bare claim and we conclude the district court did not err by denying it. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

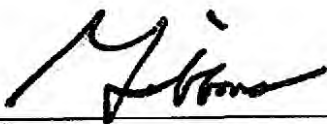
Second, Montalvo claims the district court erred by denying his petition as procedurally barred because his petition was not untimely. In his petition, Montalvo claimed he filed his petition before the remittitur issued on his first postconviction-petition and the time during which his first petition was pending was tolled. This claim lacked merit. The Nevada Supreme Court has declined to adopt tolling as providing good cause to excuse the delay in filing a petition. *See Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 874 (2014). Therefore, we conclude the district court did not err by denying this claim.


Third, Montalvo claims the district court erred by denying his petition as procedurally barred because he needs to exhaust his claims for federal habeas purposes. Exhaustion of state remedies in order to seek federal court review was insufficient to demonstrate good cause. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *superseded by statute on other grounds as stated in State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012). Therefore, we conclude the district court did not err by denying this claim.

Finally, Montalvo claims the district court erred by denying his petition as successive. In his petition, he claimed that because the district

court in his prior postconviction proceedings failed to address his request for an evidentiary hearing, his petition was never fully resolved. By denying the claims in his petition without holding an evidentiary hearing, the district court implicitly denied Montalvo's request for an evidentiary hearing. Accordingly, Montalvo failed to demonstrate good cause, and we conclude the district court did not err by denying this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Elias G. Montalvo
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk