

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID LEVOYD REED,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 78865-COA

FILED

MAR 12 2020

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

ORDER OF AFFIRMANCE

David Levoyd Reed appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Reed filed his petition on January 22, 2019, more than 13 years after the issuance of the order granting Reed the voluntary dismissal of his direct appeal on February 28, 2005. *Reed v. State*, Docket No. 44242 (Order Dismissing Appeal, February 28, 2005). Thus, Reed's petition was untimely filed. *See* NRS 34.726(1); *see also Gonzales v. State*, 118 Nev. 590, 596 n.18, 53 P.3d 901, 904 n.18 (2002) (recognizing that where a timely direct appeal is voluntarily dismissed, the one-year time period for filing a postconviction petition for a writ of habeas corpus commences from the date of entry of the court's order granting the motion to voluntarily dismiss the appeal). Moreover, Reed's petition 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(2). Reed's petition was procedurally barred absent a

¹*Reed v. State*, Docket No. 75732 (Order of Affirmance, October 25, 2018).

demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Reed was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

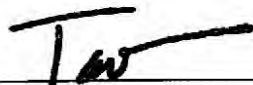
In his petition, Reed first claimed he had good cause because he recently learned that his trial-level counsel had been disbarred. Reed asserted the disbarment should permit him to assert that his counsel improperly coerced him into pleading guilty and improperly caused the withdrawal of his direct appeal. However, the factual bases for Reed's underlying claims were reasonably available to be raised in a timely-filed petition and Reed did not explain why he did not raise them at an earlier time. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Moreover, Reed did not overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). Therefore, we conclude the district court did not err by denying relief.

Next, Reed appeared to assert the procedural bars did not apply because he was actually innocent. Reed contended the victims did not identify him as the perpetrator at the preliminary hearing. Reed also claimed witnesses recanted their testimony, but he did not identify which witnesses. Reed's claim concerning the victims' identification testimony is belied by the record because the victims testified at the preliminary hearing that Reed was one of the men that committed the robberies. In addition, the record reveals Reed was in possession of items taken from one of the victims when he was arrested. Given the record, Reed did not demonstrate actual innocence because he failed to show that "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). We therefore conclude the district court did not err in denying Reed's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
David Levoyd Reed
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk