

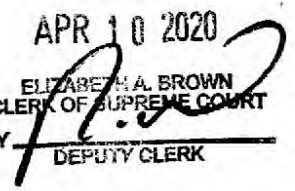
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TAIWAN ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78389-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Taiwan Allen appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 22, 2018, and a supplement filed on October 23, 2018. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Allen argues the district court erred by denying his petition as procedurally barred. Allen filed his petition nearly 13 years after issuance of the remittitur on direct appeal on May 17, 2005. *Allen v. State*, Docket No. 42847 (Order of Affirmance, April 20, 2005). Thus, Allen's petition was untimely filed. *See* NRS 34.726(1). Moreover, Allen's petition was successive because he had previously filed two postconviction petitions 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 petitions.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Allen'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

¹*Allen v. State*, Docket No. 69157 (Order of Affirmance, April 14, 2016); *Allen v. State*, Docket No. 51656 (Order of Affirmance, April 9, 2009).

innocent such that it would result in a fundamental 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). Moreover, because the State specifically pleaded laches, Allen was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

In his petition, Allen claimed counsel was ineffective for failing to request a competency examination prior to trial. He claimed he had good cause to raise this claim now because he did not know of this claim until recently. Specifically, he claimed the head injury he suffered prior to trial prevented him from raising this claim earlier.

To demonstrate good cause to overcome the procedural bars, a petitioner must show that an impediment external to his defense prevented him from presenting his claim. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, a petitioner must demonstrate that his claim was not reasonably available to be raised during the statutory time period. *Id.* at 252-53, 71 P.3d at 506.

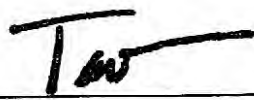
The district court found Allen's ineffective assistance of counsel claim was available to be raised in his previous petitions. The record supports the decision of the district court. Here, Allen filed two previous postconviction petitions, one of which he had the assistance of counsel. Further, Allen's purported head injury did not constitute an impediment external to the defense. *See Phelps v. Director, 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 postconviction petition). Therefore, we conclude the district court did not err by denying this claim.

Allen also claimed his alleged incompetency constituted a fundamental miscarriage of justice. Even assuming a claim that a petitioner was incompetent at the time of trial could constitute a fundamental miscarriage of justice, Allen failed to allege that he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983). Therefore, Allen failed to support this claim with specific facts that, if true and not belied by the record, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, the district court did not err by denying this claim.

Finally, Allen failed to allege any facts to rebut the presumption of prejudice to the State. NRS 34.800(1)(a); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
Benjamin Durham Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk