

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY DWAYNE DIXON,  
Appellant,  
vs.  
JAMES DZURENDA, DIRECTOR,  
Respondent.

No. 79194-COA

**FILED**

SEP 04 2020

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

*ORDER OF AFFIRMANCE*

Terry Dwayne Dixon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 22, 2019. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Dixon filed his petition nearly eight years after issuance of the remittitur on direct appeal on April 11, 2011. *See 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 two postconviction petitions for a writ of habeas corpus, with his first being decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Dixon's petition was procedurally barred absent a demonstration

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<sup>1</sup>*Dixon v. State*, Docket No. 70273-COA (Order of Affirmance, May 16, 2017); *Dixon v. State*, Docket No. 61172 (Order of Affirmance, April 10, 2013).

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 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). Further, because the State specifically pleaded laches, Dixon was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Dixon claims the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing as to his claims of good cause. To warrant an evidentiary hearing on a claim of good cause, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to have his underlying claims decided on the merits. *Berry*, 131 Nev. at 967, 363 P.3d at 1154.

First, Dixon claimed he had good cause because he was not appointed postconviction counsel to represent him during his first postconviction proceeding. Dixon previously raised this as a good cause claim in his second postconviction proceeding, and it was rejected by this court on appeal. *See Dixon v. State*, Docket No. 70273-COA (Order of Affirmance, May 16, 2017). Therefore, this claim is barred by the doctrine of law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Dixon claimed he had good cause because he had new evidence that was not reasonably available to him prior to the filing of this petition. Specifically, he claimed he was not previously able to secure an

expert's report regarding voluntary intoxication or photographs from the room where the shooting took place<sup>2</sup> because he proceeded in pro se during his first postconviction petition proceedings. To the extent this claim was just a variation of the claim above, it was barred by the doctrine of law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99. To the extent this claim was different, Dixon failed to demonstrate this claim was not reasonably available to him prior to the filing of this petition. This is Dixon's third postconviction petition, and he was represented by counsel during his second postconviction petition proceedings. As such, he failed to demonstrate good cause for the entire length of his delay. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Dixon claimed he had good cause because postconviction counsel who represented him during his second postconviction petition proceedings was ineffective. Dixon acknowledged that the Nevada Supreme Court has held that the ineffective assistance of postconviction counsel in a

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<sup>2</sup>To the extent Dixon claimed he needed discovery in order to show the photographs would provide good cause, Dixon failed to demonstrate he was entitled to relief. First, he was not entitled to discovery. *See* NRS 34.780(2). Second, the claim the photographs would have related to was previously raised in Dixon's second postconviction petition and was rejected by this court on appeal. *See Dixon v. State*, Docket No. 70273 (Order of Affirmance, May 16, 2017). And Dixon failed to demonstrate these photographs would provide good cause for raising his claim again. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99 (claims that have been raised previously and rejected are barred by the doctrine of law of the case which cannot be avoided by more detailed and precisely focused arguments).

noncapital case may not constitute good cause to overcome the procedural bars, *see Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014), but he urged that *Brown* be overturned. This court cannot overrule Nevada Supreme Court precedent. *See People v. Solorzano*, 63 Cal. Rptr.3d 659, 664 (2007), *as modified* (Aug. 15, 2007) (“The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court.” (quotation marks and internal punctuation omitted)). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Dixon claims the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing as to his claim of actual innocence. Dixon claimed that it would amount to a fundamental miscarriage of justice if his claims were not heard on the merits because he is actually innocent of the attempted murder of the officers. A petitioner must demonstrate that, considering all of the evidence, “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) (quotation marks omitted); *accord Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. And to warrant an evidentiary hearing on this issue, a petitioner must “present[ ] specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence.” *Berry*, 131 Nev. at 968, 363 P.3d at 1155.

Dixon claimed he is actually innocent based on his voluntary intoxication because it prevented him from forming the necessary specific

intent to commit the crime of attempted murder. Dixon claimed he had new evidence to support this claim in the form of a report from an expert witness finding that he was in the midst of a cocaine-induced psychosis during the incident.

Voluntary intoxication is not a complete defense to a crime and may only be taken into consideration concerning purpose, motive, or intent. *See* NRS 193.220. Even assuming the expert's report may have been helpful to portray a voluntary intoxication defense, it would not have demonstrated actual innocence. The district court found evidence was presented at trial that, when officers attempted to coax Dixon out of his apartment, he shouted, "I'm going to kill you," and then shot at the officers through the door, causing one to drop his gun. Dixon next shot at three separate places outside the apartment building, all of which were where officers had taken cover. Finally, there was a lull in the shooting before Dixon retrieved the gun the officer had dropped near his door and began shooting again. This finding is supported by substantial evidence in the record. Given this evidence, Dixon failed to demonstrate his voluntary intoxication negated his specific intent to kill the officers and that no reasonable juror would have convicted him of attempted murder. Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.<sup>3</sup>

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<sup>3</sup>Because we conclude Dixon failed to demonstrate that no reasonable juror would have convicted him in light of new evidence, we decline to reach Dixon's claim that a claim of innocence due to voluntary intoxication is a claim of factual versus legal innocence.

Finally, Dixon claims the district court erred by applying laches without first allowing him to seek discovery. Dixon sought the personnel records of the officers who testified against him so that he could determine whether they were still in the area and available to testify. Dixon argues that, had the district court allowed this discovery, he could have rebutted the presumption that the State would be prejudiced.

The district court found that Dixon's discovery request only addressed whether some of the witnesses would still be available to testify. Dixon's request and answer did not address whether the witnesses would be able to testify given the passage of time, the cost to the State to re-try the case, and the potential of lost evidence. Therefore, the district court concluded, Dixon failed to address the presumption of prejudice to the State and the discovery sought by Dixon would not answer these questions. The record supports the findings of the district court. Further, Dixon was not entitled to discovery because the writ was not granted and no evidentiary hearing was set. *See* NRS 34.780(2). Therefore, we conclude the district court did not err by denying Dixon's discovery request.

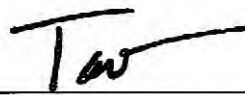
Dixon also argued he could overcome the presumption of prejudice to the State because he made a colorable showing of actual innocence and the delay in filing was not attributable to him because he had new evidence that was not reasonably available to him prior to the filing of this petition. The district court found that Dixon failed to demonstrate a fundamental miscarriage of justice or that he could not have had knowledge of his claims by the exercise of reasonable diligence. Therefore, the district court found, Dixon did not overcome the presumption of prejudice to the State. The record supports the findings of the district court, and we

conclude the district court did not err by finding the petition was barred by laches.

Having concluded that the district court did not err by denying Dixon's petition as procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk