

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MILTON T. TELLIS,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 80250-COA

FILED

SEP 18 2020

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

ORDER OF AFFIRMANCE

Milton T. Tellis appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 5, 2019. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Tellis filed his petition nearly 35 years after issuance of the remittitur on direct appeal on September 11, 1984, *see Tellis v. State*, Docket No. 14961 (Order Dismissing Appeal, August 23, 1984), and more than 26 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Thus, Tellis's petition was untimely filed. *See* NRS 34.726(1). Moreover, Tellis's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was 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 petition. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Tellis'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 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, Tellis was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Tellis argued the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claims that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). A claim of good cause must be raised within one year of the claim being available. *See Rippo*, 134 Nev. at 422, 423 P.3d at 1097. Tellis first raised this good cause claim in a pleading filed more than one year after *Montgomery* (decided January 25, 2016), and *Welch* (decided April 18, 2016), and he did not attempt to explain the delay. Accordingly, these cases do not provide good cause to overcome the procedural bars. Moreover, as a separate and independent ground to deny relief, this court has previously rejected a good-cause argument similar to Tellis's. *See Branham v. Warden*, 134 Nev. 814, 817, 434 P.3d 313, 316 (Ct. App. 2018).

Tellis also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because he is actually innocent. “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted). Tellis conceded below that he was not actually innocent of murdering the victim—just that he was innocent of first- as opposed to second-degree murder. This is not factual innocence.

Finally, Because Tellis failed to demonstrate a fundamental miscarriage of justice, he failed to overcome the presumption of prejudice to the State. *See* NRS 34.800. We therefore conclude the district court did not err by denying Tellis's petition as procedurally barred. Accordingly, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Milton T. Tellis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk