

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVIN MARVELL TONEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83246-COA

FILED

MAR 09 2022

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

ORDER OF AFFIRMANCE

Davin Marvell Toney appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 14, 2020, and supplemental petition filed on January 26, 2021. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Toney argues the district court erred by denying his petition as procedurally time barred without first conducting an evidentiary hearing on either his good cause claims or on his underlying claims. Toney filed his petition more than two years after entry of the judgment of conviction on October 30, 2017.¹ Thus, Toney's petition was untimely filed. *See* NRS 34.726(1). Toney's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see id.*, 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). A petitioner may

¹Toney did not file a direct appeal.

be entitled to a postconviction evidentiary hearing on his good cause claims when his claims are “supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.” *Id.* at 967, 363 P.3d at 1154-55 (internal quotation marks omitted). A district court may deny a petitioner an evidentiary hearing on substantive postconviction claims where a petitioner cannot overcome procedural bars. *Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008).

First, Toney claimed he had good cause because counsel was ineffective for failing to investigate, failing to properly counsel him regarding his plea, and failing to challenge the deadly weapon enhancement. “[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Toney’s ineffective-assistance-of-counsel claims were available to be raised in a timely postconviction petition and were therefore procedurally defaulted. Thus, this claim did not provide good cause to overcome the procedural bar, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Toney claimed the United States Supreme Court decision in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), provided good cause to raise his deadly-weapon-enhancement claims. Toney’s petition was filed more than one year after the decision in *Davis*, and Toney did not adequately explain his delay in raising this claim. See *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (holding that a good-cause claim must be raised within one year of it becoming available).

Thus, this claim did not provide good cause to overcome the procedural bar, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Toney claimed he had good cause because the State improperly or erroneously charged him with the deadly weapon enhancement. This claim was available to be raised in a timely filed petition, and Toney did not adequately explain his delay in filing this claim. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Thus, this claim did not provide good cause to overcome the procedural bar, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Toney claimed that he could overcome the procedural time bar because he was actually innocent of the deadly weapon enhancement. Specifically, he claimed that a BB gun or a pellet gun did not qualify as a deadly weapon and, therefore, he was erroneously convicted of the enhancements. Toney failed to demonstrate actual innocence because he failed to allege that new evidence showed he was actually innocent. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12. Thus, this claim failed to overcome the procedural bar, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Having concluded Toney failed to overcome the procedural time bar, we conclude the district court did not err by denying Toney's petition

without first conducting an evidentiary hearing on substantive claims raised in the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk