

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOEL BURKETT, A/K/A RAYMOND
HAIRE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83743-COA

FILED

APR 20 2022

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

ORDER OF AFFIRMANCE

Joel Burkett appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 6, 2020. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Burkett filed his petition more than 36 years after issuance of the remittitur on direct appeal on May 10, 1983. *See Burkett v. State*, Docket No. 13600 (Order Dismissing Appeal, April 21, 1983). Further, Burkett filed his petition nearly 26 years after an amended judgment of conviction was filed on February 28, 1994, and nearly 2 years after an amended judgment of conviction was filed on March 2, 2018.¹ Also, Burkett's petition was filed more than 27 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). Thus, Burkett's petition was untimely filed. *See* NRS 34.726(1).

¹Burkett did not appeal from either amended judgment of conviction.

Moreover, Burkett's petition was successive because he had previously filed numerous postconviction petitions for a writ of habeas corpus that were 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.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Burkett'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). Actual prejudice may be demonstrated by showing that the alleged error "in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." See *Hogan v. Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993).

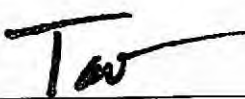
Burkett claimed the Supreme Court's decision in *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018), provides good cause. In *McCoy*, the Supreme Court held that an attorney may not concede a defendant's guilt where the defendant expressly objects or insists on maintaining his innocence. *Id.* at 1509. Burkett filed his petition more than one year after *McCoy* was decided and therefore did not raise his claim based on *McCoy* within a reasonable time after it became available. See *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (concluding that a claim is raised within a reasonable time when the petition is filed

²*Burkett v. Warden*, No. 79999-COA, 2020 WL 2521672 (Nev. Ct. App. May 15, 2020) (Order of Affirmance); *Burkett v. State*, No. 63661, 2014 WL 495430 (Nev. January 24, 2014) (Order of Affirmance); *Burkett v. State*, Docket No. 45769 (Order of Affirmance, November 15, 2005); *Burkett v. State*, Docket No. 41504 (Order of Affirmance, March 5, 2004); *Burkett v. State*, Docket No. 34767 (Order of Affirmance, July 10, 2001). Burkett also filed postconviction petitions for a writ of habeas corpus on February 2, 1994, and December 7, 2015. He was granted relief in those proceedings and did not appeal.

within one year after the factual or legal basis for the claim becomes available). Thus, Burkett failed to demonstrate good cause. Further, Burkett failed to demonstrate an alleged error in the proceedings worked to his actual and substantial disadvantage because counsel did not concede Burkett's guilt at trial. Accordingly, we conclude the district court did not err by denying his petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Joel Burkett
Attorney General/Carson City
Clark County District Attorney
Attorney General/Las Vegas
Eighth District Court Clerk