

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH LARAY THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

KENNETH LARAY THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85611-COA

FILED

MAY 11 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

No. 85794-COA

ORDER OF AFFIRMANCE

In Docket No. 85611, Kenneth Laray Thomas appeals from an order of the district court denying a motion to modify sentence filed on September 2, 2022. In Docket No. 85794, Thomas appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 29, 2022.¹ These cases were consolidated on appeal. See NRAP 3(b). Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

¹Thomas titled his pleading as a motion to withdraw guilty plea and vacate sentence. The district court properly construed the motion as a postconviction habeas petition. See *Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014).

Docket No. 85611

In his motion, Thomas claimed that the district court erred by relying on the sentencing recommendation in the presentence investigation report (PSI) because the PSI showed he had been to prison four times when he had only been to prison once. “[A] motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant’s criminal record which work to the defendant’s extreme detriment.” *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

The PSI showed that Thomas had been to prison four times because he had received prison sentences in four separate cases. Those four separate prison terms were set to run concurrently and/or consecutively to each other, thus explaining why Thomas only went to prison once. The information in the PSI was accurate; therefore, Thomas failed to demonstrate the district court sentenced him based on a mistaken assumption regarding his criminal record.

Thomas also argues that the district court erred by denying his motion to appoint counsel. Because no statute or court rule allows for the appointment of counsel for a motion to modify sentence, we conclude the district court did not err by denying the motion to appoint counsel.

Finally, Thomas argues the district court erred by not allowing him to be present at the hearing denying his motion to modify sentence. The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely denied the motion. Thomas does not demonstrate he was prejudiced by his absence from the relevant hearing, and we conclude Thomas is not entitled to relief. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002)

(concluding a petitioner's statutory rights were violated when she was not present at a hearing where testimony and evidence were presented).

Docket No. 85794

Thomas filed his petition more than 10 years after entry of the judgment of conviction on April 18, 2011.² Thus, Thomas's petition was untimely filed. See NRS 34.726(1). Moreover, Thomas'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 petitions.³ See NRS 34.810(2). Thomas's petition was procedurally barred absent a demonstration of good cause and actual prejudice, see NRS 34.726(1); 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).

Thomas claimed he could overcome the procedural bars because he had proof that he asked counsel to file a presentence motion to withdraw his guilty plea. His proof consisted of a 2016 affidavit from a fellow inmate stating that back in 2011, prior to Thomas's sentencing, he called Thomas's counsel and left a message with counsel's secretary that Thomas wanted to withdraw his plea. Thomas also provided a copy of the inmate call log from

²Thomas did not appeal from his judgment of conviction.

³*Thomas v. State*, No. 71452-COA, 2017 WL 3033610 (Nev. Ct. App. July 12, 2017) (Order of Affirmance); *Thomas v. State*, No. 63801, 2014 WL 7107961 (Nev. Dec. 11, 2014) (Order of Affirmance).

that time period. Thomas failed to demonstrate good cause because this claim could have been raised in his previous petitions. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, we conclude that the district court did not err by denying this claim.

Thomas also appeared to argue that he could overcome the procedural bars because he has always maintained he was innocent. Thomas did not demonstrate actual innocence because he failed to show that “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) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Therefore, we conclude the district court did not err by denying this claim.

On appeal, Thomas argues he has good cause because prior postconviction counsel did not have access to his entire file as trial counsel passed away and because he had to use an inmate law clerk to file his documents. These claims were not raised below, and we decline to consider them for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Finally, Thomas argues the district court erred by denying his request for the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Thomas’s petition was subject to summary dismissal because it was procedurally barred pursuant to NRS 34.810(2). *See* NRS 34.745(4).

Therefore, we conclude the district court did not abuse its discretion by declining to appoint counsel.

Having concluded Thomas is not entitled to relief, we
ORDER the judgments of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen E. Delaney, District Judge
Kenneth Laray Thomas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk