

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVON RAY HOCKEMIER,
Appellant,
vs.
TIM GARRETT, WARDEN,
Respondent.

No. 89221-COA

FILED

NOV 12 2025

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

ORDER OF AFFIRMANCE

Devon Ray Hockemier appeals from a district court order granting a motion to dismiss a postconviction petition for a writ of habeas corpus filed on November 20, 2023.¹ Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Hockemier filed his petition more than seven years after issuance of the remittitur on direct appeal on May 16, 2016. *Hockemier v. State*, No. 68333-COA, 2016 WL 1616587 (Nev. Ct. App. Apr. 20, 2016) (Order of Affirmance). Thus, Hockemier's petition was untimely filed. See NRS 34.726(1). Moreover, Hockemier'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

¹In his petition, Hockemier raised four claims: (1) counsel was ineffective during the pretrial stage by failing to meaningfully challenge the State's assertion that the district court had jurisdiction over Hockemier's case pursuant to 2013 Nev. Stat., ch. 483, § 1, at 2902 (formerly NRS 62B.330(3)(e)(2)); (2) counsel was ineffective during sentencing; (3) the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) Hockemier was denied due process because the district court lacked jurisdiction to convict and sentence him.

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he raised claims new and different from those raised in his previous petition.² See NRS 34.810(3). Hockemier's petition was procedurally barred absent a demonstration of good cause and actual prejudice, see NRS 34.726(1); NRS 34.810(4), or a showing he is actually innocent such that "the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice," *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available" to be raised in a timely petition. *Id.* (internal quotation marks omitted).

First, Hockemier alleged he had good cause to overcome the procedural bars because the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that could have "undermined" the district court's jurisdiction over the case pursuant to 2013 Nev. Stat., ch. 483, § 1, at 2902 (formerly NRS 62B.330(3)(e)(2)). Hockemier alleged the State improperly withheld documents in the possession of the Elko Police Department that predated and were unrelated to the instant offenses.³

²*Hockemier v. Baker*, No. 83147-COA, 2022 WL 1439519 (Nev. Ct. App. May 5, 2022) (Order of Affirmance).

³This case involved two victims: O.M. and S.B. In response to a public records request conducted by Hockemier's current counsel, the Elko Police Department provided law enforcement records pertaining to Hockemier's mother, Pamela Ernstine; R. Hockemier; O.M.'s mother, H. Overholser; Michael Overholser; C. Bridge (who was in a relationship with H. Overholser, and is S.B.'s father), and Hockemier himself.

Hockemier alleged that these documents, when considered in conjunction with O.M.'s responses during his interview with Detective Hessing, would have prompted a reasonable investigating agency to discover Hockemier's identity as O.M.'s assailant before Hockemier turned 21 years old.⁴

A valid *Brady* claim can constitute good cause and prejudice to excuse the procedural bars. See *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). To establish a *Brady* violation, generally, "the defendant must show (1) that the State withheld evidence, (2) which is favorable to the accused because it is exculpatory or impeaching, and (3) that prejudice resulted because the evidence was material, i.e., that there is a reasonable possibility of a different result had there been disclosure." *Rippo v. State*, 134 Nev. 411, 431, 423 P.3d 1084, 1103 (2018). However, in the guilty plea context, to establish materiality or prejudice, a defendant is normally required to demonstrate "there is a reasonable probability/possibility that, but for the failure to disclose exculpatory evidence, the defendant would have refused to plead guilty and would have insisted on going to trial." *State v. Huebler*, 128 Nev. 192, 204, 275 P.3d 91, 99 (2012). Showing that the State withheld exculpatory evidence in violation of *Brady* parallels the good cause showing required to overcome procedural bars and establishing that the evidence was material under *Brady* can demonstrate prejudice to

⁴As is relevant for our discussion of Hockemier's claim, 2013 Nev. Stat., ch. 483, § 1, at 2902 (formerly NRS 62B.330(3)(e)(2)) provided that the juvenile court does not have jurisdiction over a person charged with committing a category A or B felony "if the person was at least 16 years of age but less than 18 years of age when the offense was committed" and "the person is not identified by law enforcement as having committed the offense until the person reaches 21 years of age."

overcome the procedural bars. *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

Even assuming *Brady* applies to circumstances giving rise to a district court's jurisdiction pursuant to NRS 62B.330, Hockemier failed to demonstrate the documents would have been material to the jurisdiction of the district court pursuant to NRS 62B.330. At a hearing held on trial-level counsel's motion to transfer the matter to the juvenile court, Hessing testified that he began investigating child sexual assault allegations against O.M. on November 20, 2013, and that he interviewed O.M. on November 21, 2013. Hessing further testified that during the interview, O.M. discussed sexual assaults that had been perpetrated on him. Hessing explained that O.M. told him his assailant's mother's first name was Pam, and that his assailant was white, had earrings, black hair and brown eyes, liked to wear black clothes, and worked at a movie theater near McDonald's. Hessing testified that he received no other information regarding the identity of O.M.'s assailant on November 21, 2013.

Hessing further testified that he learned the identity of O.M.'s mother (H. Overholser) during O.M.'s interview and interviewed H. Overholser on November 25, 2013. Hessing explained this was a "drop in" interview where H. Overholser "just basically showed up" at the police station. During that interview, H. Overholser stated that she knew a woman named Pam or Pamela and that the woman had a son named Devon Hockemier. H. Overholser indicated that she and her family had lived with Pam at Pam's home between approximately September 2009 and February 2010. Hessing explained that he gave H. Overholser the description of the assailant O.M. had provided during his interview just days earlier and that

H. Overholser indicated the description matched Hockemier. She also confirmed Hockemier had worked at the movie theater.

In addition, Hessing testified that he also interviewed Bridge on November 25, 2013, and from his investigation he learned that Bridge had been in a relationship with H. Overholser. Hessing explained that Bridge told him that Bridge, H. Overholser, O.M., and Bridge's son (the other victim, S.B.) had all lived at Pam's residence. This led to Hessing interviewing S.B. on the same day. During that interview, S.B. stated that Hockemier had sexually assaulted him when they lived together. On cross-examination by the State, Hessing testified that O.M. only gave him the above description of his assailant but no name because "he didn't know any names." As to what Hessing did regarding this case between November 21 and November 25, 2013, Hessing explained, "That would have been my days off so I didn't do anything with the case from the 21st until the 25th." Hessing explained that he found out Hockemier's identity on November 25, 2013, the day after Hockemier turned 21 years old and four days after O.M. disclosed the abuse, and "didn't purposely decide to wait" until that day to identify Hockemier.

In light of these circumstances, we conclude Hockemier failed to demonstrate that disclosure of the police documents would have resulted in a reasonable possibility that the district court's jurisdiction would have been undermined. Hessing testified that he did not learn of Hockemier's identity until November 25, 2013. Although Hockemier argued the police could have learned about his identity in a time period shorter than four days by using their internal documents to trace O.M.'s description of his assailant back to Hockemier through various parties and police reports from years' previous, nothing in those documents undermines Hessing's

testimony about when he actually identified Hockemier. Further, we are not persuaded that Hessing's testimony regarding his days off work was undermined by a police report showing that Hessing went to the hospital in relationship to O.M.'s victim's case on November 22, as nothing in that report indicated that Hessing worked on this case on that day. Therefore, we conclude the district court did not err by rejecting this good cause claim.

Next, Hockemier alleged he had good cause to overcome the procedural bars because his claims were not reasonably available until law enforcement disclosed the above-mentioned records pursuant to a 2023 public records request made by Hockemier's current counsel. All of the records Hockemier identified in support of his petition predate the entry of Hockemier's plea and involve Hockemier or people Hockemier knew. And Hockemier failed to demonstrate an impediment external to the defense prevented him from obtaining these records previously. Further, Hockemier argued in his petition that the basis for his underlying claims—that the district court lacked jurisdiction over his case because the offenses were committed before he was 16 and because the police identified him before he was 21—was apparent from previously available sources, thus demonstrating these claims were available to be raised previously. Indeed, Hockemier alleged in his petition that Hessing's preliminary hearing testimony established that Hessing identified Hockemier before he turned 21 and that other witness testimony at the preliminary hearing established a timeline that demonstrated the offenses occurred when Hockemier was between 15 and 16. In light of these circumstances, Hockemier failed to demonstrate the claim was not reasonably available to him previously. Therefore, we conclude the district court did not err by rejecting this good cause claim.

Next, Hockemier alleged he had good cause to overcome the procedural bars because he did not have the legal basis for his claims relating to the jurisdiction of the district court based on NRS 62B.330 until the Nevada Supreme Court issued its opinion in *Zalyaul v. State*, 138 Nev. 760, 520 P.3d 345 (2022). Notwithstanding the fact that *Zalyaul* interprets a different statute than the one Hockemier challenges, Hockemier's claim fails because *Zalyaul* did not announce a new rule of law. Rather, the supreme court merely interpreted NRS 62B.335 as it applied to the facts of *Zalyaul*'s case. As such, Hockemier could have raised his claims related to the jurisdiction of the district court prior to the supreme court's decision in *Zalyaul*. See *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); see also *Nika v. State*, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008) (discussing when a "state court interpretation of a state criminal statute constitutes a change in—rather than a clarification of—the law"). Therefore, we conclude the district court did not err by rejecting this good cause claim.

Next, Hockemier alleged he had good cause to overcome the procedural bars because prior postconviction counsel was ineffective. Hockemier was not entitled to the assistance of postconviction counsel, as his was a noncapital case; thus, his allegations of ineffective assistance of postconviction counsel do not provide good cause. See *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). And we decline Hockemier's invitation to extend the right to the effective assistance postconviction counsel to circumstances where the petitioner has been granted an

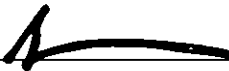
evidentiary hearing. Therefore, we conclude the district court did not err by rejecting this good cause claim.

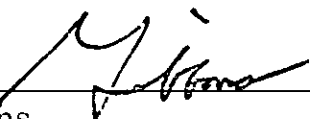
Finally, Hockemier alleged he could overcome the procedural bars because failure to consider his claims on the merits would result in a fundamental miscarriage of justice. Hockemier made two interrelated arguments regarding this claim. First, he contended that where the district court lacked jurisdiction over his case, his conviction and sentence amounted to a fundamental miscarriage of justice. Second, he contended that he was actually innocent of the jurisdiction element of the crimes.

“Where a petitioner cannot demonstrate cause and prejudice, we have recognized an exception to these bars against untimely and successive petitions: the petitioner must show that the failure to consider the petition on its merits would result in a fundamental miscarriage of justice, meaning the imprisonment of a person who is actually innocent of the offense for which he was convicted or the execution of a person who is actually innocent of the death penalty.” *Lisle v. State*, 131 Nev. 356, 358, 351 P.3d 725, 727 (2015); *see also Schlup v. Delo*, 513 U.S. 298, 316 (1995) (“Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.”). Actual innocence means factual innocence, not legal innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Where the petitioner has been convicted pursuant to a guilty plea, he must demonstrate that he is actually innocent of the charges foregone by the State in the course of plea bargaining. *See id.* at 624. Because Hockemier’s claim to overcome the procedural bars does not implicate his actual innocence, we conclude the district court did not err by rejecting this claim.

In light of the above, we conclude the district court did not err by dismissing Hockemier's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Kriston N. Hill, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk