

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN KINFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60510

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus.¹ Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Appellant filed his petition on December 1, 2011, more than two years after the order dismissing appellant's direct appeal was filed on August 10, 2009.² Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Appellant filed a direct appeal, but withdrew it voluntarily. Kinford v. State, Docket No. 52377 (Order Dismissing Appeal, August 10, 2009). This court noted in its order dismissing appeal, because no remittitur issued from the withdrawal of appellant's direct appeal, see NRAP 42(b), the one-year period for filing a timely post-conviction petition under NRS 34.726(1) was to commence from the date of that order.

previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.³ See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

First, appellant claimed he had good cause for a successive petition because post-conviction counsel for his first petition failed to exhaust claims for purposes of federal court review. Exhaustion of claims in order to seek federal court review does not demonstrate good cause. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); see also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000). Further, appellant's argument lacked merit as appellant had no statutory right to post-conviction counsel, and thus the ineffective assistance of post-conviction counsel does not provide good cause for a successive and untimely petition. See McKague v. Warden, 112 Nev. 159, 164-65 & n.5, 912 P.2d 255, 258 & n.5 (1996); Crump v. Warden, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997).

Second, appellant claimed he had good cause because of mental difficulties due to brain damage. This failed to demonstrate good cause for filing an untimely and successive post-conviction petition as appellant failed to demonstrate his claims could not have been raised in his previous petition. See Phelps v. Director, Prisons, 104 Nev. 656, 660,

³Kinford v. State, Docket No. 56491 (Order of Affirmance, September 29, 2011).

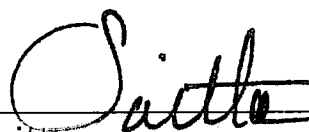
764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).

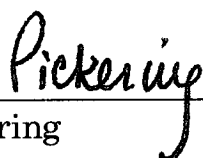
Third, appellant claimed he had good cause because his trial counsel and the State withheld evidence showing that the victim's father molested her and that appellant's ex-wife fabricated evidence that appellant committed the crime. Appellant stated his trial counsel possessed this information, and thus, appellant failed to demonstrate that an impediment external to the defense prevented him from raising this claim in his first petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, as appellant stated his trial counsel possessed this information, appellant failed to demonstrate that the State withheld exculpatory evidence, and therefore, this claim failed to demonstrate good cause to overcome the procedural bars. See State v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) (citing State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003)).


Finally, appellant asserted that he was actually innocent due to evidence showing that the victim's father molested her and that appellant's ex-wife fabricated evidence that appellant committed the crime. Appellant failed to 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); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

We therefore conclude that the district court did not err in dismissing appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Saitta, J.


Pickering, J.


Hardesty, J.

cc: Hon. Leon Aberasturi, District Judge
Steven Kinford
Attorney General/Carson City
Lyon County District Attorney
District Court Clerk