

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUSTIN MICHAEL BARNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73958

FILED

AUG 14 2018

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

ORDER OF AFFIRMANCE

Dustin Michael Barnett appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 28, 2015, and a supplemental petition filed on September 1, 2016. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Barnett challenges the district court's denial of his petition without first conducting an evidentiary hearing. Barnett filed his petition nearly two years after issuance of the remittitur on direct appeal on January 14, 2014. *See Barnett v. State*, Docket No. 61083 (Order of Affirmance, December 18, 2013). Barnett's petition was therefore untimely filed. *See NRS 34.726(1)*. His petition was also successive insofar as some of his claims could have been raised on direct appeal. *See NRS 34.810(1)(b)(2)*. Barnett's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice, *see NRS 34.726(1)*; *NRS 34.810(1)(b)*, or actual innocence, *see Berry v. State*, 131 Nev. 657, 966, 363 P.3d 1148, 1154 (2015). To warrant an evidentiary hearing on his claims to overcome the procedural bars, Barnett had to allege more than bare claims. He had to allege specific facts that, if true and not belied by the record,

would have entitled him to overcome the procedural bars. *Berry*, 131 Nev. at 967, 363 P.3d at 1155.

Barnett first claimed his mental health issues, including his allegedly questionable competency; his erroneous filing of a postconviction habeas petition in federal court; and his lack of postconviction counsel before the statute of limitations ran all constituted good cause to excuse his procedural time bar. Barnett had to “show that an impediment external to the defense prevented him . . . from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Barnett’s claims did not implicate impediments external to his defense. See *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as stated in State v. Huebler*, 128 Nev. 192, 275 P.3d 91 (2012); *Phelps v. Dir., Nev. Dep’t of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 69 P.3d 676 (2003). Further, the district court lacked authority to appoint postconviction counsel before Barnett filed his postconviction habeas petition, and he was not thereafter entitled to the appointment of counsel. See NRS 34.750(1); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

Barnett next claimed he had good cause because he had limited phone access, appellate counsel did not give him the remittitur from his direct appeal, and the prison threw away his paperwork. Barnett did not explain how his limited phone access interfered with his ability to satisfy the procedural requirements. And he did not indicate when he learned his direct appeal had been denied or when his paperwork was thrown away. His bare claims failed to allege sufficient facts that, if true, would have overcome the procedural bars. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d

at 506 (indicating good-cause claims must not themselves be procedurally barred).

Barnett next claimed he had good cause because he was in lockdown for most of the days and he lacked money to pay for postage, copies, and envelopes.¹ Barnett's claims are belied by the record. Barnett was able to file a postconviction habeas petition within the statute of limitations, but he filed it in federal court rather than state court. Barnett also claimed he filed a timely postconviction habeas petition in state court but that he has never heard of the status of that petition.²

Finally, Barnett claimed his procedural defaults should be excused because he is actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice. To prevail, Barnett had 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 *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Barnett's bare claim failed to identify any new evidence of his actual innocence.

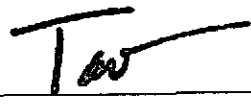
¹Barnett also claims on appeal that he had "no access" to the law library. This is new argument not raised below, and we decline to consider it on appeal in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). His argument below was that he received inadequate assistance from the prison law clerk. Such a claim would not constitute good cause. See *Phelps*, 104 Nev. at 660, 764 P.2d at 1306.

²Notably, Barnett has never suggested that the instant petition is identical to this earlier petition. Accordingly, even if Barnett did submit a timely petition, it would not demonstrate good cause to excuse the procedural bar.

For the foregoing reasons, we conclude the district court did not err by denying Barnett's petition as procedurally barred without first conducting an evidentiary hearing. And because the application of the procedural bars is mandatory, *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), we further conclude the district court did not err by failing to conduct an evidentiary hearing on Barnett's underlying, substantive claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³We have reviewed all documents Barnett has filed in this matter, and we conclude no relief based upon those submissions is warranted.