

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUSHON NICHALOS GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74435-COA

FILED

FEB 14 2019

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

ORDER OF AFFIRMANCE

Dushon Nichalos Green appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Green filed his petition on August 3, 2017, almost eight years after issuance of the remittitur on direct appeal on August 25, 2009. *Green v. State*, Docket No. 50756 (Order of Affirmance, July 31, 2009). Thus, Green's petition was untimely filed. *See* NRS 34.726(1). Moreover, Green's petition was successive because he had previously filed a postconviction 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.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Green'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). Moreover, because the State specifically pleaded laches, Green was required to

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²*Green v. State*, Docket No. 61858 (Order of Affirmance, May 13, 2014).

overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

First, Green appeared to assert the procedural bars did not apply because he had to exhaust state remedies so that he can proceed in federal court. However, exhaustion of state remedies in order to seek federal court review was insufficient to demonstrate good cause. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229 1230 (1989).


Second, Green appeared to assert he had good cause because his postconviction counsel for his prior petition did not properly assert his claims of error violated the U.S. Constitution. Green's claim did not demonstrate good cause as he had no statutory right to postconviction counsel, and thus ineffective assistance of postconviction counsel would not provide good cause for a successive and untimely petition. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014).

In addition, Green failed to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). Therefore, the district court properly denied the petition as procedurally barred.

Next, Green appears to argue the district court erred by denying the petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations not belied by the record, that if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). The district court concluded Green's claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper.

Therefore, the district court properly denied the petition without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Dushon Nichalos Green
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

The Honorable Michael L. Douglas did not participate in the decision in this matter.