

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDMOND WADE GREEN,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 73096-COA

FILED

MAR 20 2019

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

ORDER OF AFFIRMANCE

Edmond Wade Green appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 11, 2017.¹ Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Green filed his petition 17 years after issuance of the remittitur on direct appeal on September 8, 1999. *See Green v. State*, Docket No. 31909 (Order Dismissing Appeal, August 12, 1999). Green's petition was therefore untimely filed. *See* NRS 34.726(1). Green's petition was also successive and an abuse of the writ.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Green'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); NRS 34.810(3).

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²*See Green v. Warden*, Docket No. 55786 (Order of Affirmance, December 10, 2010); *Green v. State*, Docket No. 46469 (Order of Affirmance, January 9, 2007). Green did not appeal the district court's denial of his November 5, 2015, postconviction petition for a writ of habeas corpus.

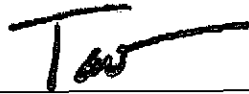
Green claimed he was entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), and NRS 193.165 and that the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to those claims. *Welch* and *Montgomery* do not provide good cause to overcome the procedural bars to his *Byford* claim. See *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).

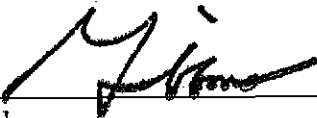
Neither do *Welch* and *Montgomery* provide good cause to overcome Green's NRS 193.165 claim. Those cases address situations where a court interpreted a statute or made a constitutional ruling, see *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726-27, but the changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension, *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008).


Green also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Green claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Green thus failed to overcome the procedural bars. See *Bousley v. United States*, 523 U.S. 614, 623 (1998)

("[A]ctual innocence' means factual innocence, not mere legal insufficiency."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Tao


_____, J.
Gibbons


_____, J.
Bulla

cc: Chief Judge, Second Judicial District
Edmond Wade Green
Attorney General/Carson City
Washoe County District Attorney
Washoe 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-Nova v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).