

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAUL D. FOWLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74210-COA

FILED

MAR 20 2019

ELIZABETH A. BROWN
CLERK OF APPEALS COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Paul D. Fowler appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017.¹ Eighth Judicial District Court, Clark County; Nancy Becker, Senior Judge.

Fowler filed his petition nearly 21 years after issuance of the remittitur on direct appeal on May 21, 1996. *See Fowler v. State*, Docket No. 27377 (Order Dismissing Appeal, May 1, 1996). Fowler's petition was therefore untimely filed. *See* NRS 34.726(1). Fowler's petition was also successive.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Fowler'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). Further, because the State specifically pleaded laches, Fowler was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

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

²*See Fowler v. State*, Docket No. 68016 (Order of Affirmance, November 13, 2015); *Fowler v. State*, Docket No. 44259 (Order of Affirmance, February 15, 2005).

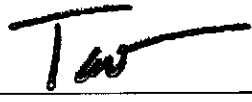
Fowler claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).

Fowler 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 Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Fowler claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Fowler 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.”). And because he failed to demonstrate a fundamental miscarriage of justice, Fowler failed to overcome the presumption of prejudice to the State. See NRS 34.800.


Fowler’s claim that the district court failed to allow him the opportunity to reply to the State’s response as required by NRS 34.800(2) is belied by the record. The district court explicitly acknowledged Fowler’s reply in the order in which it denied his petition.

Finally, we 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). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, J.
Gibbons


_____, J.
Bulla

cc: Hon. Nancy Becker, Senior Judge
Paul D. Fowler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk