

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATRICK BRIAN DUNN,
Appellant,
vs.
ISIDRO BACA, WARDEN, NORTHERN
NEVADA CORRECTIONAL CENTER
(NNCC),
Respondent.

No. 76080-COA

FILED

APR 29 2019

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

ORDER OF AFFIRMANCE

Patrick Brian Dunn appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Dunn argues the district court erred by denying his July 27, 2015, petition and later-filed supplement. Dunn claimed the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by withholding evidence concerning the victim's actions in an otherwise unrelated criminal case stemming from a fight that occurred in 2009. The victim in this matter was also the victim in the 2009 fight, but Dunn contended evidence from that case could have been used by Dunn to show that the victim had refused to withdraw from that confrontation and had a habit of that behavior.

The district court conducted an evidentiary hearing and considered Dunn's claim on the merits. However, the district court should have applied the procedural bar from NRS 34.810(1)(b) because Dunn's claim could have been raised on direct appeal from the judgment of conviction. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural

default rules to post-conviction habeas petitions is mandatory.”). Because Dunn could have raised his underlying claim on direct appeal, Dunn’s petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(b), (3).

“To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.” *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012) (internal quotation marks omitted). When a claim alleging withheld exculpatory evidence is raised in a procedurally barred postconviction petition for a writ of habeas corpus, “the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars.” *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). “Good cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” *Id.* “We give deference to the district court’s factual findings regarding good cause, but we will review the court’s application of the law to those facts de novo.” *Huebler*, 128 Nev. at 198, 275 P.3d at 95.

First, the district court found Dunn failed to meet his burden to establish this evidence was withheld because at the evidentiary hearing Dunn did not elicit any evidence to support his claim that his trial counsel were unaware of the separate criminal matter. Substantial evidence supports the district court’s finding. In addition, Dunn did not explain why he did not raise this claim on direct appeal and, therefore, failed to meet his


burden to demonstrate an impediment external to the defense prevented him from raising this claim on direct appeal. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Accordingly, Dunn failed to demonstrate good cause to overcome the procedural bar.


Second, the district court found Dunn failed to demonstrate the evidence related to the separate criminal matter was material to the defense. The district court found specific-act evidence concerning the victim had been ruled inadmissible by the trial court and the Nevada Supreme Court affirmed that decision on direct appeal. *Dunn v. State*, Docket No. 62676 (Order of Affirmance, March 2, 2015). The district court found evidence concerning the victim's actions in the separate criminal matter was "precisely the type of character evidence disallowed" by the trial court, and, therefore, would not have been admissible at Dunn's trial. The district court further found evidence concerning the victim's actions in the 2009 fight did not establish those actions amounted to the victim's habit and, therefore, Dunn failed to show such evidence would have been admissible pursuant to NRS 48.059. For those reasons, the district court found Dunn failed to demonstrate either a reasonable probability or possibility of a different outcome at trial had his trial counsel had access to evidence stemming from the separate criminal matter. *See Bennett*, 119 Nev. at 600, 81 P.3d at 8 (explaining the different tests for materiality of undisclosed evidence when a defendant made either a general or a specific request for the information). Substantial evidence supports the district court's finding that the evidence concerning the 2009 fight was not material to Dunn's defense. Accordingly, Dunn failed to demonstrate actual prejudice sufficient to overcome the procedural bar.

Because Dunn did not demonstrate that the evidence related to the separate criminal matter was withheld or that it was material to his defense, he failed to demonstrate good cause and actual prejudice sufficient to overcome the procedural bar. *See id.* at 599, 81 P.3d at 8. Therefore, we conclude Dunn's petition was procedurally barred, and we affirm the denial of his petition. *See* NRS 34.810(1)(b); *see also* *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Alvin R. Kacin, District Judge
Hillewaert Law Firm
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk