

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD FREDERICK POWELL, III,  
Appellant,  
vs.  
RENEE BAKER, WARDEN,  
Respondent.

No. 78905-COA

**FILED**

MAR 20 2020

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

*ORDER OF AFFIRMANCE*

Richard Frederick Powell, III appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Powell filed his petition on February 1, 2019, almost three years after entry of the judgment of conviction on February 10, 2016.<sup>1</sup> Thus, Powell's petition was untimely filed. *See* NRS 34.726(1). Powell's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *See Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1155 (2015).

First, Powell claims he had cause for the delay because he did not understand the sentence he faced by the entry of his guilty plea and recently discovered it was lengthier than he initially believed. However,

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<sup>1</sup>Powell did not pursue a direct appeal.

the factual basis for Powell's underlying claim was reasonably available to be raised in a timely-filed petition and Powell did not demonstrate an impediment external to the defense prevented him from doing so. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, we conclude the district court did not err by denying this good-cause claim without conducting an evidentiary hearing.

Second, Powell claims the procedural time bar did not apply as the district court lacked subject matter jurisdiction concerning this matter as he did not receive the notice of grand jury proceedings. However, this claim did not implicate the jurisdiction of the courts, and therefore, the procedural bars apply to Powell's petition. See Nev. Const. art. 6, § 6; NRS 171.010; *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[T]he term jurisdiction means . . . the court’s statutory or constitutional power to adjudicate the case.” (internal quotation marks omitted)). Moreover, the factual basis for Powell's underlying claim was reasonably available to be raised in a timely-filed petition and Powell did not demonstrate an impediment external to the defense prevented him from doing so. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Therefore, we conclude the district court did not err by denying this good-cause claim without conducting an evidentiary hearing.

Third, Powell claims the procedural time bar did not apply because he was actually innocent of resisting a public official with the use of a firearm. Powell contends he had dropped the firearm by the time he was confronted by a police officer. A petitioner may overcome the procedural bars and “secure review of the merits of defaulted claims by

showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154. However, “actual innocence means factual innocence, not mere legal insufficiency,” and the “petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted). The evidence contained within the record demonstrates that an officer was dispatched due to a reported suspicious person at a home. The officer approached the home and viewed Powell in the possession of a firearm. The officer observed Powell raise the firearm and, in response, the officer shot Powell. The firearm was recovered from the crime scene. A gun case containing ammunition was also discovered in Powell’s backpack. Given the evidence of Powell’s guilt contained within the record, Powell failed to demonstrate it is more likely than not that no reasonable juror would have convicted him. *See id.* at 624 (explaining that a court may consider “any admissible evidence of petitioner’s guilt” when weighing a claim of actual innocence). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Powell argues the district court erred by finding he had improperly challenged the computation of his time served in the same petition that he challenged his judgment of conviction. However, the district court properly resolved the portion of the petition challenging the judgment of conviction and found a challenge to the computation of time served cannot be raised in a postconviction petition for a writ of habeas corpus challenging the validity of the judgment of conviction. *See NRS*

34.738(3). The denial of Powell's claim was without prejudice and he may separately file a postconviction petition for a writ of habeas corpus challenging the computation of time served in the county in which he is incarcerated. *See* NRS 34.724(1); NRS 34.730(2); NRS 34.738(1).

Fifth, Powell argues the district court erred by entering an order denying the petition after Powell had filed a motion to disqualify the district court judge.<sup>2</sup> NRS 1.235(1)(a) requires a party seeking to disqualify a district court judge for actual or implied bias to do so at least 20 days prior to a trial or hearing. Powell filed the motion to disqualify after the district court judge had presided over hearings concerning Powell's petition and orally denied the petition. Therefore, Powell is not entitled to relief because he did not timely request disqualification of the district court judge. *See Brown v. Fed. Sav. & Loan Ins. Corp.*, 105 Nev. 409, 412, 777 P.2d 361, 363 (1989) ("Failure to comply timely with the requirements for seeking recusal provided in NRS 1.235(1) & (2) results in a waiver of the issue"); *see also Valladares v. Second Judicial Dist. Court*, 112 Nev. 79, 81-83, 910 P.2d 256, 258-59 (1996) (discussing and applying time limitations for motion for disqualification from NRS 1.235 to a criminal matter).


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<sup>2</sup>Powell also argues the district court improperly entered an initial order denying the petition that failed to contain specific findings of fact as required by NRS 34.830(1). However, the district court later entered a final order with specific factual findings. We conclude the district court's final order denying the petition contains findings with sufficient specificity to permit this court to appropriately review its decision on appeal. Therefore, we conclude Powell fails to demonstrate he is entitled to relief.

Sixth, Powell argues the district court erred by denying the petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. See NRS 34.750(1). A review of the record reveals the issues in this matter were not difficult, Powell was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. See *id.* Therefore, Powell fails to demonstrate the district court abused its discretion by denying the petition without appointing postconviction counsel. See *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.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Eric Johnson, District Judge  
Richard Frederick Powell, III  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk