

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79738-COA

KEVIN DEVON SUTTON,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 79758-COA

FILED

MAY 15 2020

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

ORDER OF AFFIRMANCE

Kevin Devon Sutton appeals from an order of the district court denying a ninth postconviction petition for a writ of habeas corpus filed on May 6, 2017 (Docket No. 79738-COA) and a twelfth postconviction petition for a writ of habeas corpus filed on July 8, 2019 (Docket No. 79758-COA). Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.
Docket No. 79738-COA

Sutton filed this petition nearly 16 years after issuance of the remittitur on direct appeal on July 9, 2001. *See Sutton v. State*, Docket No. 34165 (Order of Affirmance, June 11, 2001). Thus, Sutton's petition was untimely filed. *See* NRS 34.726(1). Moreover, Sutton's petition was successive because he had previously filed numerous postconviction petitions 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

petitions.¹ See NRS 34.810(2). Sutton's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Sutton was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

On appeal, Sutton argues the district court erred by denying his claim that the trial court lacked jurisdiction to accept his guilty plea because the trial court failed to ascertain whether he understood the nature of the charge against him. This claim did not implicate the jurisdiction of the district court. See Nev. Const. art. 6, § 6; NRS 171.010. Therefore, to the extent this claim could be considered an attempt to overcome the procedural bars, Sutton fails to demonstrate he was entitled to relief. Further, Sutton failed to overcome the presumption of prejudice to the State. Accordingly, we conclude the district court did not err by denying the petition as procedurally barred.

Docket No. 79758-COA

Sutton filed this petition nearly 16 years after issuance of the remittitur on direct appeal on July 9, 2001. See *Sutton v. State*, Docket No.

¹*Sutton v. State*, Docket No. 75988-COA (Order of Affirmance, March 14, 2019); *Sutton v. State*, Docket No. 73651-COA (Order of Affirmance, April 25, 2018); *Sutton v. State*, Docket No. 71025-COA (Order of Affirmance, July 12, 2017); *Sutton v. State*, Docket No. 67584 (Order of Affirmance, December 18, 2015); *Sutton v. State*, Docket No. 65121 (Order of Affirmance, September 18, 2014); *Sutton v. State*, Docket No. 64244 (Order of Affirmance, June 11, 2014); *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010); *Sutton v. State*, Docket No. 40477 (Order of Affirmance, July 8, 2004). Sutton also filed a postconviction petition for a writ of habeas corpus on September 16, 2004, that appears has not been resolved and another one on January 5, 2016, from which Sutton did not appeal the district court's denial.

34165 (Order of Affirmance, June 11, 2001). Thus, Sutton's petition was untimely filed. See NRS 34.726(1). Moreover, Sutton's petition was successive because, as noted above, he had previously filed numerous postconviction petitions 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 petitions. See NRS 34.810(2). Sutton's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Sutton was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Sutton argued he had good cause to overcome the procedural bars based on *McCoy v. Louisiana*, a new case from the United States Supreme Court. 584 U.S. ___, 138 S. Ct. 1500 (2018). Sutton argued that like the defendant in *McCoy*, counsel conceded his guilt without Sutton's permission. Specifically, he claimed counsel coerced him into pleading guilty, thereby conceding Sutton's guilt. The district court determined that Sutton did not file his petition within a reasonable time of *McCoy* being decided because Sutton filed his petition more than one year after *McCoy* was decided. We conclude the district court did not err by making this finding. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Further, the district court determined that *McCoy* did not apply in Sutton's situation because in *McCoy*, the defendant went to trial where his counsel conceded his guilt over his objection. Here, Sutton pleaded guilty and counsel did not concede Sutton's guilt over Sutton's objection. The district court also determined that this claim was available to be raised in Nevada more than a decade before *McCoy* was decided. See *Jones v. State*, 110 Nev. 730, 738, 877 P.2d 1052, 1057 (1994). Finally, the district

court determined Sutton failed to overcome the presumption of prejudice to the State. The record supports the decision of the district court, and we conclude the district court did not err by denying Sutton's twelfth petition as procedurally barred. Accordingly, we

ORDER the judgments of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Kevin Devon Sutton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²To the extent Sutton challenges actions of the district court clerk, Sutton failed to demonstrate any alleged error affected his substantial rights. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, we conclude Sutton is not entitled to relief on these claims.