

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN CHOATE,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN,  
Respondent.

No. 80224-COA

**FILED**

**JUN 26 2020**

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

*ORDER OF AFFIRMANCE*

Stephen Choate appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Michael A. Cherry, Senior Justice.

Choate filed his petition on January 25, 2019, more than three years after entry of the judgment of conviction on April 22, 2015.<sup>1</sup> Thus, Choate's petition was untimely filed. *See* NRS 34.726(1). Choate's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

First, Choate claimed the procedural time bar should not apply because he filed multiple motions within a year of entry of the judgment of conviction and those motions should have been considered as functionally equivalent to a motion to withdraw guilty plea or a postconviction petition for a writ of habeas corpus. The district court found Choate's motions were not filed in compliance with NRS Chapter 34. The district court further found there was no duty for it to construe Choate's motions as either motions to withdraw guilty plea or as postconviction petitions for a writ of

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

habeas corpus. The record supports the district court's findings, *cf. Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014) (explaining when a district court should construe a motion to withdraw guilty plea as a postconviction petition for a writ of habeas corpus), and we conclude the district court properly found Choate's petition was procedurally barred pursuant to NRS 34.726(1).

Second, Choate claimed the procedural time bar should not apply because he pursued relief in federal court and was informed he needed to exhaust state remedies. However, exhaustion of state remedies in order to seek federal review was insufficient to demonstrate cause for the delay. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012).

Third, Choate appeared to claim he had cause for his delay because his counsel was ineffective at the sentencing hearing and failed to pursue a direct appeal. However, Choate's claims were untimely and, thus, could not constitute cause for his delay. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (holding a good-cause "claim itself must not be procedurally defaulted"); *see also Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (holding a good-cause claim must be raised within one year of its becoming available).

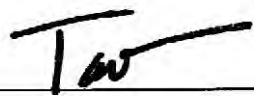
Fourth, Choate appeared to argue the failure to consider his claims on their merits would result in a fundamental miscarriage of justice because he is actually innocent. A petitioner may overcome the procedural bars and "secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice." *Berry v. State*, 131 Nev. 957, 966, 363

P.3d 1148, 1154 (2015). However, Choate did not demonstrate “that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* (internal quotation marks omitted). Accordingly, we conclude the district court did not err by denying Choate’s petition as procedurally barred.

Finally, Choate contends the district court erred by denying the petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations not belied by the record that, if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Because Choate did not demonstrate cause for the delay, he fails to demonstrate the district court erred by declining to conduct an evidentiary hearing concerning his procedurally-barred claims. Therefore, Choate is not entitled to relief based upon this argument. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

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

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

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

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<sup>2</sup>We have reviewed Choate’s document filed in this court on June 3, 2020, and we conclude no relief is warranted.

cc: Hon. Michael A. Cherry, Senior Justice  
Stephen Choate  
Attorney General/Las Vegas  
Nye County Clerk