

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FREDERICK J. BENSON, JR., A/K/A
FREDRICK J. BENSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80141-COA

FILED

JUL 24 2020

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

ORDER OF AFFIRMANCE

Frederick J. Benson, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and a later-filed supplement. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Benson filed his petition¹ on July 18, 2018, more than 14 years after issuance of the remittitur on direct appeal on February 24, 2004. *Benson v. State*, Docket No. 40463 (Order of Affirmance, January 28, 2004). Thus, Benson's petition was untimely filed. See NRS 34.726(1). Moreover, Benson's petition was successive because he had previously filed several postconviction petitions for a writ of habeas corpus and Benson's first petition was decided upon the merits.² See NRS 34.810(2). Benson's petition was procedurally barred absent a demonstration of good cause and

¹Benson filed a motion to withdraw guilty plea and the district court properly construed it as a postconviction petition for a writ of habeas corpus. See *Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014).

²*Benson v. State*, Docket No. 57175 (Order of Affirmance, November 17, 2011); *Benson v. State*, Docket No. 44932 (Order of Affirmance, June 16, 2005).

actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Benson was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Benson claimed he had good cause based upon ineffective assistance of his trial-level counsel. Benson asserted he learned during the interview for the presentence investigation report that at some point the State had offered to reduce his charge to second-degree murder, but the offer had not been conveyed to him. Benson contended he discussed this issue with counsel prior to the sentencing hearing, but she refused to raise claims stemming from this issue and she advised him he should not raise it. Benson further contended he would have raised this issue prior to entry of the judgment of conviction but for his counsel's improper advice.

As Benson knew of this issue prior to entry of the judgment of conviction, claims stemming from this information were reasonably available to be raised in a timely-filed petition, and Benson did not demonstrate an impediment external to the defense prevented him from doing so. *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). In addition, Benson failed to overcome the presumption of prejudice to the State. Therefore, we conclude the district court did not err by denying the petition as procedurally barred.

Next, Benson argues the district court erred by denying his request for the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here,

the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and declined to appoint counsel. Because the petition was subject to summary dismissal, *see* NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carolyn Ellsworth, District Judge
Frederick J. Benson, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk