

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEANGELO MARON MALONE,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 80193-COA

FILED

OCT 16 2020

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

ORDER OF AFFIRMANCE

Deangelo Maron Malone appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Malone filed his petition on August 2, 2019, more than ten years after issuance of the remittitur on direct appeal on March 31, 2009. *Malone v. State*, Docket No. 51301 (Order of Affirmance, March 4, 2009). Thus, Malone's petition was untimely filed. See NRS 34.726(1). Moreover, Malone's petition was successive because he had previously filed two postconviction petitions for a writ of habeas corpus, one of which was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.¹ See

¹Malone filed a postconviction petition for a writ of habeas corpus in the district court on February 25, 2010, and the district court denied that petition. The Nevada Supreme Court dismissed Malone's appeal from the denial of that petition for lack of jurisdiction because Malone did not timely file the notice of appeal. *Malone v. State*, Docket No. 57222 (Order Dismissing Appeal, December 20, 2010). Malone filed a second postconviction petition for a writ of habeas corpus in the district court on August 8, 2014. The Nevada Supreme Court dismissed the appeal from the

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

Malone argued that the decision in *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018), provided good cause to overcome the procedural bars to his current petition, in which he alleged that his counsel improperly conceded that Malone committed second-degree murder. In *McCoy*, the United States Supreme Court recognized a defendant's right to choose the objective of his defense. *Id.* at ___, 138 S. Ct. at 1508. Thus, "[w]hen a client expressly asserts that the objective of his defence [sic] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at ___, 138 S. Ct. at 1509 (internal quotation marks omitted).

Assuming, without deciding, that *McCoy* announced new constitutional law that applies retroactively, would support a claim that was not reasonably available to be raised in a timely petition, and thus provided good cause, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), Malone did not demonstrate actual prejudice. Unlike the appellant in *McCoy*, Malone did not object to the concession strategy. *See McCoy*, 584 U.S. at ___, 138 S. Ct. at 1510 ("[C]ounsel may not admit her client's guilt of a charged crime over the client's intransigent objection to

denial of that petition because Malone's challenge to his life-without-parole sentence became moot when the Legislature enacted A.B. 267 and made Malone eligible for parole after 20 years of incarceration. *Malone v. State*, Docket No. 66874 (Order Dismissing Appeal as Moot, December 20, 2015).

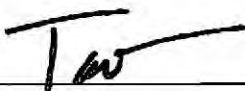
that admission.” (emphasis added)). The record instead demonstrated that Malone expressly consented to this defense strategy. Malone’s reliance on *McCoy* was therefore misplaced.

Malone also appeared to claim that *McCoy* provided good cause to assert that he did not knowingly and voluntarily agree to a defense concession strategy. However, the *McCoy* court did not require that a defendant must knowingly and voluntarily agree to a concession strategy, but rather held that counsel may not pursue a concession strategy against a defendant’s expressly stated wishes. *See id.* at ___, 138 S. Ct. at 1509-1510. “[A] concession strategy does not involve the waiver of a constitutional right that must be knowing and voluntary.” *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). Therefore, Malone did not demonstrate actual prejudice sufficient to overcome the procedural bars.

Finally, Malone did not overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). Therefore, we conclude the district court did not err by denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Deangelo Maron Malone
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk