

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID AUGUST KILLE, SR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 81558-COA

FILED

APR 12 2021

ELIZABETH A. GIBSON  
CLERK OF SUPREME COURT  
BY *Elizabeth A. Gibson*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

David August Kille, Sr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Kille argues the district court erred by denying his December 2, 2019, petition.<sup>1</sup> Kille filed his petition more than 15 years after issuance of the remittitur on direct appeal on March 30, 2004.<sup>2</sup> Thus, Kille's petition

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<sup>1</sup>Kille filed a "motion to vacate plea agreement and judgment of conviction for lack of jurisdiction, ex post facto violation, breach of contract, and violating sentencing guidelines of 2002." Kille challenged the validity of his judgment of conviction. Due to the nature of the claims raised, the district court properly construed the petition as a postconviction petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating a postconviction petition for a writ of habeas corpus is the exclusive remedy with which to challenge the validity of a judgment of conviction).

<sup>2</sup>*Kille v. State*, Docket No. 42254 (Order of Affirmance, March 5, 2004).

was untimely filed. *See* NRS 34.726(1). Moreover, Kille's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that 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.<sup>3</sup> *See* NRS 34.810(2). Kille's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).

Kille claimed the procedural bars did not apply to his petition because the trial-level court lacked jurisdiction to convict him. The Nevada Supreme Court has considered and rejected Kille's claim that the trial-level court lacked jurisdiction, *see Kille v. State*, Docket No. 62741 (Order of Affirmance, November 13, 2013), and this holding is the law of the case, *see Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying his petition as procedurally barred.

Next, Kille argues the district court improperly declined to permit him the opportunity to rebut the State's oral argument at the hearing concerning the petition. The record demonstrates the district court permitted both parties to orally advocate their respective positions regarding Kille's petition, and Kille fails to demonstrate any error in this regard. To the extent the district court should have provided Kille with

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<sup>3</sup>*Kille v. State*, Docket No. 75403-COA (Order of Affirmance, October 12, 2018); *Kille v. State*, Docket No. 62741 (Order of Affirmance, November 13, 2013); *Kille v. State*, Docket No. 45216 (Order of Affirmance, October 11, 2005).

additional opportunities to orally argue in favor of his petition, we conclude any error was harmless and Kille fails to demonstrate he suffered prejudice. See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). Therefore, Kille is not entitled to relief based on this claim.

Finally, Kille argues that the chief judge of the district court erred by denying his motion to disqualify the presiding district court judge. In his motion, Kille contended that the presiding judge should be disqualified because the presiding judge had previously considered and denied motions that Kille filed in this matter. “The test for whether a judge’s impartiality might reasonably be questioned is objective and presents a question of law such that this court will exercise its independent judgment of the undisputed facts.” *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (internal citations, quotation marks, and punctuation omitted). The Nevada Supreme Court has previously held that the “rulings and actions of a judge during the course of official judicial proceedings do not establish” bias sufficient to disqualify a district court judge from presiding over a particular matter, *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988), and that “[a] judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification. Disqualification must be based on facts, rather than mere speculation.” *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (internal citations omitted).


The chief judge reviewed Kille’s motion and concluded that disqualification based upon the presiding judge’s prior rulings in this

matter was not warranted. The record supports the chief judge's decision. We conclude that Kille did not meet his burden of establishing sufficient grounds to warrant disqualification, and therefore, we conclude the chief judge did not err by denying his motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Dept. 3  
David August Kille, Sr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk