

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN EUGENE CAPTON,
Appellant,
vs.
PERRY RUSSELL, WARDEN, NNCC-
NDOC,
Respondent.

No. 82062-COA

FILED

MAY 07 2021

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

ORDER OF AFFIRMANCE

Kevin Eugene Capton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Capton filed his petition on October 6, 2020, more than one year after entry of the judgment of conviction on July 17, 2019.¹ Thus, Capton's petition was untimely filed. *See* NRS 34.726(1). Capton's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see id.*; *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record

¹Capton did not pursue a direct appeal. Further, none of Capton's claims appear to challenge the revocation of his probation or the imposition of an amended underlying term of imprisonment.

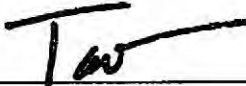
and, if true, would entitle him to relief. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008).


In his petition, Capton appeared to assert he had cause for his delay because he lacks legal knowledge and did not know he could pursue postconviction relief. However, those issues did not demonstrate an impediment external to the defense that prevented Capton from timely filing his petition. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). Therefore, the district court did not err by denying the petition as procedurally barred without conducting an evidentiary hearing.

Capton appears to argue on appeal that failure to review his claims on the merits would result in a fundamental miscarriage of justice because he is innocent. However, Capton did not raise this claim in his petition and we decline to consider it in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Thomas L. Stockard, District Judge
Kevin Eugene Capton
Attorney General/Carson City
Churchill County District Attorney/Fallon
Churchill County Clerk