

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN FERNANDO LOPEZ, A/K/A
JUAN FERNANDO LOPEZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82315-COA

FILED

JUN 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Juan Fernando Lopez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 14, 2020. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Lopez contends the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. Lopez filed his petition nearly 12 years after entry of the judgment of conviction on October 7, 2008.¹ Thus, his petition was untimely filed. See NRS 34.726(1). Lopez's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see id.*, 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 on claims to overcome procedural bars, the claims must be supported by specific factual allegations that are not

¹Lopez did not pursue a direct appeal.

belied by the record and, if true, would entitle the petitioner to relief. *Id.* at 969, 363 P.3d at 1154-55.

Lopez claimed the ineffective assistance of trial-level counsel constituted good cause to overcome the procedural time bar. While the ineffective assistance of counsel may constitute good cause to excuse a procedural default, the ineffective-assistance claim must not itself be time-barred. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Here, Lopez knew counsel did not pursue a direct appeal but waited nearly 12 years to seek postconviction relief. Because his good-cause claim is itself untimely, it does not overcome the procedural time bar. We therefore conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

To the extent Lopez claimed his lack of knowledge about the law constituted good cause, this claim also fails to overcome the procedural time bar. *See 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 Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). We therefore conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

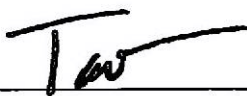
Lopez next claimed he was actually innocent such that the failure to consider his claims on the merits would result in a fundamental miscarriage of justice. Lopez did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423

n.12, 423 P.3d 1084, 1097 n.12 (2018). We therefore conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Lopez contends the district court abused its discretion by denying his motion to appoint postconviction counsel. The appointment of counsel in this matter was discretionary. See NRS 34.750(1); *Brown v. McDaniel*, 130 Nev. 565, 570-72, 331 P.3d 867, 870-72 (2014) (declining to adopt the equitable exception of *Martinez v. Ryan*, 566 U.S. 1 (2012)). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). The issues Lopez presented were not difficult, he was able to comprehend the proceedings, and counsel was not necessary to proceed with discovery. For these reasons, we cannot conclude the district court abused its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Juan Fernando Lopez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk