

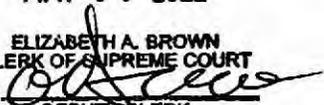
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK LEAL,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 83451-COA

FILED

MAY 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Jack Leal appeals from a judgment of conviction, an amended judgment of conviction, and an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appeal from judgment of conviction and amended judgment of conviction

This court's review of Leal's appeal from his judgment of conviction and amended judgment of conviction reveals jurisdictional defects. Specifically, the notice of appeal was untimely filed, *see* NRAP 4(b), and "an untimely notice of appeal fails to vest jurisdiction in this court," *Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 426 n.18, 423 P.3d 1084, 1100 n.18 (2018). In addition, Leal has previously appealed the judgment of conviction, *see Leal v. State*, No. 74050-COA, 2018 WL 4408757 (Nev. Ct. App. Sept. 11, 2018) (Order of Affirmance), and a second duplicate appeal may not be pursued. Accordingly, we dismiss these portions of Leal's appeal.

Appeal from denial of postconviction relief

Leal argues that the district court erred by dismissing his petition and supplement as procedurally barred. Leal filed his petition on

April 28, 2020, more than one year after issuance of the remittitur on direct appeal on December 24, 2018. *See id.* Thus, Leal's petition was untimely filed. *See* NRS 34.726(1). Moreover, Leal'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 petition.¹ *See* NRS 34.810(2). Leal's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), 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).

First, Leal claimed that the procedural time bar did not apply because the instant petition was timely filed from the amended judgment of conviction. Relying on *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012), Leal claimed his original judgment of conviction was not a final judgment because, even though it specified a restitution amount, the trial-level court entered an amended judgment of conviction that added a provision for the previously imposed restitution to be paid jointly and severally with Leal's codefendant. "Only a judgment of conviction that imposed restitution in an unspecified amount is not final under our decision today." *Whitehead*, 128 Nev. at 263 n.2, 285 P.3d at 1055 n.2. The original judgment of conviction in this matter specified the amount of Leal's restitution obligation and, thus, it was a final judgment. Therefore, the

¹*See Leal v. Warden*, No. 79243-COA, 2020 WL 6019375 (Nev. Ct. App. Oct. 9, 2020) (Order of Affirmance).

procedural time bar applied, and we conclude the district court did not err by concluding Leal was not entitled to relief.

Second, Leal claimed that he had good cause because his petition was filed within one year of entry of the amended judgment of conviction on May 9, 2019. Entry of the amended judgment of conviction did not provide good cause because the claims Leal raised in the instant petition challenged the proceedings that gave rise to his original judgment of conviction and not those that gave rise to the amended judgment of conviction. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Therefore, we conclude the district court did not err by dismissing this good-cause claim.

Third, Leal appeared to assert that he had good cause due to the ineffective assistance of his trial-level counsel. “[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Leal’s ineffective-assistance-of-counsel claims were themselves procedurally barred because he raised them in an untimely, successive, and abusive manner. And Leal did not demonstrate an impediment external to the defense prevented him from raising his underlying claims at an earlier time. *See id.* at 252-53, 71 P.3d at 506. Therefore, we conclude the district court did not err by dismissing this good-cause claim.

Fourth, Leal appeared to assert that he had good cause because his codefendant was sentenced in 2019, she was given a lenient sentence, and he was unable to raise claims stemming from her lenient sentence prior to 2019. However, “sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms.”

Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Thus, Leal did not demonstrate that imposition of a lenient sentence for his codefendant provided good cause to excuse his untimely, successive, and abusive petition. Therefore, we conclude the district court did not err by dismissing this good-cause claim.

Fifth, Leal appeared to assert that the procedural bars should not apply because he is actually innocent. In support of his claim, Leal contended that the victims in this matter purchased the properties subject to any existing encumbrances and, therefore, he believed he fulfilled all of his duties of disclosure regarding the sale of the properties.

A petitioner may overcome the procedural bars and “secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154. However, “actual innocence means factual innocence, not mere legal insufficiency,” and the “petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted).

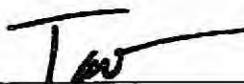
Leal did not demonstrate he was factually innocent or that, in light of all the evidence, it was more likely than not that no reasonable juror would have convicted him, because the evidence contained within the record demonstrated that Leal and his codefendant represented that the properties were unencumbered when they induced the victims to purchase them. *See id.* (explaining that a court may consider “any admissible evidence of petitioner’s guilt” when weighing a claim of actual innocence).

Therefore, the district court did not err by concluding Leal was not entitled to relief based upon this claim.

Finally, Leal argues on appeal that the district court should have conducted an evidentiary hearing concerning the merits of his claims. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations that are not belied by the record and, if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046, 194 P.3d 1224, 1233-34 (2008). Because Leal did not demonstrate good cause sufficient to overcome application of the procedural bars, he failed to demonstrate the district court should have conducted an evidentiary hearing concerning his procedurally barred claims. *Id.* at 1046 n.53, 194 P.3d at 1234 n.53 (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Accordingly, we

ORDER the appeal from the judgment of conviction and amended judgment of conviction DISMISSED and ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Attorney General/Ely
Eighth District Court Clerk