

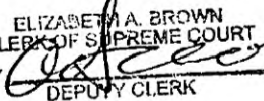
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85851-COA

FILED

JUN 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Ferrill Joseph Volpicelli appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 3, 2021, and a supplemental petition filed on May 19, 2021. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Volpicelli filed his petition nearly 16 years after issuance of the remittitur on direct appeal on July 26, 2005. *See Volpicelli v. State*, Docket No. 43203 (Order of Affirmance, June 29, 2005). Thus, Volpicelli's petition was untimely filed. *See* NRS 34.726(1). Moreover, Volpicelli'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.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Volpicelli's

¹*See Volpicelli v. State*, No. 70126-COA, 2017 WL 2735765 (Nev. Ct. App. Jun. 14, 2017) (Order of Affirmance); *Volpicelli v. State*, Docket No. 51622, (Order of Affirmance, December 3, 2009).

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), 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).

Volpicelli argued that he could overcome the procedural bars because he was actually innocent. Specifically, he claimed that the testimony and evidence presented at trial demonstrated he was actually innocent of two of the counts of burglary. Volpicelli 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) (emphasis added) (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.


Volpicelli also argued the trial court lacked jurisdiction over his case because the facts constituting the charged burglaries did not amount to crimes under the burglary statute. Volpicelli relies on *Eureka County Bank Habeas Corpus Case*, which held that, to determine jurisdiction, the court can go beyond the indictment to determine whether the facts of the case constitute a criminal offense. 35 Nev. 80, 102, 125, 126 P. 655, 661, 669 (1912). *Eureka* has been limited to cases where the petition for a writ of habeas corpus was brought before conviction. *See Ex Parte McKay*, 63

Nev. 262, 268, 168 P.2d 315, 318 (1946). Because Volpicelli was convicted before he filed his petition, he failed to demonstrate that *Eureka* applied. Accordingly, we conclude the district court did not err by denying this claim or by determining that Volpicelli's petition was procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Westbrook


_____, Sr.J.
Silver

cc: Hon. Kathleen A. Sigurdson, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.