

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW WASHINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79834-COA

FILED

JUN 26 2020

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

ORDER OF AFFIRMANCE

Matthew Washington appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Washington filed his petition on June 17, 2019, more than two years after issuance of the remittitur on direct appeal on December 19, 2016. *Washington v. State*, 132 Nev. 655, 376 P.3d 802 (2016). Thus, Washington's petition was untimely filed. See NRS 34.726(1). Moreover, Washington's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, 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(1)(b)(2); NRS 34.810(2). Washington's 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the

¹*Washington v. State*, Docket No. 75777-COA (Order of Affirmance, March 14, 2019).

record and, if true, would entitle him to relief. *See Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154-55 (2015).

First, Washington claimed he had good cause due to ineffective assistance of postconviction counsel. However, ineffective assistance of postconviction counsel was not good cause in the instant case because the appointment of counsel was not statutorily or constitutionally required. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014); *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). Therefore, the district court did not err by finding Washington failed to demonstrate good cause to overcome the procedural bars.

Second, Washington claimed the failure to consider his claims on their merits would result in a fundamental miscarriage of justice because he is actually innocent. Washington based his actual-innocence claim upon assertions that he was not criminally liable for the actions of his codefendant and the trial court improperly instructed the jury. 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. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *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).

Washington’s claims involved legal, not factual innocence. In addition, Washington did not demonstrate “that it is more likely than not that no reasonable juror would have convicted him in the light of the new

evidence.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (internal quotation marks omitted). Accordingly, we conclude the district court did not err by denying Washington’s petition without conducting an evidentiary hearing.

Washington also sought the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2), summarily dismissed the petition, and declined to appoint counsel. Because the petition was summarily dismissed, we conclude the district court did not abuse its discretion by declining to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Matthew Washington
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk