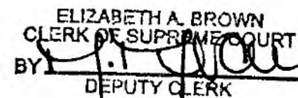
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRADLEY GALE DRUMMOND,
Appellant,
vs.
TIMOTHY GARRETT, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 86828-COA

FILED

APR 29 2024



ORDER OF AFFIRMANCE

Bradley Gale Drummond appeals from a district court order denying a "petition for writ of habeas corpus (post-conviction) pursuant to NRS 34.900 to 34.990" filed on December 27, 2022. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In his petition, Drummond alleged a claim of factual innocence pursuant to NRS 34.900-.990 and alleged a state habeas claim. A claim of factual innocence is separate from any state habeas claim alleging a fundamental miscarriage of justice to excuse a procedural bar and cannot be raised in the same pleading. *See* NRS 34.724(1); NRS 34.950. The district court addressed Drummond's claims under the rules governing both types of petitions.

To the extent Drummond intended to file a petition for factual innocence pursuant to NRS 34.900-.990, he claimed he is actually innocent of sexual assault and murder because counsel failed to present DNA evidence at trial. The sole exhibit Drummond presented in support of his petition was a report analyzing the DNA testing done on the victim's body. Drummond alleged the report supported his claim that he had a consensual

sexual relationship with the victim and did not sexually assault or murder her.

A person who has been convicted of a felony may petition the district court for a hearing to establish their factual innocence. NRS 34.960(1). The petition must contain supporting affidavits or other credible documents indicating that newly discovered evidence exists which, if credible, establishes a bona fide issue of factual innocence. NRS 34.960(2)(a). The petition must also assert that neither petitioner nor the petitioner's counsel knew of the newly discovered evidence at the time of trial. NRS 34.960(3)(a). "Newly discovered evidence" means evidence "which is material to the determination of the issue of factual innocence" and that was not available to a petitioner at trial. NRS 34.930.

Drummond alleged that counsel knew of the evidence prior to trial but decided not to use it because Drummond had confessed to committing the crime. In light of these circumstances, Drummond failed to identify any newly discovered evidence that would establish his factual innocence. Therefore, we conclude the district court did not err by denying this claim.

To the extent Drummond intended to file a postconviction petition for a writ of habeas corpus, he claimed that counsel was ineffective for failing to present DNA evidence at trial. Drummond filed his petition more than 13 years after issuance of the remittitur on direct appeal on September 18, 2009. *See Drummond v. State*, No. 51203, 2009 WL 2611696 (Nev. Aug. 24, 2009) (Order of Affirmance). Thus, Drummond's petition was untimely filed. *See* NRS 34.726(1). Moreover, Drummond'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(3).[2] Drummond'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(4), 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).

Drummond claimed he had good cause because the "reason was previously unknown to me." Drummond's bare claim failed to demonstrate an impediment external to the defense prevented him from raising his underlying ineffective-assistance-of-counsel claim at an earlier time. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Drummond also claimed he could overcome the procedural bars because he is actually innocent. The report stated that sperm containing Drummond's DNA was found on a swab taken from the victim's vagina. Although Drummond claimed that the lack of DNA found elsewhere supported his argument that the encounter was consensual, Drummond 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 the 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.*

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[1]Drummond filed a postconviction petition for a writ of habeas corpus in the district court on July 20, 2010. Drummond did not appeal from the district court's order denying that petition.

[2]The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. *See* A.B. 49, 82d Leg. (Nev. 2023).

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). Therefore, we conclude the district court did not err by denying Drummond's claim of ineffective assistance of trial counsel as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_______________________, C.J.
Gibbons

_______________________, J.
Bulla

_______________________, J.
Westbrook

cc: Hon. Jacqueline M. Bluth, District Judge
Bradley Gale Drummond
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]Drummond appears to raise several new arguments on appeal. We decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).