IN THE SUPREME COURT OF THE STATE OF NEVADA

MELONIE LYNN SHEPPARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61231

FILED

DEC 12 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On appeal from the denial of her November 12, 2010, petition, appellant argues that the district court erred in denying her claim that she was entitled to a new trial based on newly discovered evidence that the State's key witness gave perjured testimony at petitioner's trial that she has since recanted. Preliminarily, we note that the district court's order denying the petition suggests that the petition is untimely, successive, and an abuse of the writ and is thus procedurally barred absent a demonstration of good cause and actual prejudice. NRS 34.726(1); NRS 34.810. Although the application of the procedural default rules to a post-conviction habeas petition is mandatory, *see State v. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), the district court failed to address them and instead addressed appellant's claims on their merits. Moreover, this court has never analyzed whether a claim of newly discovered evidence is within the scope of a post-conviction petition for a writ of habeas corpus as delineated by NRS 34.724. *See, e.g., Snow v.*

State, 105 Nev. 521, 523, 779 P.2d 96, 97 (1989) (relying ultimately only on cases decided prior to the creation of the post-conviction relief scheme under which the instant petition was filed). We nevertheless affirm the district court's denial of appellant's petition because, even assuming without deciding that appellant could have presented good cause to excuse any procedural bars and that her claims were cognizable, the claims lack merit.

A petitioner is entitled to a new trial based on recanted testimony if

> (1) the court is satisfied that the trial testimony of material witnesses was false; (2) the evidence showing that false testimony was introduced at trial is newly discovered; (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial.

Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995). The district court found that appellant satisfied the first three *Callier* elements but that she failed to demonstrate the fourth element. We review the district court's decision for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

Appellant argues that the district court abused its discretion in finding that she had not demonstrated that it was probable that, absent the false testimony, the result at trial would have been different. Specifically, appellant argues that had the jurors known of the witness's false testimony, they "may not" have known which version to believe, they "could have" disregarded all of her testimony as incredible, and no other evidence clearly established appellant's involvement. Appellant fails to

demonstrate that the district court abused its discretion. First, appellant bears the burden of demonstrating that it was "probable" that the result at trial would have been different. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's order stated that it "cannot conclude that the jury would have reached a different result," in essence a finding that appellant did not meet her burden of proof. Appellant's arguments on appeal do not dispute this as she only argues about the potential effect of the new evidence in terms of "may" and "could," not "probably." Second, appellant has only provided this court with a brief excerpt of the trial transcripts—the testimony of one witness—such that we could not review the district court's findings even had appellant meaningfully challenged them. *See* NRAP 30(b)(1); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Janet J. Berry, District Judge
Eric W. Lerude
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk