

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FREDERICK VONSEYDEWITZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67735

**FILED**

AUG 04 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Frederick Vonseydewitz's January 7, 2015, petition was untimely because it was filed more than four years after entry of the judgment of conviction on June 16, 2010.<sup>2</sup> See NRS 34.726(1). Vonseydewitz's petition was also successive because he previously filed a post-conviction petition for a writ of habeas corpus, and his first petition was denied on the merits.<sup>3</sup> See NRS 34.810(2). Consequently,

<sup>1</sup>This appeal has been submitted for decision without oral argument, see NRAP 34(f)(3), and we conclude the record is sufficient for our review and briefing is unwarranted, see *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>Vonseydewitz did not pursue a direct appeal.

<sup>3</sup>See *Vonseydewitz v. State*, Docket No. 60213 (Order of Affirmance, November 14, 2012).

Vonseydewitz's petition was procedurally barred absent a showing of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).


Vonseydewitz claimed he had good cause to overcome the procedural bars because the justice court erroneously defined the term "consensual" for a witness during the preliminary hearing. Vonseydewitz argued the justice court committed a structural error by misrepresenting the meaning of an essential legal element and insisted he first learned of the error in 2011. However, Vonseydewitz failed to demonstrate an impediment external to the defense prevented him from complying with the procedural rules, and his claim of good cause is itself procedurally defaulted because he knew of the "error" in 2011. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).


Vonseydewitz also claimed failure to consider his petition would result in a fundamental miscarriage of justice. A colorable showing of actual innocence may overcome the procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Vonseydewitz did not demonstrate actual innocence because his claim is based on an alleged legal error that occurred during the preliminary hearing and is not based on newly discovered evidence. Accordingly, Vonseydewitz failed to show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in his habeas petition." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (internal quotation marks omitted); *see Pellegrini*, 117 Nev. at

887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Having concluded the district court did not err by denying Vonseydewitz's habeas petition, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Jennifer P. Togliatti, District Judge  
Frederick Vonseydewitz  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk