

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TREVINO MONTRACE OGLESBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71732

FILED

DEC 13 2017

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

ORDER OF AFFIRMANCE

Trevino Montrace Oglesby appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Oglesby filed his petition on January 1, 2016, more than three years after entry of the judgment of conviction on September 25, 2012.² Thus, Oglesby's petition was untimely filed. *See* NRS 34.726(1). Oglesby's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Oglesby argues the district court erred in denying his petition without conducting an evidentiary hearing concerning his claim of actual innocence. Oglesby based his actual-innocence claim upon an assertion that the victim recanted the allegations and other witnesses had altered their version of events. Oglesby further asserted his counsel informed the district

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²Oglesby did not pursue a direct appeal.

court of the evidence demonstrating his innocence during the probation revocation hearing.

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 v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154 (2015). A petitioner can demonstrate a fundamental miscarriage of justice occurred because he is actually innocent by demonstrating “it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Id.* (internal quotation marks omitted). A petitioner is entitled to an evidentiary hearing regarding his actual-innocence claim when the claim is “supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.” *Id.* (internal quotation marks omitted). “[T]he actual-innocence standard is demanding and permits review only in the extraordinary case.” *Id.* at ___, 363 P.3d at 1156 (internal quotation marks omitted).

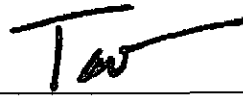
Our review of the record reveals Oglesby was not entitled to relief because his actual-innocence claim was not based upon new evidence. *See Schlup v. Delo*, 513 U.S. 298, 324, (1995) (“To be credible, [an actual-innocence claim] requires petitioner to support his allegations of constitutional error with new reliable evidence.”). At the probation revocation hearing, Oglesby’s counsel explained to the district court the State offered concessions during the plea negotiations due to “significant proof problems involved in this case, including a recantation.” Accordingly, the evidence Oglesby based his claim upon was known to the defense prior to entry of Oglesby’s plea and was part of the parties’ calculations during the plea negotiations. Because Oglesby’s actual-innocence claim was not

based upon new evidence, he did not raise a claim that would have entitled him to relief. Therefore, we conclude the district court did not err in denying the petition without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, Chief Judge
Trevino Montrace Oglesby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk