

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIANO MADRID,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73454

FILED

MAR 14 2018

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

ORDER OF AFFIRMANCE

Mariano Madrid 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; Kenneth C. Cory, Judge.

Madrid filed his petition on January 30, 2017, more than seven years after issuance of the remittitur on direct appeal on May 26, 2009. *Madrid v. State*, Docket No. 50115 (Order of Affirmance, May 1, 2009). Thus, Madrid's petition was untimely filed. *See* NRS 34.726(1). Moreover, Madrid'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.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Madrid'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).

First, Madrid argues the district court erred in denying his petition without conducting an evidentiary hearing concerning his claim of

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

²*Madrid v. State*, Docket No. 63916 (Order of Affirmance, November 13, 2014).

actual innocence. Madrid asserted he was actually innocent due to voluntary intoxication and further argued the trial court erred by improperly instructing the jury on intent.

In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A petitioner is entitled to an evidentiary hearing regarding a gateway claim of actual innocence if he raises specific factual allegations which would “show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted). Madrid merely alleged legal innocence, and accordingly, his claim failed to meet the narrow standard to support a valid actual-innocence claim. Therefore, the district court properly denied the petition without conducting an evidentiary hearing concerning Madrid’s actual-innocence claim. *See id.* at ___, 363 P.3d at 1155.

Second, Madrid argues the district court erred by denying the petition without permitting him to respond to the State’s motion to dismiss. The State filed its motion to dismiss on May 2, 2017. Pursuant to NRS 34.750(4), Madrid had 15 days after service of that motion to file his response. However, the district court orally denied the petition on May 8, 2017, prior to the expiration of Madrid’s 15-day response time. We conclude the district court erred by denying the petition without permitting Madrid the appropriate time to file a response to the State’s motion to dismiss. However, because Madrid’s petition was procedurally barred and without good cause, we conclude this error was harmless. *See* NRS 178.598 (stating that any error, defect, irregularity or variance which does not affect a

party's substantial rights shall be disregarded). Therefore, Madrid is not entitled to relief for this claim.

Third, Madrid argues the district court erred by denying the petition without appointing postconviction counsel to represent him. The appointment of postconviction counsel was discretionary in this matter. See NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel. See *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kenneth C. Cory, District Judge
Mariano Madrid
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³The Honorable Abbi Silver did not participate in the decision in this matter.