

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARILYN MARIE TOSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74255

FILED

SEP 11 2018

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

ORDER OF AFFIRMANCE

Marilyn Marie Toston 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; Douglas W. Herndon, Judge.

Toston filed her petition on June 28, 2017, more than one year after issuance of the remittitur on direct appeal on June 13, 2016. *Toston v. State*, Docket No. 68530 (Order of Affirmance, May 17, 2016). Thus, Toston's petition was untimely filed. *See* NRS 34.726(1). Toston's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

First, Toston claimed the procedural time bar should not apply because she delivered her petition to prison officials for mailing by the

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).


timely-filing deadline and it should be considered filed on that date due to the prison mailbox rule. However, the prison mailbox rule does not apply to postconviction petitions for a writ of habeas corpus. *See Gonzales v. State*, 118 Nev. 590, 595, 53 P.3d 901, 904 (2002). Because Toston's petition was not timely filed, the district court properly denied it as procedurally barred.


Next, Toston appeared to claim the procedural bar should not apply because she was actually innocent. Toston asserted she was actually innocent because her trial counsel failed to investigate this case and the evidence produced at trial was insufficient to demonstrate her guilt.

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. 957, 966, 363 P.3d 1148, 1154 (2015). 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 can demonstrate actual innocence by demonstrating "it is more likely than not that no reasonable juror would have convicted [her] in the light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted). Toston's underlying claims were not based upon newly discovered evidence and did not demonstrate she was factually innocent. *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.”). Therefore, we conclude the district court did not err by denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Marilyn Marie Toston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).