

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVIN T. CEDENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77191-COA

FILED

AUG 14 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Devin T. Cedeno 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; Ronald J. Israel, Judge.

Cedeno filed his petition on May 9, 2018, more than three years after entry of the judgment of conviction on January 5, 2015.² Thus, Cedeno's petition was untimely filed. See NRS 34.726(1). Moreover, Cedeno's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.³ See NRS 34.810(2).

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

²Cedeno did not pursue a direct appeal.

³*Cedeno v. State*, Docket No. 70482 (Order of Affirmance, December 28, 2016).

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

Cedeno claimed he would suffer a fundamental miscarriage of justice if his claims were not considered on their merits because he is actually innocent of using a deadly weapon because the weapon he possessed was not actually deadly. 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). To demonstrate actual innocence a petitioner must demonstrate in light of all the evidence, it is more likely than not that no reasonable juror would have convicted petitioner absent a constitutional violation. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Cedeno contended in his petition that he used an air soft pistol during his crimes and he also filed a document that listed the firearm as a BB gun. Cedeno failed to demonstrate that either item did not meet the statutory definition of a deadly weapon. *See* NRS 193.165(6)(c); NRS 202.290; NRS 202.320(1); 2007 Nev. Stat., ch. 418, § 1, at 1913-14 (version of NRS 202.265 in effect when Cedeno committed his crimes). Accordingly, Cedeno failed to demonstrate no reasonable juror would have convicted him in light of further information concerning his use of a deadly weapon during the commission of the crimes. Moreover, Cedeno's claim only encompassed legal innocence, which is not sufficient to make a colorable showing of actual

innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Therefore, the district court did not err by denying Cedenó's actual-innocence claim.

Next, Cedenó argues the district court erred by denying his request for the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and declined to appoint counsel. Because the petition was subject to summary dismissal, *see* NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Bulla

⁴Because Cedenó's petition was procedurally barred, we conclude the district court did not err by denying Cedenó's motion requesting testing of evidence.

The Honorable Jerome T. Tao did not participate in the decision in this matter.

cc: Hon. Ronald J. Israel, District Judge
Devin T. Ceden
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk