

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELDER ZACARIAS-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78107-COA

FILED

NOV 05 2019

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

ORDER OF AFFIRMANCE

Elder Zacarias-Lopez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 24, 2018. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Zacarias-Lopez filed his petition more than 14 years after issuance of the remittitur on direct appeal on June 8, 2004, *see Zacarias-Lopez v. State*, Docket No. 40116 (May 11, 2004), and more than five years after issuance of the remittitur on direct appeal from his amended judgment of conviction on June 7, 2013, *see Zacarias-Lopez v. State*, Docket No. 60725 (Order of Affirmance, May 13, 2013). Thus, Zacarias-Lopez' petition was untimely filed. *See* NRS 34.726(1). Moreover, Zacarias-Lopez' petition was successive because he had previously filed four postconviction petitions 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 petitions.¹ *See*

¹*Zacarias-Lopez v. State*, Docket No. 71985 (Order of Affirmance, October 13, 2017); *Zacarias-Lopez v. State*, Docket No. 66088 (Order of Affirmance, December 11, 2014); *Zacarias-Lopez v. State*, Docket No. 54427

NRS 34.810(1)(b)(2); NRS 34.810(2). Zacarias-Lopez' 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).

In his petition, Zacarias-Lopez claimed he could overcome the procedural bars because he was actually innocent. He claimed he was actually innocent because he was high and drunk at the time of the murder and he had an IQ of 59. He claimed that had the jury been provided this information, they would have concluded he could not have formed the intent to commit the murder.² Further, he claimed he was actually innocent because the State used an analogy when discussing what constitutes first-degree murder.

“A habeas 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). A colorable showing of actual innocence may overcome a procedural bar under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097

(Order of Affirmance, September 10, 2010); *Zacarias-Lopez v. State*, Docket No. 44802 (Order of Affirmance, June 14, 2005).

²To the extent Zacarias-Lopez claimed he was actually innocent based on the jury not being properly instructed on the mens rea elements of first-degree murder, Zacarias-Lopez raised this claim in a previous petition, and it was rejected by the Nevada Supreme Court. See *Zacarias-Lopez v. State*, Docket No. 71985 (Order of Affirmance, October 13, 2017). Therefore, this claim was barred by the doctrine of law of the case which cannot be avoided by a more detailed and precisely focused argument. See *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

n.12 (2018). To demonstrate actual innocence a “petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Berry*, at 966, 363 P.3d at 1154 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). “[A]n evidentiary hearing regarding actual innocence is required where the new evidence, if credited, would show that it is more likely than not no reasonable jury would find the petitioner guilty beyond a reasonable doubt.” *Berry*, 131 Nev. at 967, 363 P.3d at 1155 (internal quotation marks omitted).

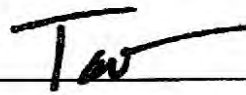
Zacarias-Lopez failed to demonstrate he was actually innocent based on this evidence. Evidence presented at trial showed Zacarias-Lopez shot and killed the victim. Specifically, gunshot residue was found on his hands, the gun Zacarias-Lopez threw out of his window was the same used to shoot the victim, the unfired cartridges found on Zacarias-Lopez appeared to be made in the same manufacturing lot as those used to kill the victim, and the blood on Zacarias-Lopez’ pants matched the victim’s DNA. Zacarias-Lopez failed to allege exactly how his low IQ and intoxication may have affected his ability to form the intent to kill. Therefore, Zacarias-Lopez failed to demonstrate it was more likely than not that no reasonable jury would have found him guilty beyond a reasonable doubt had this evidence been presented at trial. Finally, the State’s use of an analogy during closing argument did not demonstrate Zacarias-Lopez was actually innocent. Accordingly, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

On appeal, Zacarias-Lopez raises several claims that were not raised in his petition below: the district court lacked subject matter

jurisdiction because the oath was not administered to the jury, the time bars are inconsistently applied, counsel was not present at his resentencing, and his presentence credit was miscalculated. Because these claims were not raised below, we decline to consider them for the first time on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Having concluded Zacarias-Lopez is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Elder Zacarias-Lopez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³Because the district court did not give Zacarias-Lopez adequate time to respond to the State's laches argument, we conclude the district court erred by denying the petition based on laches. See NRS 34.800(2). However, because the district court otherwise correctly denied the petition as procedurally barred under NRS 34.810, we conclude the district court did not err by denying the petition.