

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 78260-COA

FILED

DEC 27 2019

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

ORDER OF AFFIRMANCE

Charles Joseph Maki appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on January 2, 2019, and a motion to modify sentence filed on December 7, 2018. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Postconviction Petition

Maki filed his petition more than 23 years after issuance of the remittitur on direct appeal on October 24, 1995. *Maki v. State*, Docket No. 26049 (Order Dismissing Appeal, October 4, 1995). Thus, Maki's petition was untimely filed. See NRS 34.726(1). Moreover, Maki's petition was successive because he had previously filed a several 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 petition.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Maki'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).

¹*Maki v. State*, Docket No. 66144 (Order of Affirmance, December 11, 2014); *Maki v. State*, Docket No. 30904 (Order of Affirmance, October 10, 2000)

First, Maki claims the district court erred by denying his petition because he could overcome the procedural bars based on a *Brady*² violation by the State. Maki claimed the State improperly withheld pictures of the victims' physical examinations until three days before trial. This claim does not provide good cause for this untimely, successive, and abusive petition because this claim was previously litigated at trial, and Maki previously raised a similar claim in a prior postconviction petition for a writ of habeas corpus. The Nevada Supreme Court affirmed the district court's denial of that claim. *See Maki v. State*, Docket No. 30904 (Order of Affirmance, October 10, 2000). Therefore, it was barred by the doctrine of law of the case. *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

On appeal, Maki argues the district court erred by denying his actual innocence claim. A district court may excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. *Berry v. State*, 131 Nev. 957, 967, 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, 34 P.3d 519 (2001). To demonstrate actual innocence a "petitioner must show that it is more likely than not that no reasonable juror would have convicted him of the new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). [A]n evidentiary hearing regarding actual innocence is required where the new evidence, if credited, would show that

²*Brady v. Maryland*, 373 U.S. 83 (1963).

it is more likely than not no reasonable jury would find the petitioner guilty beyond a reasonable doubt.” *Id.* at 966, 363 P.3d at 1155 (internal quotation marks omitted).

Maki claims he was actually innocent because the victim stated Maki did not insert his penis into her vagina and she only changed her story after being threatened by the prosecutor at the trial. Further, Maki claims he was actually innocent because the district court erred by denying him a sexual abuse expert. As to the victim’s testimony, this claim was not based on new evidence not presented at trial, and Maki failed to demonstrate he was actually innocent. As to being denied an expert witness, Maki failed to demonstrate that testimony by an expert would have caused the jury not to find him guilty beyond a reasonable doubt. Maki, in his interview with police, admitted to at least some of the allegations made by the victims. Therefore, Maki failed to demonstrate a colorable claim of actual innocence. Accordingly, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Finally, Maki claims the district court erred by denying his claim that he was actually innocent because it was physically impossible for him to have committed the crimes because he was in a full body cast at the time of the crimes. This claim was not raised in Maki’s petition below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

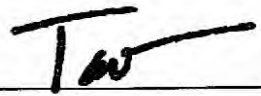
Motion for Modification of Sentence

In his motion, Maki claimed his sentence should be modified because of his age, his lengthy sentence, and his health issues. Maki’s claims fell outside the narrow scope of claims permissible in a motion to modify or correct an illegal sentence. *See Edwards v. State*, 112 Nev. 704,

708, 918 P.2d 321, 324 (1996). Therefore, without considering the merits of any of the claims raised in the motion, we conclude the district court did not err by denying the motion.

Having concluded Maki is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Charles Joseph Maki
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk