

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICKIE LEAVITT DURAN, A/K/A  
VICKIE LEAVITT SITTLE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78055-COA

**FILED**

**FEB 11 2020**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY \_\_\_\_\_  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Vickie Leavitt Duran appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 11, 2018. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Duran filed her petition seven years after issuance of the remittitur on direct appeal on August 9, 2011. *Duran v. State*, Docket No. 56728 (Order of Affirmance, July 14, 2011). Thus, Duran's petition was untimely filed. See NRS 34.726(1). Moreover, Duran's petition was successive because she had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as she raised claims new and different from those raised in her previous petition.<sup>1</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Duran'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).

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<sup>1</sup>*Duran v. State*, Docket No. 63063 (Order of Affirmance, February 27, 2014).

Duran argues the district court erred by denying her petition as procedurally barred. She asserts she could overcome the procedural bars because she is actually innocent. 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, 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 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*, 131 Nev. 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 petitioner is “entitled to an evidentiary hearing on his gateway actual innocence claim if he has presented specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence.” *Berry*, 131 Nev. at 968, 363 P.3d at 1155 (internal quotation marks omitted).

In her petition, Duran argued she is actually innocent of driving and/or being in actual physical control while under the influence of intoxicating liquor causing death (DUI) because she did not cause the accident. Specifically, she claimed she had new evidence she did not cause the accident because she has photos that were not presented at trial that show the damage to the victim’s vehicle was only on the right side. She also

claims she is innocent because the "arc of initial collision" as presented at trial was incorrect.

At trial, photos and testimony were presented that the damage to the victim's vehicle was mostly on the right rear of the vehicle and the damage to Duran's vehicle was on the left front side of her vehicle. Therefore, the photographs now provided by Duran are not new evidence not presented at trial. Further, Duran's claim that the "arc of initial collision" as presented at trial was incorrect is based on speculation by Duran. Accordingly, Duran failed to demonstrate that no reasonable juror would have convicted her in light of new evidence, and we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

She also claimed she is actually innocent of DUI and child endangerment because there was no way her blood alcohol level could have been as high as found by the blood alcohol tests. She also claimed only one blood draw was taken because the State's "notice of intent" only referenced one affidavit and one blood sample. Other than her own supposition, Duran failed to present any new evidence showing her blood alcohol level was lower than as found by the blood tests. Further, the fact the State's "notice of intent" only referenced one affidavit and one blood sample did not demonstrate Duran is factually innocent of DUI. There are two blood samples in the record that show her blood alcohol level was .315 approximately one hour and fifty minutes after the accident and .295 approximately two hours and fifty minutes after the accident. Therefore, Duran failed to demonstrate that no reasonable juror would have convicted her in light of new evidence, and we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Duran further claimed she is actually innocent of leaving the scene of the accident because she stopped as soon as she safely could. Duran claimed that had she testified at trial, she would have testified she initially tried to turn right but could not because of damage to her car. Instead, she turned left as soon as she safely could and stopped in a parking lot. She also claimed that the State's witness who testified she could not start her car was lying. She claimed her car could be started as it started when it was retrieved at the tow yard.

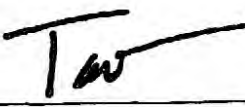
At trial, evidence was presented that Duran hit the victim's vehicle, continued driving about 500-1000 feet, stopped, and then turned into the parking lot. Bystanders went to Duran's vehicle and told her to wait there. She then tried to start her vehicle again but it made an awful noise. She then exited her vehicle, told her son to get out of the vehicle, and told her son they needed to walk home. Bystanders prevented her from leaving. The Nevada Supreme Court found this constituted sufficient evidence to demonstrate Duran was guilty of leaving the scene of an accident. Further, in her previous postconviction petition, Duran claimed counsel was ineffective for failing to investigate and present her claims at trial regarding being not able to turn right and the operability of her car. The Nevada Supreme Court found that she failed to demonstrate prejudice because she failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented this evidence. *Duran v. State*, Docket No. 63063, (Order of Affirmance, February 27, 2014, \*8-9). The standard for proving actual innocence is a higher standard than that for claims alleging prejudice due to counsel's deficiency. *Compare Berry*, 131 Nev. at 966, 363 P.3d at 1154 (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.”), *with Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to demonstrate prejudice based on counsel’s deficiency, a petition must demonstrate that there is a reasonable probability, but for counsel’s errors, the outcome of the proceedings would have been different). Because Duran could not meet the prejudice prong under the lower standard, she necessarily could not meet the prejudice prong here. Accordingly, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Finally, Duran claimed in her petition that she could overcome the procedural bars because the State, defense counsel, and postconviction counsel were engaged in a conspiracy because they withheld exculpatory evidence from her. Duran failed to demonstrate there was a conspiracy or that exculpatory evidence was withheld from her. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michael Villani, District Judge  
Vickie Leavitt Duran  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk