

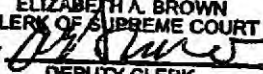
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERTO CARLOS HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80069-COA

FILED

AUG 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Roberto Carlos Hernandez appeals from a district court order denying a motion to withdraw a guilty plea filed on February 27, 2019, and a postconviction petition for a writ of habeas corpus filed on July 15, 2019. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Hernandez's petition was untimely because it was filed more than two years after his judgment of conviction was entered on April 5, 2016,¹ *see* NRS 34.726(1), and it was successive because his previous postconviction habeas petition was decided on the merits,² *see* NRS

¹The statutory period for Hernandez's postconviction habeas petition began to run when the judgment of conviction was filed, because he did not pursue a direct appeal. *See* NRS 34.726(1). The district court erred by finding the statutory period began to run after the remittitur on appeal from the amended judgment of conviction was issued. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The district court also erred by basing the time bar on the date Hernandez filed his petition instead of on the date he filed his motion. *See Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014). However, we also conclude the district court reached the right result by finding that the time bar applied. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

²*See Hernandez v. State*, Docket No. 73870-COA (Order Dismissing Appeal, September 14, 2018).

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34.810(2). Consequently, Hernandez's petition was procedurally barred absent a demonstration of good cause and actual prejudice or that the failure to consider his claims would result in a fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(3); *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).


In an attempt to show good cause, Hernandez argued that defense counsel was ineffective and therefore he was entitled to equitable tolling to develop the facts supporting his ineffective-assistance-of-counsel claim. However, the Nevada Supreme Court has expressly "rejected equitable tolling of the one-year filing period set forth in NRS 34.726 because the statute's plain language requires a petitioner to demonstrate a legal excuse for any delay in filing a petition." *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 874 (2014). Consequently, the district court properly determined that equitable tolling could not be applied to overcome the procedural bars to Hernandez's petition.

Hernandez also argued the district court's failure to consider his claim on the merits will result in a fundamental miscarriage of justice. He asserts that "had he received effective assistance of counsel, and proceeded to trial, he would have been found innocent of the charges in this case." A colorable showing of actual innocence may overcome a procedural bar under the fundamental miscarriage of justice standard. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. However, "actual innocence means factual innocence, not mere legal insufficiency," and the "petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted) (addressing actual

innocence in guilty plea cases). Hernandez did not make a colorable showing of actual innocence, and therefore, he did not demonstrate a fundamental miscarriage of justice sufficient to excuse the procedural bars to his petition.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk