

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO ENRIQUE VIDAL,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 80195-COA

FILED

DEC 08 2020

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

ORDER OF REVERSAL AND REMAND

Francisco Enrique Vidal appeals from an order of the district court denying an October 9, 2019, postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

First, Vidal argues the district court erred by denying his petition as procedurally barred. Vidal filed his petition more than three years after the Nevada Supreme Court issued its order granting Vidal the voluntary dismissal of his direct appeal on December 16, 2015. *Vidal v. State*, Docket No. 68412 (Order Dismissing Appeal, December 16, 2015). Thus, Vidal's petition was untimely filed. *See* NRS 34.726(1); *see also Gonzales v. State*, 118 Nev. 590, 596 n.18, 53 P.3d 901, 904 n.18 (2002) (recognizing that where a timely direct appeal is voluntarily dismissed, the one-year time period for filing a postconviction petition for a writ of habeas corpus commences from the date of entry of this court's order granting the motion to voluntarily dismiss the appeal).

Moreover, Vidal's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, 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). Vidal'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), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, see *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

In his petition, Vidal contended that he suffered from a fundamental miscarriage of justice because he was actually innocent. In support of this claim, Vidal asserted that medical records demonstrated that the child did not sustain substantial bodily harm and that he was not responsible for the child's death.

The district court noted that Vidal's petition was not timely filed, but the district court did not consider Vidal's actual-innocence claim. Because a petitioner may overcome the procedural bars and obtain review of defaulted claims on the merits via a valid actual-innocence claim, *id.*, the district court erred by failing to consider Vidal's actual-innocence claim. Therefore, we remand this matter for the district court to review Vidal's actual-innocence claim to ascertain whether Vidal can demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Id.* (internal quotation marks omitted).

Next, the district court denied the petition as a fugitive document because it found Vidal was represented by counsel. A postconviction petition for a writ of habeas corpus is an independent proceeding that seeks collateral review of the conviction, and thus, it may


¹*Vidal v. State*, Docket No. 76643-COA (Order of Affirmance, October 16, 2019).

be litigated separately from matters that have been filed in a criminal case. See NRS 34.724(2)(a) (providing that a habeas corpus petition is not a substitute for and does not “affect any remedies which are incident to the proceedings in the trial court”); NRS 34.730(3) (“[T]he clerk of the district court shall file a [habeas corpus] petition as a new action separate and distinct from any original proceeding in which a conviction has been had.”).

The record reveals that counsel appeared on Vidal’s behalf in Vidal’s criminal case (district court case number C-14-295196-1) and represented Vidal in the proceedings concerning matters filed in that case. Counsel did not make an appearance in this case, which concerns Vidal’s October 9, 2019, petition filed in district court case number A-19803378-W. The record does not support the district court’s finding that Vidal was represented by counsel in this matter. Therefore, the district court erred by denying Vidal’s petition as a fugitive document. Rather, as explained previously, the district court should have considered whether Vidal’s actual-innocence claim was sufficient to overcome the procedural bars and permit the review of his underlying claims on their merits. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Francisco Enrique Vidal
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk