IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81484-COA

FILED
APR 28 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brendan James Nasby appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 27, 2020. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Nasby argues the district court erred by denying his petition as procedurally barred instead of reaching the merits of his claims. Nasby filed his petition nearly 19 years after issuance of the remittitur on direct appeal on March 6, 2001.[1] Thus, Nasby's petition was untimely filed. *See* NRS 34.726(1). Moreover, Nasby's petition was successive insofar as he had previously filed postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ insofar as he raised claims new and different from those raised in his previous petitions.[2] *See* NRS

[1]*See Nasby v. State*, Docket No. 35319 (Order of Affirmance, February 7, 2001).

[2]*See Nasby v. State*, Docket Nos. 78744-COA, 80443-COA (Order of Affirmance and Denying Petition, April 10, 2020); *Nasby v. State*, Docket No. 73412-COA (Order of Affirmance, August 14, 2018); *Nasby v. State*, Docket No. 70626-COA (Order of Affirmance, July 12, 2017); *Nasby v. State*,

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34.810(1)(b)(2); NRS 34.810(2). Accordingly, Nasby'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).

First, Nasby argued he had good cause to excuse the procedural bars because he was denied meaningful access to the courts. Nasby claimed he lacked physical access to the prison law library or to persons trained to assist him in legal matters and that the prison's "paging system" violated federal law. Inmates have a right to present grievances to the courts, but inmates do not have a constitutional right to conduct generalized research. *See Lewis v. Casey*, 518 U.S. 343, 350, 360 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). Nasby did not claim that he was denied access to legal materials or denied the ability to file for relief. And, as demonstrated by the filing of his six previous postconviction habeas petitions as well as other pro se pleadings. Nasby is a prolific filer who frequently accesses the courts. Finally, to the extent Nasby suggested his ignorance of the law was good cause, he failed to demonstrate that this constituted an impediment external to the defense in this case. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). We therefore conclude Nasby is not entitled to relief based on this claim.

Docket No. 67580 (Order of Affirmance, September 11, 2015); *Nasby v. State*, Docket No. 58579 (Order of Affirmance, February 8, 2012); *Nasby v. State*, Docket No. 47130 (Order of Affirmance, June 18, 2007).

Second, Nasby argued the procedural bars do not apply to him because his case is outside the scope of a postconviction petition for a writ of habeas corpus. Specifically, he claimed postconviction habeas petitions presuppose a judgment of conviction and, because his judgment of conviction is void, his petition instead falls under the habeas provisions of NRS 34.360 through NRS 34.680. Nasby's claim that his judgment of conviction is void is a challenge to the validity of his conviction. And such a claim can only be raised in a postconviction petition for a writ of habeas corpus. *See* NRS 34.724(2)(b). Further, the application of procedural bars to postconviction habeas petitions is mandatory. *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). We therefore conclude Nasby is not entitled to relief based on this claim.

Third, Nasby argued he could overcome the procedural bars because he is actually innocent in that the statute pursuant to which he was convicted is facially unconstitutional. This is a claim of legal insufficiency rather than factual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("[A]ctual innocence means factual innocence, not mere legal insufficiency."). And Nasby did not demonstrate that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also 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). We therefore conclude Nasby is not entitled to relief based on this claim.

Nasby also contends on appeal that the district court abused its discretion because its written order erroneously stated that the court did not order a response from the State and Nasby was not properly noticed of

the hearing regarding his petition. Nasby failed to allege how these actions affected his substantial rights. We therefore conclude Nasby is not entitled to relief based on this claim. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

For the foregoing reasons, we conclude the district court did not err in denying Nasby's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 19
Brendan James Nasby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]We have reviewed all documents Nasby has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Nasby attempts to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).