

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY WILLIAM JOHNSON, III,
Appellant,
vs.
WARDEN JOHNSON,
Respondent.

No. 82264-COA

FILED

JUN 28 2021

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

ORDER OF AFFIRMANCE

Johnny William Johnson, III, appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Johnson argues the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. Johnson filed his petition on July 17, 2020, more than five years after issuance of the remittitur on direct appeal on February 17, 2015. *Johnson v. State*, Docket No. 64936-COA (Order of Affirmance, January 21, 2015). Thus, Johnson's petition was untimely filed. *See* NRS 34.726(1). Moreover, Johnson's petition was successive because he had previously filed a postconviction petition 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). Johnson'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

¹*Johnson v. State*, Docket No. 71924-COA (Order of Affirmance, July 17, 2018).

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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Id.* at 967, 363 P.3d at 1154-55.

First, Johnson appeared to argue that the procedural bars should not apply because he needs to exhaust state remedies before he can pursue federal court review of his case. However, exhaustion of state remedies in order to seek federal review was insufficient to demonstrate cause for the delay. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012).

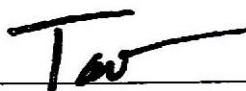
Second, Johnson appeared to assert that his claims should be reviewed on their merits because he is actually innocent. Johnson based his actual-innocence claim upon an assertion that he has information indicating that another person was responsible for the shooting. However, the record reveals that several witnesses identified Johnson as the shooter. Police officers subsequently searched an apartment associated with Johnson and discovered ammunition consistent with the bullet casings recovered from the crime scene and clothing consistent with the type that the shooter had been wearing during the incident. In light of the strong evidence of Johnson's guilt presented at trial, he did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of the 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 the district court did not err by denying Johnson's petition without conducting an evidentiary hearing.

Finally, Johnson appears to argue the district court erred by failing to appoint postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and did not appoint counsel to represent Johnson. Because the petition was subject to summary dismissal, *see* NRS 34.745(4), we conclude the district court did not err by denying the petition without appointing postconviction counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Johnny William Johnson, III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk