

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT ANTHONY SMITH,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 82411-COA

FILED

DEC 16 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Anthony Smith 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.

Smith argues that the district court erred by denying his September 28, 2020, petition. Smith filed his petition more than 20 years after issuance of the remittitur on direct appeal on August 1, 2000. See *Smith v. State*, Docket No. 32283 (Order Dismissing Appeal, July 7, 2000). Thus, Smith's petition was untimely filed. See NRS 34.726(1). Moreover, Smith'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). Smith'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

¹*Smith v. State*, No. 55078, 2010 WL 5238661 (Nev. Dec. 10, 2010) (Order of Affirmance).

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).

Relying in part on *Martinez v. Ryan*, 566 U.S. 1 (2012), Smith argued that ineffective assistance of postconviction counsel excused his procedural defects. Ineffective assistance of postconviction counsel would not be good cause in the instant case because the appointment of counsel in the prior postconviction proceedings was not statutorily or constitutionally required. *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Further, the Nevada Supreme Court has held that *Martinez* does not apply to Nevada's statutory postconviction procedures, *see Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014), and thus, *Martinez* does not provide good cause for this late and successive petition.

Smith also appeared to assert that the procedural bars did not apply because he is actually innocent. In support of this claim, Smith asserted that a prosecution witness, Mario Sanchez, may have actually killed the victim. To prove actual innocence as a gateway to reach procedurally barred constitutional claims of error, a petitioner must show 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) (*accord 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). The district court "must make its determination concerning the petitioner's innocence in light of all the evidence," including a review of "both the reliability of the new evidence and its materiality to the conviction

being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction." *Berry*, 131 Nev. at 968, 363 P.3d at 1155. Then, the district court must "assess how reasonable jurors would react to the overall, newly supplemented record." *Id.* at 968, 363 P.3d at 1156.

Smith did not demonstrate that his claim was based upon new evidence, because Sanchez's possible motives to kill the victim were discussed during trial. Moreover, multiple witnesses stated that Smith shot the victim. In light of the significant evidence of Smith's guilt presented at trial, the information Smith provided concerning Sanchez was insufficient to undermine the confidence in the result of the trial. *See id.* at 966, 363 P.3d at 1154. Therefore, Smith did not demonstrate that it is more likely than not that no reasonable juror would have convicted him had additional information concerning Sanchez been presented at trial. Accordingly, we conclude the district court did not err by denying this actual-innocence claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Robert Anthony Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk