

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SAMMIE NUNN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83660-COA

FILED

FEB 23 2022

ELIZABETH A. DEWITT
CLERK OF APPEALS COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

Sammie Nunn appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Nunn argues the district court erred by denying his May 24, 2021, petition and later-filed supplement as procedurally barred. Nunn filed his petition more than one year after entry of the judgment of conviction on June 20, 2019, and entry of an order revoking probation and amended judgment of conviction on November 18, 2019. Thus, Nunn's petition was untimely filed. *See* NRS 34.726(1). Moreover, Nunn'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 insofar as he raised claims new and different from those raised in his previous petition.¹ *See* NRS 34.810(2). Nunn's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), or that he was actually

¹Nunn filed a postconviction petition for a writ of habeas corpus in the district court on October 10, 2019, but Nunn did not pursue an appeal from the denial of that petition.

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, Nunn appeared to claim he had good cause due to the ineffective assistance of his trial-level counsel. “[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Nunn’s ineffective-assistance-of-counsel claims were themselves procedurally barred because he raised them in an untimely, successive, and abusive petition. Nunn’s underlying claims of ineffective assistance of trial-level counsel were reasonably available to have been raised during the timely filing period for a postconviction petition, and Nunn did not demonstrate an impediment external to the defense prevented him from raising those claims. *See id.* at 252-53, 71 P.3d at 506. Accordingly, we conclude the district court did not err by denying this good-cause claim.

Second, Nunn appeared to assert he had good cause because the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in the form of a witness, K. Hines, who would have supported Nunn’s assertion that he acted in self-defense. When a claim alleging withheld exculpatory evidence is raised in a procedurally barred postconviction petition for a writ of habeas corpus, “the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars.” *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). “Good cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State

withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” *Id.*

Nunn’s trial-level counsel informed the trial-level court that he personally talked with Hines, and therefore, Nunn did not demonstrate that the State withheld information concerning the witness. Thus, Nunn failed to demonstrate he had good cause to overcome the procedural bars. Accordingly, we conclude the district court did not err by denying this good-cause claim.

Third, Nunn appeared to claim that he would suffer a fundamental miscarriage of justice if his claims were not reviewed on the merits because he is actually innocent. Nunn based his actual-innocence claim upon an assertion that a witness, E. Mekonnen, would have testified that Nunn acted in self-defense. To demonstrate actual innocence, 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) (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).

Nunn raised this same actual-innocence claim in his 2019 petition, and the district court rejected that claim. Thus, Nunn’s actual-innocence claim was based upon evidence that was already presented and not upon evidence that was newly presented to the district court. Therefore, Nunn did not demonstrate that his claim was based upon new evidence, *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (holding postconviction petitioners may satisfy the actual-innocence test “by offering ‘newly presented’ evidence of actual innocence”), and, in turn, that no

reasonable juror would have convicted him in light of new evidence, *see Berry*, 131 Nev. at 969, 363 P.3d at 1156 (“It bears emphasizing that the actual-innocence ‘standard is demanding and permits review only in the extraordinary case.’” (quoting *House v. Bell*, 547 U.S. 518, 538 (2006))). Accordingly, we conclude the district court did not err by denying Nunn’s petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tara D. Clark Newberry, District Judge
Sammie Nunn
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk