

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN H. ROSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83866-COA

FILED

MAY 13 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

John H. Rosky appeals from an order of the district court dismissing a petition to establish factual innocence. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

First, Rosky argues the district court erred by dismissing his May 6, 2021, petition. In his petition, Rosky claimed that the Nevada Supreme Court's decision on direct appeal to reverse his conviction of sexual assault operated as an acquittal and he was therefore factually innocent of that offense.¹ Rosky's claim did not implicate factual innocence as it is defined by NRS 34.920, and the information contained within Rosky's petition did not constitute "evidence that was...material to the determination of the issue of factual innocence." NRS 34.930. Moreover, Rosky's claim was not "distinguishable from any claims made in any previous petition," NRS 34.960(2)(b)(3), because Rosky raised the underlying issue in a previously filed petition for a writ of habeas corpus and this court explained that the reversal of the conviction on direct appeal was not an acquittal, *see Rosky v. Warden*, No. 75209-COA, 2018 WL

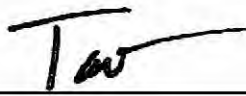
¹*See Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005) (reversing Rosky's conviction of sexual assault due to improper admission of prior-bad-act evidence and remanding for a new trial on that charge).

3232265 (Nev. Ct. App. May 22, 2018) (Order Denying Petition). Therefore, we conclude the district court did not err by dismissing Rosky's petition. See NRS 34.960(4)(a).

Second, relying on NRS 34.970(1), Rosky contends that the district court's decision to order the State to respond to his petition means that the district court concluded he met the pleading requirements of NRS 34.960 and that it was therefore error for the district court to later dismiss the petition as insufficiently pleaded. Pursuant to NRS 34.970(1), "[i]f the court does not dismiss a petition after reviewing the petition in accordance with NRS 34.960, the court shall order the district attorney or the Attorney General to file a response to the petition." Here, the district court's order directing the State to file a response plainly did not state that it had already reviewed Rosky's petition and concluded that he met the pleading requirements of NRS 34.960 or that it was directing the State to respond pursuant to NRS 34.970(1) after its review of the petition. Rather, the district court's order directing the State to respond to Rosky's petition merely stated that it believed a responsive pleading would assist the district court in resolving Rosky's petition. Therefore, Rosky does not demonstrate that he is entitled to relief based upon application of NRS 34.970(1). Accordingly, we conclude that the district court did not err by dismissing the petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
John H. Rosky
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk