IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY DEWANE BAILEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84722-COA

ORDER OF AFFIRMANCE

Anthony Dewane Bailey appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 13, 2021. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

Bailey's petition was filed more than five years after issuance of the remittitur on direct appeal on October 25, 2016.[1] Thus, Bailey's petition was untimely filed. *See* NRS 34.726(1). Moreover, Bailey's petition was successive as he had previously filed two postconviction petitions 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 petitions.[2] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Bailey's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS

[1]*See Bailey v. State*, No. 67108, 2016 WL 5820450 (Nev. Sep. 30, 2016) (Order of Affirmance).

[2]*See Bailey v. State*, Nos. 80128-COA, 80129-COA, 2020 WL 5352197 (Nev. Ct. App. Sep. 4, 2020) (Order of Affirmance); *Bailey v. State*, No. 75489-COA, 2019 WL 1754654 (Nev. Ct. App. Apr. 18, 2019) (Order of Affirmance).

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).

Bailey appeared to assert that his claims should be reviewed on their merits because he is actually innocent. Bailey claimed he was actually innocent because counsel failed to raise the implied acquittal doctrine on direct appeal and because he was convicted of a non-existent statute. 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). A petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Bailey's claims involved legal, not factual innocence. Because Bailey neither identified any new evidence nor pleaded facts that demonstrated he was factually innocent, he did not make a colorable showing of actual innocence. Therefore, we conclude the district court did not err by denying the petition as procedurally barred.

Next, Bailey claims the district court erred by denying his request for the appointment of 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 declined to appoint counsel. Because the petition was

subject to summary dismissal, *see* NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel.

Next, Bailey alleges error arising from the State's failure to timely respond to his petition. However, "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and Bailey had the burden of pleading and proving facts to overcome the procedural bars, *see State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Because Bailey failed to meet his burden to overcome the procedural bars, the district court properly denied the petition as procedurally barred even though the State filed an untimely response to his petition.

Next, Bailey claims the district court erred by denying his petition without first allowing him to file a reply to the State's response. NRS 34.750(4) allows a petitioner to file a response "within 15 days after service to a motion by the State to dismiss the action." The district court waited more than a month after the State filed and served its response arguing for dismissal before the court denied the petition. Bailey did not file a reply during that time, nor does he allege that he was prevented from doing so. Therefore, we conclude Bailey fails to demonstrate he is entitled to relief based on this claim.

Next, Bailey claims the district court failed to act impartially by allowing the State to prepare the written order. Judges are presumed to be impartial. *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). A district court may request a party to submit proposed findings of facts and conclusions of law. *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007). Here, the district court ordered the State to prepare the written

order in accordance with the local rules. *See* EDCR 1.90(a)(4) ("[T]he prevailing party shall submit a written order to the judge . . . ."); EDCR 7.21 (requiring the prevailing party to provide the court with a draft order or judgment). The district court acted in accordance with the law, and therefore, we conclude Bailey is not entitled to relief based on this claim.

Finally, Bailey raises a number of claims for the first time on appeal. Because these claims were not raised in Bailey's petition below, we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

For the foregoing reasons, we

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

_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Christy L. Craig, District Judge
Anthony Dewane Bailey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[3]The Honorable Jerome T. Tao did not participate in the decision in this matter.