

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVIER BENITO-VICTORIA,  
Appellant,  
vs.  
TIM GARRETT, WARDEN,  
Respondent.

No. 84879-COA

FILED

JAN 13 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Javier Benito-Victoria appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Benito-Victoria argues the district court erred by denying his June 7, 2021, petition as procedurally barred. Benito-Victoria filed his petition more than eight years after issuance of the remittitur on direct appeal on December 24, 2012. *Benito-Victoria v. State*, No. 58866, 2012 WL 5992098 (Nev. Nov. 29, 2012) (Order of Affirmance). Thus, Benito-Victoria's petition was untimely filed. *See* NRS 34.726(1). Moreover, Benito-Victoria'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.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Benito-Victoria's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS

---

<sup>1</sup>*Benito-Victoria*, No. 70747-COA, 2017 WL 3707148 (Nev. Ct. App. Aug. 16, 2017) (Order of Affirmance).

34.810(1)(b), (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).

First, Benito-Victoria claimed he had good cause because his judgment of conviction was not a final order as the sentencing court did not impose a special sentence of lifetime supervision. At the sentencing hearing, the sentencing court was unsure whether lifetime supervision was appropriate because it believed that Benito-Victoria's crime predated enactment of the relevant statutes. The sentencing court ultimately decided to enter a judgment of conviction that did not impose a special sentence of lifetime supervision. As a result, the judgment of conviction in this matter disposed of all issues and did not leave anything further for consideration, and thus, the judgment of conviction constituted a final order. *See Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) (“[A] final order [is] one that disposes of all issues and leaves nothing for future consideration.”). Moreover, Benito-Victoria's claim was reasonably available to be raised in a timely petition, and he did not demonstrate an impediment external to the defense prevented him from doing so. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, the district court properly rejected this good-cause claim.

Second, Benito-Victoria claimed he had good cause due to the ineffective assistance of his trial and appellate counsel. “[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” *Id.* Benito-Victoria's ineffective-assistance-of-counsel claim was itself procedurally barred because he raised it in an untimely, successive, and abusive petition. And Benito-Victoria did

not demonstrate an impediment external to the defense prevented him from raising his claim at an earlier time. *See id.* at 252-53, 71 P.3d at 506. Therefore, we conclude that the district court did not err by rejecting this good-cause claim.

Third, Benito-Victoria appeared to claim he would suffer a fundamental miscarriage of justice if his claims were not considered on the merits because he is actually innocent. 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). Benito-Victoria’s claim was not based on new evidence. Thus, Benito-Victoria did not demonstrate that he was entitled to relief based on his actual-innocence claim. Therefore, we conclude that the district court did not err by denying the petition as procedurally barred.

Next, Benito-Victoria appears to argue on appeal that he has good cause because he is uneducated, has difficulties with the English language, and relies on another inmate for help with legal matters. However, Benito-Victoria did not raise these good-cause claims in his petition, and 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).

Next, Benito-Victoria appears to argue 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.

Finally, Benito-Victoria appears to argue the district court judge denied the petition because the judge was biased against him. Benito-Victoria appears to assert that the district court judge was biased against him because he failed to present authority in support of the arguments raised in his petition. Benito-Victoria did not demonstrate that the district court was biased against him due to any failure to present authority. Moreover, the "rulings and actions of a judge during the course of official judicial proceedings do not establish" that a district court judge was biased against a party, *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988), and thus, the denial of Benito-Victoria's petition is insufficient to establish impermissible bias. Therefore, Benito-Victoria is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Ronald J. Israel, District Judge  
Javier Benito-Victoria  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk