

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87505-COA

FILED

MAY 28 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ferrill Joseph Volpicelli appeals from a district court order denying a “petition for determination of factual innocence” filed on August 31, 2023. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Volpicelli argues the district court erred by denying his petition without applying the actual innocence standards discussed in *Herrera v. Collins*, 506 U.S. 390 (1993), and *Schlup v. Delo*, 513 U.S. 298 (1995). An offender may seek to have his felony conviction vacated and his records sealed through a petition to establish factual innocence filed pursuant to NRS 34.900 through NRS 34.990. *See* NRS 34.970(7).

Volpicelli specifically styled his petition as one seeking determination of factual innocence “as allowed under Nevada’s innocence statute (NRS 34.900 et seq.)” *Herrera* addressed freestanding claims of actual innocence, which have not been recognized in Nevada outside of claims of factual innocence made pursuant to NRS 34.900 to 34.990, inclusive. *See Herrera*, 506 U.S. at 404-05; *see also Berry v. State*, 131 Nev.

957, 967 n.3, 363 P.3d 1148, 1154 n.3 (2015). *Schlup* addressed gateway claims of actual innocence to overcome a procedural bar in habeas proceedings and does not apply to claims of factual innocence made pursuant to NRS 34.900 to 34.990, inclusive. *See Schlup*, 513 U.S. at 315; *see also* NRS 34.950. Therefore, we conclude the district court did not err by not applying the *Herrera* and *Schlup* standards, and Volpicelli is not entitled to relief based on this claim.

Volpicelli also argues the district court erred by denying his petition without conducting an evidentiary hearing because he is factually innocent. In his petition, Volpicelli alleged he is actually innocent of indecent exposure and open or gross lewdness because at the time of the incident, he was treating a skin condition and the police officer who witnessed the incident mistakenly took the application of medical ointment to Volpicelli's groin for masturbation.

A petition to establish factual innocence must contain supporting affidavits or other credible documents indicating that newly discovered evidence exists which, if credible, establishes a bona fide issue of factual innocence. NRS 34.960(2)(a). The petition must also assert that “[n]either the petitioner nor the petitioner’s counsel knew of the newly discovered evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition, and the evidence could not have been discovered by the petitioner or the petitioner’s counsel through the exercise of reasonable diligence.” NRS 34.960(3)(a). NRS 34.970(3) provides that “the district court shall order a hearing” on a petition to establish factual innocence if the court

determines that the petition satisfies the pleading requirements set forth in subsections 2 and 3 of NRS 34.960 and “that there is a bona fide issue of factual innocence.”

Volpicelli attached an affidavit to his petition below stating that he informed counsel prior to trial about his skin condition defense but counsel stated he would not pursue it absent scientific evidence supporting Volpicelli’s claim. Volpicelli also attached to his petition a medical report from Dr. Standlee describing a “gluteal cleft rash” and a prescription for ointment. The report contains dates ranging between 1996 and 1998. Although Volpicelli did not allege a specific date the medical report was discovered, he did appear to allege that it had been first obtained by a family member sometime after 2019.

Prior to trial, which took place in 2003, Volpicelli wrote a letter to Dr. Standlee asking for documentation of the “skin conditions that have plagued [Volpicelli’s] groin and rectal areas.” The letter further sought documentation that Dr. Standlee “prescribed cleaning, drying, and medicating the areas with topical cream or ointment upwards for three times daily.” Volpicelli filed a copy of Dr. Standlee’s medical report in support of his October 7, 2004, postconviction petition for a writ of habeas corpus. *See Volpicelli v. State*, Docket No. 50595 (Order of Affirmance, March 5, 2008). Thus, Volpicelli knew about his skin condition defense prior to trial and about Dr. Standlee’s medical report prior to filing his first postconviction petition. Further, because Volpicelli knew about his skin condition defense before trial, he could have obtained Dr. Standlee’s report prior to trial through reasonable diligence. In light of these circumstances,

we conclude that Volpicelli failed to support his petition with newly discovered evidence. Therefore, we conclude the district court did not err by denying Volpicelli's petition without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk