

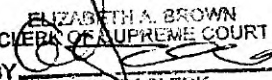
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO A. CRUZ,
Appellant,
vs.
BRIAN WILLIAMS, SR., WARDEN;
AND THE STATE OF NEVADA,
Respondents.

No. 87810-COA

FILED

AUG 11 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Francisco A. Cruz appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on September 28, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Cruz filed his petition more than eleven years after issuance of the remittitur on direct appeal on July 16, 2012. *See Cruz v. State*, No. 55976, 2012 WL 2366422 (Nev. June 20, 2012) (Order of Affirmance). Thus, Cruz's petition was untimely filed. *See* NRS 34.726(1). Moreover, Cruz'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.¹ *See* NRS 34.810(1)(b)(2); NRS

¹*Cruz v. State*, No. 69876, 2017 WL 1946286 (Nev. May 9, 2017) (Order of Affirmance).

34.810(3).² Cruz’s petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(4), or a demonstration 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, Cruz argued he had good cause because postconviction counsel was ineffective. Cruz was not entitled to the effective assistance of postconviction counsel because the appointment of postconviction counsel was not statutorily or constitutionally required in this case. Thus, postconviction counsel’s alleged ineffectiveness does not provide good cause to overcome the procedural bars. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). Therefore, we conclude that the district court did not err by denying this good-cause claim.

Second, Cruz argued that he could overcome the procedural bars because he was actually innocent based on newly discovered evidence. He claimed that he learned in June of 2023 that the crime scene analyst who did the DNA testing in his case had made errors in another case. He stated that the analyst’s errors demonstrated that the DNA evidence in his case was also erroneous.

To demonstrate actual innocence, Cruz was required to 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*

²The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. *See* A.B. 49, 82d Leg. (Nev. 2023).

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). The district court found that the report provided by Cruz did not demonstrate that mistakes were made in his case as the report related to another case. Further, the district court found that, even if there were errors made with respect to the DNA evidence in Cruz's case, Cruz did not demonstrate he was actually innocent. The district court found that, had the DNA evidence not been presented at trial, Cruz still would have been convicted because Cruz admitted he was at the crime scene and shot his gun.³ The record supports the findings of the district court. We therefore conclude the district court did not err by denying this actual-innocence claim.

On appeal, Cruz argues the district court erred by denying his petition because he has good cause—he does not understand the law and he does not understand the English language well. This claim was not raised in his petition below; therefore, we decline to consider this claim on appeal.⁴ See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

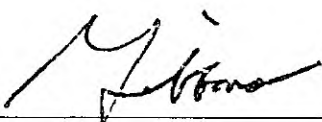
Finally, Cruz argues the district court erred by denying his request for the appointment of postconviction counsel without first considering his reply to the State's response to his petition and motion for the appointment of counsel. NRS 34.750(1) provides for the discretionary


³We note the Nevada Supreme Court previously found that Cruz's confession was knowing and voluntary. See *Cruz v. State*, No. 69876, 2017 WL 1946286 (Nev. May 9, 2017) (Order of Affirmance).

⁴To the extent Cruz raised this claim in his reply to the State's response to his petition, Cruz was required to raise his good-cause claims on the face of his petition. See *Chappell v. State*, 137 Nev. 780, 787, 501 P.3d 935, 949 (2021).

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(3) and declined to appoint counsel. Because the petition was subject to summary dismissal, *see* NRS 34.745(3), we conclude the district court did not err by declining to appoint counsel. Further, we conclude that any error in failing to consider his reply did not affect his substantial rights. *See* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge
Francisco A. Cruz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk