IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENNY HAMMONS,
Appellant,
vs.
WARDEN, BRIAN E. WILLIAMS; AND THE STATE OF NEVADA,
Respondents.

No. 86677-COA

FILED

AUG 08 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Benny Hammons appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on July 11, 2016, and a supplement filed on July 10, 2022. Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

Hammons filed his petition more than four years after issuance of the remittitur on direct appeal on October 11, 2011. *See Hammons v. State*, No. 55801, 2011 WL 4337050 (Nev. Sept. 14, 2011) (Order of Affirmance). Thus, Hammons' petition was untimely filed. *See* NRS 34.726(1). Moreover, Hammons' 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]

[1]*See Hammons v. State*, No. 63648, 2014 WL 4669815 (Nev. Sept. 17, 2014) (Order of Affirmance).

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See NRS 34.810(1)(b)(2); NRS 34.810(3).[2] Hammons' 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 showing that he is actually innocent such that a fundamental miscarriage of justice would result were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

"In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence not legal innocence." *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014); *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). Actual innocence requires a showing that "it is more likely than not that no reasonable juror would have convicted [the petitioner] 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 Berry*, 131 Nev. at 966, 363 P.3d at 1154. This "standard is demanding and permits review only in the extraordinary case." *Berry*, 131 Nev. at 969, 363 P.3d at 1156 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

Hammons claimed he was actually innocent of the charges of burglary and grand larceny related to a safe that was taken from the victim's home and later found in the desert. In support of his claim, Hammons argued M. Madison, a witness at his trial, sent his sister an email containing new evidence relevant to his innocence. The email stated

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[2]The 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).

Madison was "the girl who found the safe" in the desert, the safe was not damaged when she found it, the prosecutor showed her a photograph of a damaged safe when he met with her pretrial, and she told the prosecutor it was not the safe she had found. Based on this email, Hammons argued the prosecutor obtained his convictions through false evidence, the prosecutor violated *Brady*[3] by not disclosing this exculpatory evidence, and, if this evidence had been presented to the jury, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt."

The district court conducted an evidentiary hearing where Madison, an investigator, Hammons, and the prosecutor testified.[4] The district court found that (1) during the evidentiary hearing, Madison was shown photographs of the safe that had been admitted at trial; (2) Madison testified that she believed those photographs showed the safe she found in the desert; (3) Madison gave no indication that her trial testimony was false; and (4) overall, Madison's testimony at the evidentiary hearing was consistent with her trial testimony. These findings are supported by the record. During trial, Madison was shown State's exhibits 66 and 69 and testified the photographs depicted the safe she had found. Madison was shown those same photographs during the evidentiary hearing and again testified that they depicted the safe she found. Thus, Hammons has not shown that he was convicted by false evidence.

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[3]*Brady v. Maryland*, 373 U.S. 83 (1963).

[4]Previously, this court reversed and remanded Hammons' claim for actual innocence and ordered the district court to apply the *Berry* test to determine whether Hammons was entitled to an evidentiary hearing on his claim. *Hammons v. State*, No. 71523-COA, 2017 WL 3033704 (Nev. Ct. App. July 12, 2017) (Order of Reversal and Remand).

Two additional photographs were admitted at trial and the evidentiary hearing—State's exhibits 82 and 84—which Hammons alleges show damage to the safe. When Madison was shown State's exhibits 82 and 84 during the evidentiary hearing, she testified that she thought they were the photographs the prosecutor had shown her before trial. The prosecutor testified at the evidentiary hearing that the photographs he showed Madison before trial were the same ones he showed her at trial and that she never said the photographs depicted a different safe than the one she found. The prosecutor also testified that he only showed Madison photographs of the safe taken from the police storage system, and all four exhibits were admitted at trial, thus indicating nothing was withheld from Hammons. Further, the victim testified during trial that all four exhibits depicted her safe or the contents of her safe as they appeared when recovered by police. The jury heard the victim's testimony that she kept lock boxes inside her safe and that the item depicted in State's exhibit 82 was "the lock box that had been broken open." In light of the victim's testimony identifying State's exhibit 82 as a lock box that had been broken open and Madison's identification of the safe in State's exhibits 66 and 69 as the safe she found in the desert, Hammons failed to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of new evidence.[5]

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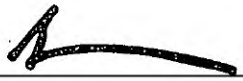
[5]To the extent Hammons argues on appeal that his intellectual disabilities and mental health issues support his gateway claim of actual innocence because they explain his inconsistent statements to police about whether he had been in the victim's bedroom, Hammons failed to raise this argument in his pleadings below or to properly present it to the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider this argument on appeal. *See McNelton v. State,* 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

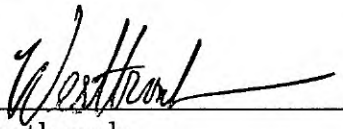
We therefore conclude the district court did not err by denying Hammons' petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Bulla



_____, J.
Westbrook

cc: Hon. Jennifer L. Schwartz, District Judge
Jean J. Schwartzer
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk