

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID BOOKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88098-COA

FILED

SEP 12 2024

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

ORDER OF AFFIRMANCE

David Booker appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on November 8, 2023. Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

First, Booker argues the district court erred by construing his petition as a second postconviction petition for a writ of habeas corpus. We disagree. On May 23, 2023, Booker filed a “writ of habeas corpus petition to establish factual innocence” that alleged both a claim of factual innocence pursuant to NRS 34.900-.990 and state postconviction habeas claims. *See Booker v. State*, No. 87150-COA, 2024 WL 2746707 (Nev. Ct. App. May 28, 2024) (Order of Affirmance) (noting Booker claimed in the petition that he was factually innocent and that counsel was ineffective for various failures). The district court determined the petition raised both types of claims and denied it on the merits. Based on the fact that Booker previously filed a postconviction petition for a writ of habeas corpus that challenged the validity of his judgment of conviction or sentence and the fact that the petition was decided on the merits, we conclude the district court did not

err by determining the instant petition was a second postconviction petition for a writ of habeas corpus.

Because the instant petition was Booker's second postconviction habeas petition, the district court found that it was procedurally barred. This finding is supported by the record. Booker's petition was successive because his previously filed postconviction petition for a writ of habeas corpus 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(3).² Booker's petition was thus procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(4). Booker did not allege good cause to overcome the procedural bars. Therefore, the district court did not err by denying the petition.

Second, Booker appears to argue the district court erred by not appointing him 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. As concluded above, Booker's petition was procedurally barred, and Booker failed to allege good cause to overcome the procedural bars. Thus, the petition was subject to summary dismissal, *see* NRS 34.745(3), and we conclude the district court did not err by declining to appoint counsel.

Finally, Booker argues the State failed to timely respond to his petition and the district court erred by failing to consider the State's lack of

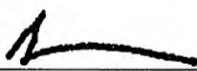
¹*See Booker*, No. 87150-COA, 2024 WL 2746707.

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).

response "an admittance of error." The record reflects that the State filed a timely response and served Booker with a copy. Therefore, we conclude that Booker is not entitled to relief on this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Danielle K. Pieper, District Judge
David Booker
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk