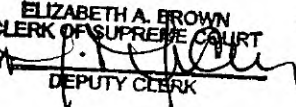


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES BEN FRITSCHÉ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87089-COA

FILED
SEP 19 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Charles Ben Fritsche appeals from a district court order granting a motion to dismiss a postconviction petition for a writ of habeas corpus filed on June 22, 2020, and supplement. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Fritsche argues the district court erred by denying his freestanding claim of actual innocence on the basis that the claim had to be brought in a separate petition pursuant to NRS 34.900-.990. The Legislature created a specific remedy that allows people who have been convicted of a felony to assert their factual innocence based on newly discovered evidence: the petition to establish factual innocence. *See* NRS 34.900-.990. There is no statutory provision that requires a petition to establish factual innocence to be filed separately from a postconviction petition for a writ of habeas corpus. However, Nevada's statutory scheme clearly contemplates that a postconviction habeas petition and a petition to establish factual innocence are separate and distinct remedies, each subject to their own procedural and substantive requirements. *Compare* NRS 34.720-.830 *with* NRS 34.900-.990.

To begin, the petitions have different requirements as to who may file a petition, *compare* NRS 34.724(1) (“Any person convicted of a crime and under sentence of death or imprisonment . . .) *with* NRS 34.960(1) (providing “a person who has been convicted of a felony”), and when a petition may be filed, *compare* NRS 34.726(1) (stating “a petition that challenges the validity of a judgment of conviction or sentence must be filed within 1 year after entry of the judgment of conviction or, . . . within 1 year after the appellate court . . . issues its remittitur”) *with* NRS 34.960(1) (stating a petition may be filed “[a]t any time after the expiration of the period during which a motion for a new trial based on newly discovered evidence may be made pursuant to NRS 176.515”).

Notably, unlike a postconviction habeas petition, a petition to establish factual innocence does not require the petitioner to demonstrate that a constitutional or statutory violation resulted in their conviction or sentence. *Compare* NRS 34.724(1) *with* NRS 34.960. Indeed, the Legislature intended the petition to establish factual innocence to provide a mechanism by which a person could establish their innocence independent of any constitutional violation, as it was aware that defendants who obtained new evidence of their innocence long after their conviction could not seek relief via a postconviction habeas petition without shoehorning the evidence into a constitutional claim. *See* Hearing on A.B. 356 Before the Assembly Judiciary Comm., 80th Leg., at 34-36 (Nev., Mar. 28, 2019). The Legislature also imposed strict pleading requirements that do not apply to postconviction habeas petitions to ensure relief would be granted in only a very limited set of circumstances. *See id.* at 37-38; NRS 34.960(2)-(3).

Another notable distinction between a postconviction habeas petition and a petition to establish factual innocence is the relief provided.

Although the former may result in a petitioner's conviction being vacated or reversed, the latter requires the district court to vacate the petitioner's conviction and issue an order of factual innocence and exoneration, thereby preventing any retrial of the petitioner. *See* NRS 34.970(7). Thus, a person may file a petition to establish factual innocence even if they have already obtained habeas relief and had their conviction or sentence vacated or reversed so long as "no retrial or appeal regarding the offense is pending." *See* NRS 34.960(7).

Fritsche titled his initial pro se pleading "Petition for Writ of Habeas Corpus (Pursuant to NRS 34.735 & 34.900-34.990 Inclusive),"¹ and it appears he attempted to raise postconviction habeas claims, a gateway claim of actual innocence, and a freestanding claim of factual innocence pursuant to NRS 34.900-.990. In that pleading, Ground 2 contended that Fritsche's conviction was invalid because he was "factually and actually innocent of the crimes charged." Although Fritsche did not allege that this claim was raised as a means to overcome the procedural bars applicable to postconviction habeas petitions, he invoked the standards applicable to a gateway claim of actual innocence and did not reference the pleading requirements applicable to a petition to establish factual innocence. In Ground 3, Fritsche claimed that NRS 34.960 allowed habeas petitioners to apply for a new trial. Fritsche recited various provisions of NRS 34.900-.990 and incorporated by reference his argument from Ground 2. In both

¹We note that NRS 34.730(2)(b) requires a postconviction habeas petition that challenges the validity of a judgment of conviction or sentence to be titled "Petition for Writ of Habeas Corpus (Validity of Judgment of Conviction or Sentence)."

Ground 2 and 3, Fritsche requested that the district court issue a writ of habeas corpus or grant other relief as may be appropriate.

Counsel subsequently filed a supplemental petition. Although the supplemental petition acknowledged that Fritsche had raised a claim of actual innocence that was not subject to the procedural bars applicable to postconviction habeas petitions, it identified the pro se pleading as only a habeas petition, and it did not address any of the requirements applicable to a petition to establish factual innocence under NRS 34.900-.990.

After review, we conclude that Fritsche's pleadings below did not treat Fritsche's postconviction habeas petition and his petition to establish factual innocence as separate and distinct petitions, nor did Fritsche clearly distinguish his gateway claim of actual innocence from his freestanding claim of factual innocence raised pursuant to NRS 34.900-.990. *See* NRS 34.950. This confusion also appears in Fritsche's briefs on appeal; although Fritsche contends the district court erred by requiring him to file his freestanding claim of factual innocence in a separate petition, his cited authority concerns only gateway claims of actual innocence that are properly raised in a postconviction habeas petition. *See Howard v. State*, 137 Nev. 480, 481-81, 495 P.3d 88, 90-91 (2021); *Rippo v. State*, 134 Nev. 411, 444-45, 423 P.3d 1084, 1112-23 (2018); and *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006). In light of the foregoing, we conclude the district court did not err by denying Fritsche's freestanding claim of factual innocence on the basis that such a claim had to be raised in a separate petition.

To the extent Fritsche contends the district court erred by denying his postconviction habeas petition as procedurally barred, we conclude Fritsche is not entitled to relief. Fritsche filed his petition more

than 12 years after issuance of the remittitur on direct appeal on June 4, 2010. *See Fritsche v. State*, No. 54131, 2010 WL 3341982 (Nev. May 10, 2010) (Order of Affirmance). Thus, Fritsche's petition was untimely filed. *See* NRS 34.726(1). Moreover, Fritsche'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.² *See* NRS 34.810(1)(b)(2); NRS 34.810(3).³ Fritsche'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 showing that he was actually innocent such that a fundamental miscarriage of justice would occur were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

Fritsche contended he was actually innocent in light of trucking logs from the May Trucking Company that show he was out of town and could not have committed the crimes.⁴ To demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, a petitioner must make a colorable showing of actual innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12; *see also*

²*See Fritsche v. State*, No. 65128, 2015 WL 1914911 (Nev. Ct. App. Apr. 15, 2015) (Order of Affirmance).

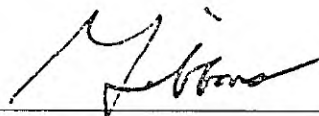
³The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. *See* A.B. 49, 82d Leg. (Nev. 2023).

⁴Fritsche does not argue on appeal that he had good cause to overcome the procedural bars.

Bousley v. United States, 523 U.S. 614, 623 (1998). 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 *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. 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)).

The amended information alleged that the crimes were committed on or between July 3, 2007, and May 15, 2008, and the evidence presented at trial indicated the offenses occurred during this timeframe. Fritsche concedes on appeal that the trucking logs “show[] he was out of town from January to April of 2007.” Thus, this evidence does not demonstrate Fritsche was out of town during the timeframe when the crimes occurred, and it does not implicate Fritsche’s actual innocence. To the extent Fritsche relied upon other evidence that had previously been considered by the district court during the litigation of his first postconviction habeas petition, Fritsche failed to identify any new evidence of his innocence. Therefore, we conclude the district court did not err by denying Fritsche’s gateway claim of actual innocence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen M. Drakulich, District Judge
Law Office of Jeannie Hua
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk