

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AIRELL JOSHUA THOMAS SAWYER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86868-COA

FILED

SEP 20 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Airell Joshua Thomas Sawyer appeals from a district court order dismissing a postconviction petition for writ of habeas corpus filed on November 10, 2020, and supplemental petition.¹ Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Sawyer filed his petition more than 14 years after entry of the judgment of conviction on September 7, 2006.² Thus, Sawyer's petition was untimely filed. See NRS 34.726(1). Moreover, Sawyer'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

¹Sawyer's notice of appeal also designates the following orders as being challenged on appeal: (1) the district court's May 3, 2023, order denying his motion to supplement or amend his petition; (2) the district court's June 26, 2023, order resolving his motion to clarify and/or reconsider the May 3, 2023, order; and (3) any and all other interlocutory orders. However, Sawyer does not present any specific arguments with respect to these decisions. Therefore, to the extent Sawyer seeks to challenge these decisions, we decline to consider any such challenges. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

²Sawyer did not appeal from the judgment of conviction.

abuse of the writ as he raised claims new and different from those raised in his previous petition.³ See NRS 34.810(1)(b)(2); NRS 34.810(3).⁴ Sawyer'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 "the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice," *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

Sawyer claimed he had good cause to overcome the procedural bars because he had acquired new evidence: three depositions that were taken during the litigation of his federal habeas case and after the denial of his prior state petition. "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel" *Id.* (internal quotation marks omitted).

Sawyer pleaded guilty to, and was convicted of, first-degree murder with the use of a deadly weapon. In the instant petition, Sawyer argued, *inter alia*, that (1) his plea was involuntary because the actual killer, Stephen T., coerced him into entering his plea; (2) trial-level counsel failed to investigate his defense that Stephen had killed the victim; and (3)

³See *Sawyer v. State*, No. 67829, 2016 WL 4162436 (Nev. July 28, 2016) (Order of Affirmance).

⁴The 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).

trial-level counsel failed to argue that his confession was involuntary because Stephen coerced his confession. In his federal habeas case, Sawyer deposed Stephen, Stephen's cousin Bryan T., and Stephen's father Armando T. Sawyer contended that their testimonies supported his claims that Stephen was the killer and that Stephen had coerced him into confessing and entering his guilty plea. Sawyer further contended that this evidence provided a "new, previously unavailable factual basis for [his] claims" which constituted good cause to overcome the procedural bars. We disagree.

The factual basis for Sawyer's underlying claims—that Stephen killed the victim and coerced him into confessing and entering his guilty plea—was known to Sawyer and, thus, his claims were reasonably available to be raised in his prior state habeas petition.⁵ Although Sawyer contended that the witnesses' testimonies supported his claims, he did not allege that an impediment external to the defense prevented him from obtaining this evidence during the litigation of his prior state habeas petition.⁶ Therefore, Sawyer failed to demonstrate good cause to overcome the procedural bars on this basis.

Sawyer also claimed he had good cause to overcome the procedural bars because postconviction counsel was ineffective in failing to

⁵We note that Sawyer in fact argued in his prior state habeas petition that Stephen was involved in the killing and that he took responsibility for the killing at Stephen's direction.

⁶On appeal, Sawyer suggests the district court would have prevented him from calling these witnesses during his prior habeas proceedings had he tried to obtain this evidence at that time. Sawyer did not raise this good-cause claim below, and we decline to consider this claim on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issues raised for the first time on appeal.").

raise certain claims in his prior state habeas petition. Sawyer did not have a statutory or constitutional right to postconviction counsel in this case. Thus, Sawyer was not entitled to the effective assistance of postconviction counsel, and “the ineffective assistance of post-conviction counsel . . . may not constitute ‘good cause’ to excuse procedural defaults.” *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). Sawyer urges this court to overrule *Brown*; however, “this court cannot overrule Nevada Supreme Court precedent.” *Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 487 n.7 (Ct. App. 2023). Therefore, Sawyer failed to demonstrate good cause to overcome the procedural bars on this basis.

Sawyer also argued he could overcome the procedural bars because he is actually innocent. To demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, “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). “This means that the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (internal quotation marks omitted); *see also Schlup v. Delo*, 513 U.S. 298, 316 (1995) (“Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.”).

Sawyer contended that the three aforementioned depositions constitute new evidence of his innocence. Specifically, Sawyer contended that (1) Stephen routinely invoked his Fifth Amendment right against self-incrimination during his deposition, which indicates Sawyer’s claims are

true; (2) Bryan testified that Stephen's neck tattoo of "WWKIT" stood for "We will kill in time" and that Sawyer and Stephen came into Bryan's office unannounced one day and Stephen stated "We need to talk. . . . We hurt somebody"; and (3) Armando testified that he never had conversations with Stephen about Sawyer and his case, which indicates Stephen lied to Sawyer in several jail calls about the possibility that Armando would help Sawyer.

This evidence does not indicate Sawyer is actually innocent of the crime of first-degree murder with the use of a deadly weapon. In fact, Bryan's testimony that he did not encourage Sawyer to take responsibility for the crime and that Stephen had used the plural pronoun "we hurt somebody" tend to undermine Sawyer's claim of actual innocence; the former directly contradicts Sawyer's claim that Bryan helped Stephen convince Sawyer to falsely confess and plead guilty on Stephen's behalf, and the latter indicates Sawyer participated in the crime.

Sawyer argues that this court should consider the evidence previously presented to the postconviction court during the litigation of his first habeas petition in determining whether he has presented new evidence of his innocence.⁷ Sawyer relies on *Griffin v. Johnson*, in which the United States Court of Appeals for the Ninth Circuit held that "new evidence" for the purposes of a gateway claim of actual innocence is evidence that is "newly presented" rather than evidence that is "newly discovered." 350 F.3d 956, 961-63 (9th Cir. 2003); *but see Fontenot v. Crow*, 4 F.4th 982, 1032 (10th Cir. 2021) (recognizing the circuit split on this issue and discussing the

⁷Regarding Sawyer's prior postconviction habeas petition, the district court held an evidentiary hearing over 9 days that took place over the span of 3 years, during which 13 witnesses testified, including Sawyer, and evidence was admitted, including jail calls between Sawyer and Stephen.

“newly discovered” and “newly presented” standards). Even assuming the “newly presented” standard applies, *Griffin* did not address a situation where the evidence had already been presented to the district court in prior postconviction habeas proceedings. Rather, *Griffin* considered a situation where the petitioner had previously sought state postconviction relief but did not present any of the new evidence during the course of those prior proceedings. See *Griffin*, 350 F.3d at 959. Therefore, Sawyer has not demonstrated that evidence previously presented to a postconviction court constitutes “newly presented” evidence for the purposes of a gateway claim of actual innocence.

Regardless, even if this court were to consider the evidence previously presented to the postconviction court, such evidence does not establish actual innocence even when considered along with the new deposition evidence. At a hearing on Sawyer’s first postconviction habeas petition, Sawyer testified, *inter alia*, that (1) he purchased gloves at a convenience store before going to the victim’s residence because Stephen did not want to leave fingerprints behind; (2) he gave Stephen his pocketknife while Stephen was attacking the victim; (3) he stabbed the victim four times in the chest; and (4) he wrote a note that was left at the scene of the crime stating “This is what happens to people who give drugs to 12-year-old girls. We’re the new equalizers. If the cops won’t handle it, we will.” Although Sawyer testified that Stephen directed him to do these things and that he believed the victim was already dead when he stabbed him, the district court found Sawyer was “unreliable and incredible in a general sense” because he had given a number of inconsistent accounts of how the murder

occurred.⁸ Sawyer failed to demonstrate that the evidence previously presented to the postconviction court should be viewed differently in light of the new depositions from Stephen, Bryan, and Armando. Moreover, given Sawyer's testimony that both he and Stephen participated in the murder, evidence implicating Stephen in the crime does not indicate Sawyer was factually innocent of the crime.

In light of the foregoing, we conclude the district court did not err by denying Sawyer's gateway claims of actual innocence. Accordingly, we further conclude the district court did not err by dismissing Sawyer's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

⁸Sawyer does not contend that this court cannot consider the prior postconviction court's credibility determinations; rather, Sawyer contends only that these credibility determinations "have little bearing on the innocence argument." We disagree. As discussed above, the district court found Sawyer was not reliable or credible "in a general sense" specifically because he had "told a number of different accounts in this proceeding and to other people about how [Stephen] attacked [the victim] and killed him and what [Sawyer] allegedly did while [Stephen] killed [the victim]."

cc: Hon. Kathleen A. Sigurdson, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk