

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD STEPHEN YAAG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75626

FILED

JUN 25 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Donald Stephen Yaag appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 31, 2017. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Senior Judge.

Yaag filed his petition more than seven years after issuance of the remittitur on direct appeal on May 4, 2010. *See Yaag v. State*, Docket No. 53787 (Order of Affirmance, April 8, 2010). Thus, Yaag's petition was untimely filed. *See* NRS 34.726(1). Moreover, Yaag's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, 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 34.810(2). Yaag'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(3).

Yaag claims the district court erred by denying his petition as procedurally barred. In his petition, Yaag claimed he could overcome the

¹*Yaag v. State*, Docket No. 62497 (Order of Affirmance, May 12, 2014).

procedural bars because he was actually innocent based on new evidence that was never presented to the jury. Specifically, he claimed he had evidence he was incarcerated in California during the time period the victim testified one of the nine counts he was convicted of occurred.

A petitioner may overcome the procedural bars without showing cause “where the prejudice from a failure to consider the claim amounts to a fundamental miscarriage of justice.” *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (internal quotation marks omitted). A fundamental miscarriage of justice may be demonstrated by a colorable showing of actual innocence. *Id.* To demonstrate actual innocence Yaag had to show “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 also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

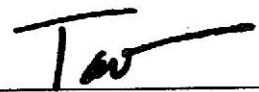
Even assuming the incarceration records were new evidence, we conclude Yaag failed to demonstrate he was actually innocent. While the victim testified she was 11-years old when the conduct for the one count occurred,² testimony was given that the victim had told the police, and had testified at the preliminary hearing, that she was 11 or 12-years old when the conduct occurred. Further, the State alleged the crime occurred between January 1, 2004 and December 31, 2006, during which time the victim was almost 11-years old to almost 14-years old. The victim testified with specificity regarding other details of the crime, and while she may have been incorrect with regard to how old she was when the crime occurred, the details she testified to could still have led the jury to convict Yaag.

²The incarceration records show Yaag was incarcerated until July of 2005. However, the victim turned 12 in February of 2005.

Therefore, Yaag failed to demonstrate no reasonable juror would have convicted him in light of new evidence. Accordingly, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Hon. Kathy A. Hardcastle, Senior Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³Yaag also claims the district court's order should not be given deference because it was prepared by the State, Yaag was not given an opportunity to object to the proposed findings, and the findings in the order differed or were not made by the district court in its oral findings. We disagree. Although the State prepared the order, the district court adopted and approved the contents of the order by signing it. Further, Yaag had the opportunity in this appeal to challenge any factual or legal errors in the written order.