

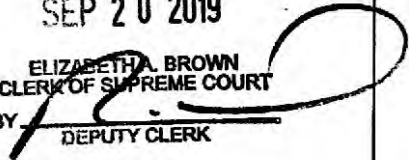
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77797-COA

FILED

SEP 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from a district court order denying a petition for a writ of *coram nobis* that was filed on October 30, 2018. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

O'Keefe claims the district court erred by construing his petition as a postconviction petition for a writ of habeas corpus, finding the petition was procedurally barred, and then addressing his actual innocence claim on its merits.

A postconviction petition for a writ of habeas corpus is not available to those who have completed the sentence imposed by the judgment of conviction and are no longer in custody. *See Nev. Const. art. 6 § 6(1); NRS 34.724(1); Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). However, a writ of *coram nobis* is available to "a person who is not in custody on the conviction being challenged." *Trujillo v. State*, 129 Nev. 706, 716, 310 P.3d 594, 601 (2013). Because O'Keefe had served his sentence for the conviction he was challenging, we conclude the district court erred by construing O'Keefe's petition for a writ of *coram nobis* as a postconviction petition for a writ of habeas corpus. Nevertheless, for the

reasons discussed below, we conclude the district court reached the correct result in denying the petition.

“[T] writ of *coram nobis* may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered.” *Id.* at 717, 310 P.3d at 601. The scope of a petition for a writ of *coram nobis* is “limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented the entry of the judgment.” *Id.* “And legal errors fall entirely outside the scope of the writ.” *Id.* “[A]ny error that was reasonably available to be raised while the petitioner was in custody is waived, and it is the petitioner’s burden on the face of his petition to demonstrate that he could not have reasonably raised his claims during the time he was in custody.” *Id.* at 717-18, 310 P.3d at 601-02.

In his petition, O’Keefe challenged his conviction for burglary. He asserted that because the jury did not find him guilty of any felony for the first five counts against him, the jury’s guilty verdict for burglary was inconsistent and improper. This claim was reasonably available to be raised by O’Keefe while he was still in custody and he did not demonstrate he could not have reasonably raised this claim while he was in custody. Therefore, this claim was waived. O’Keefe also asserted that his conviction for burglary was legally improper because he lived at the residence he was accused of burglarizing. This claim fell outside the scope of a writ of *coram nobis*. Accordingly, we affirm the denial of the petition.¹ See *Wyatt v. State*,

¹Because O’Keefe’s claims were either waived or outside the scope of the writ, we need not address his assertion on appeal that the district court erred by not presuming all of his statements were true based on the State’s failure to oppose the petition.

86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

O'Keefe also argues the district court abused its discretion by denying his request for counsel. The record demonstrates O'Keefe did not provide any cogent argument in support of his request for counsel. And, as noted above, the claims O'Keefe raised in his petition were either waived or outside the scope of the petition. Accordingly, we conclude the district court did not abuse its discretion by declining to appoint counsel.

Having concluded O'Keefe is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Eighth District Court Clerk

²We have considered all documents O'Keefe has filed in this matter and conclude no relief based upon those documents is warranted.