

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALEXANDER BERNARD BAYOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77939-COA

FILED

NOV 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Alexander Bernard Bayot appeals from an order of the district court denying a petition for a writ of mandamus and a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Petition for a Writ of Mandamus

Bayot argues the district court erred by denying his April 27, 2018, petition. In his petition, Bayot contended the bill that created the statute revision commission in 1951 was unconstitutional as it violated the separation of powers doctrine, and he requested the district court to issue a writ directing the governor to investigate whether the Nevada Revised Statutes are unconstitutional.

We review the district court's denial of a petition for a writ of mandamus for an abuse of discretion. *Douglas v. State*, 124 Nev. 379, 383, 184 P.3d 1037, 1039 (2008). A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of

mandamus will not issue, however, if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170.

Bayot was not entitled to relief because he did not demonstrate that the statute revision commission improperly encroached upon the powers of another branch of government. *See Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92, 212 P.3d 1098, 1103 (2009) ("The purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch."). Bayot also failed to demonstrate members of the Nevada Supreme Court violated Nev. Const. Art. 6, § 11, by serving in a non-judicial public office, because he failed to demonstrate that participation in a commission regarding revising Nevada's statutes involved, as part of the regular and permanent administration of the government, the continuous exercise of a public power, trust, or duty. *See* NRS 281.005(1) (defining public officer). In addition, Bayot failed to demonstrate that he did not have an adequate remedy with which to challenge his conviction. *See* NRS 34.170. Therefore, the district court did not err by denying the petition.

Postconviction Petition for a Writ of Habeas Corpus

Bayot filed his petition on April 27, 2018, more than five years after issuance of the remittitur on direct appeal on December 13, 2012. *Bayot v. State*, Docket No. 59410 (Order of Affirmance, November 15, 2012). Thus, Bayot's petition was untimely filed. *See* NRS 34.726(1). Moreover, Bayot's petition was successive because he had previously filed two postconviction petitions 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 petitions.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Bayot'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).

Bayot contended he would suffer from a fundamental miscarriage of justice if his claims were not considered on their merits because he was actually innocent. Bayot contended he was actually innocent because the statute revision commission was unconstitutional and the Nevada Revised Statutes are unlawful. Bayot asserted that, therefore, the district court lacked jurisdiction to convict him.

A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. See *Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner is entitled to an evidentiary hearing regarding a gateway claim of actual innocence if he raises specific factual allegations that would “show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Berry v. State*, 131 Nev. 957, 965, 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted).

Bayot's claim did not implicate the jurisdiction of the courts. See Nev. Const. art. 6, § 6; NRS 171.010. In addition, Bayot did not attempt

¹*Bayot v. State*, Docket No. 73097-COA (Order of Affirmance, December 14, 2017); *Bayot v. State*, Docket No. 64070 (Order of Affirmance, March 12, 2014).

to demonstrate he was factually innocent. Because Bayot's claim failed to support a valid actual-innocence claim, the district court properly denied the petition without conducting an evidentiary hearing concerning his actual-innocence claim. *See Berry*, 131 Nev. at 967, 363 P.3d at 1155. Therefore, the district court did not err by denying the petition, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
Alexander Bernard Bayot
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²The Honorable Jerome T. Tao did not participate in the decision in this matter.