

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 81867-COA

FILED

APR 23 2021

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

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from a district court order denying his petition to establish factual innocence filed on February 7, 2020. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

O'Keefe first argues the district court erred by denying his petition because he lived at the residence he was accused of burglarizing. O'Keefe fails to explain how the location of his residence at the time of the offense was not available to him at trial. Therefore, we conclude he is not entitled to relief on this claim. *See* NRS 34.960(2)(a) (requiring newly discovered evidence to establish factual innocence); *see also* NRS 34.930 ("Newly discovered evidence' means evidence that was not available to a petitioner at trial. . .").

O'Keefe next argues his burglary conviction was improperly predicated on an act of misdemeanor battery and he should have been charged with battery constituting domestic violence instead of battery. O'Keefe does not allege he did not commit any other crime arising out of or reasonably connected to the facts supporting the information upon which he

was convicted. Moreover, the Nevada Supreme Court has previously held that O'Keefe's act of misdemeanor battery is a sufficient predicate to a burglary conviction,¹ and this claim is thus barred by the doctrine of law of the case, *see Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, we conclude O'Keefe is not entitled to relief on this claim. *See* NRS 34.920(3).

O'Keefe next argues the district court erred by transferring his case to another department. Even assuming the district court committed error, O'Keefe has not demonstrated it affected his substantial rights. Therefore, we conclude O'Keefe is not entitled to relief on this claim. *See* NRS 178.598.

O'Keefe next argues the district court erred by denying his motion for judgment on the pleadings. In his motion, O'Keefe makes the same arguments he made in his petition. Accordingly, for the reasons discussed above, the district court did not err by denying his motion.

Finally, O'Keefe argues the district court erred by denying his motion to alter or amend the judgment. In his motion, O'Keefe alleged that he did not receive a copy of the district court's minute order and the State's response to his petition and that the district court's order directing the State to file a response was defective because it failed to comply with NRS 34.960 and NRS 34.970. Even assuming the district court committed error,


¹*See O'Keefe v. State*, Docket Nos. 48673, 49329 (Order of Affirmance, March 24, 2008).


O'Keefe has not demonstrated it affected his substantial rights. Therefore, we conclude O'Keefe is not entitled to relief on this claim. See NRS 178.598.

For the foregoing reasons, we conclude O'Keefe is not entitled to relief, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 23
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents O'Keefe has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent O'Keefe attempts to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance. See *McNelson v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).