

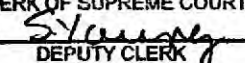
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENJAMIN MCCURDY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 81856-COA

**FILED**

APR 28 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Benjamin McCurdy appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

McCurdy filed his petition on January 8, 2019, more than two years after entry of the judgment of conviction on April 6, 2016.<sup>1</sup> Thus, McCurdy's petition was untimely filed.<sup>2</sup> See NRS 34.726(1). Moreover, McCurdy'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 abuse of the writ as he raised claims new and

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<sup>1</sup>McCurdy did not pursue a direct appeal.

<sup>2</sup>The district court filed an amended judgment of conviction on April 19, 2018, but entry of the amended judgment of conviction did not provide good cause because all of the claims McCurdy raised in the instant petition arose out of the proceedings involving his initial judgment of conviction and could have been raised before the judgment of conviction was amended. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

different from those raised in his previous petitions.<sup>3</sup> See NRS 34.810(2). McCurdy's petition was procedurally barred absent a demonstration of good cause and actual prejudice, see NRS 34.726(1); NRS 34.810(3), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, see *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

McCurdy appears to argue the district court erred by denying the petition as procedurally barred because he is actually innocent. In his petition, McCurdy asserted he is actually innocent because he could not have given the victim a sexually transmitted disease as he tested negative for that disease shortly after the victim contracted it. McCurdy also contended the victim's statements concerning the crimes were inconsistent and were not corroborated by additional evidence. However, McCurdy did not demonstrate actual innocence because he failed to show that this evidence was new. See *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (requiring new evidence of innocence to demonstrate a miscarriage of justice). And even if the test results were new evidence, McCurdy failed to demonstrate that, considering "all the evidence," *id.* at 328, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *id.* at 327; see also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). We therefore conclude the district court did not err by denying McCurdy's petition as procedurally barred.


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<sup>3</sup>McCurdy filed postconviction petitions for a writ of habeas corpus in the district court on March 28, 2017, and October 29, 2017. McCurdy did not appeal from the district court's denial of those petitions.

Finally, McCurdy appears to argue the district court judge denied the petition because she was biased against him. However, the "rulings and actions of a judge during the course of official judicial proceedings do not establish" that a district court judge was biased against a party. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). Therefore, McCurdy is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Dept. 21  
Benjamin McCurdy  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk