


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERA SAGE LEVAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83031-COA

FILED

NOV 24 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Tera Sage Levand appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James E. Wilson, Judge.

Levand argues the district court erred by dismissing her October 13, 2020, petition and later-filed supplement as procedurally barred. Levand filed her petition more than two years after entry of the judgment of conviction on September 11, 2018.¹ Thus, Levand's petition was untimely filed. *See* NRS 34.726(1). Levand's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see id.*, or that she was actually innocent such that it would result in a fundamental miscarriage of justice were her claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

First, Levand claimed she had good cause due to the ineffective assistance of trial-level counsel. Levand also contended that the Nevada Supreme Court's decision in *State v. Nye*, 136 Nev. 421, 468 P.3d 369 (2020), provided good cause to assert that her trial-level counsel was ineffective for

¹Levand did not pursue a direct appeal.

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failing to file a motion to suppress the evidence obtained during an inventory search of her vehicle. “[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Levand’s ineffective-assistance-of-counsel claims were themselves procedurally barred because she raised them in an untimely petition. Moreover, Levand’s reliance upon *Nye* was misplaced as that opinion did not announce new law related to inventory searches but rather merely discussed and applied previous decisions concerning such types of searches. 136 Nev. at 423-25, 468 P.3d at 371-73. Levand’s underlying claims of ineffective assistance of trial-level counsel were reasonably available to have been raised during the timely filing period for a postconviction petition, and Levand did not demonstrate an impediment external to the defense prevented her from raising those claims in a timely manner. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Therefore, we conclude the district court did not err by finding that Levand was not entitled to relief.

Second, Levand argued the failure to consider her claims on the merits would result in a fundamental miscarriage of justice because she is actually innocent. In support of this claim, Levand asserted that her trial-level counsel was ineffective for failing to file a motion to suppress the evidence the police discovered during a search of her vehicle and her statements to the police.

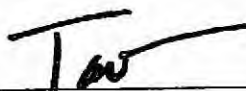
To demonstrate actual innocence, a petitioner must show that “it is more likely than not that no reasonable juror would have convicted [her] in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. 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). A petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Levand’s claim involved legal, not factual innocence. Because Levand did not allege she was factually innocent, she did not make a colorable showing of actual innocence. Therefore, the district court did not err by dismissing the petition as procedurally barred.

Finally, Levand argues on appeal that the district court should have conducted an evidentiary hearing concerning the merits of her claims. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations that are not belied by the record and, if true, would entitle her to relief. *Rubio v. State*, 124 Nev. 1032, 1046, 194 P.3d 1224, 1233-34 (2008). Because Levand did not demonstrate good cause sufficient to overcome application of the procedural bars, she failed to demonstrate the district court should have conducted an evidentiary hearing concerning her procedurally barred claims. *Id.* at 1046 n.53, 194 P.3d at 1234 n.53 (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk