

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84169-COA

FILED

MAY 26 2022

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

ORDER OF AFFIRMANCE

James Howard Hayes, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 16, 2021.¹ Eighth Judicial District Court, Clark County; Nancy A. Becker, Judge.

Hayes filed his petition more than one year after issuance of the remittitur on direct appeal on February 10, 2020. *See Hayes v. State*, No. 78590-COA, 2020 WL 230182 (Nev. Ct. App. Jan. 14, 2020) (Order of Affirmance). Thus, Hayes's petition was untimely filed. *See* NRS 34.726(1). Moreover, Hayes'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 different from those raised in his previous petition.² *See* NRS 34.810(2). Hayes's petition was procedurally barred absent a demonstration of good

¹Hayes's pleading was captioned as a postsentence motion to withdraw guilty plea. The district court properly construed the pleading as a postconviction petition for a writ of habeas corpus. *See Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014).

²*See Hayes v. State*, No. 82734-COA, 2021 WL 4261335 (Nev. Ct. App. Sept. 17, 2021) (Order of Affirmance).

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).

Hayes appeared to claim he had good cause because the trial court lacked subject matter jurisdiction over the attempted grand larceny charge to which he pleaded guilty since the justice court dismissed a count of attempted grand larceny at the preliminary hearing. Hayes previously raised this claim in a motion to modify or correct an illegal sentence. This court concluded Hayes failed to demonstrate the trial court lacked subject matter jurisdiction. *See Hayes v. State*, No. 83274-COA, 2022 WL 405312 (Nev. Ct. App. Feb. 9, 2022) (Order of Affirmance). This claim was barred by the doctrine of law of the case, *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975), and therefore could not be good cause to overcome the procedural bar.

Hayes next appeared to claim he had good cause because he was actually innocent of attempted grand larceny since the charge was dismissed after the justice court found insufficient evidence of it was presented at the preliminary hearing. To demonstrate actual innocence to overcome the procedural bars, Hayes was required to demonstrate “it is more likely than not that no reasonable juror would have convicted him 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). Further, actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges forgone by the State in the course of plea bargaining. *See Bousley v. United States*, 523 U.S. 614, 624 (1998).

Here, Hayes failed to allege new evidence that he was actually innocent. Further, we note the justice court did not dismiss the charge of attempted grand larceny based on insufficient evidence. Instead, the State requested that the charge be dismissed and gave no reason for the request. Therefore, the act of dismissing the charge did not demonstrate insufficient evidence or actual innocence. Finally, Hayes failed to demonstrate actual innocence with regard to the burglary charge that was forgone by the State in the course of plea bargaining. Burglary was a more serious crime than attempted grand larceny. Compare NRS 205.060(2) (burglary), with NRS 193.153 (attempts), and 2011 Nev. Stat., ch. 41, § 13-14, at 163-64 (former NRS 205.220 and NRS 205.222, defining grand larceny and providing the attendant penalties). Accordingly, we conclude Hayes did not overcome the procedural bars and the district court did not err by denying the petition as procedurally barred.³ Thus, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³On appeal, Hayes appears to argue he has good cause because certain documents have not been produced to him that would support his claims. Because this good-cause claim was not raised below, we decline to consider it for the first time on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

cc: Chief Judge, Eighth Judicial District Court
Hon. Nancy A. Becker, Senior Judge
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk