

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

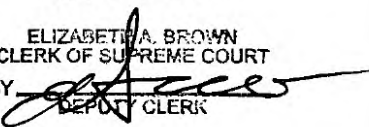
JAMAAL JOHNSON,
Appellant,
vs.
TIM GARRETT, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 86233-COA

FILED

DEC 08 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jamaal Johnson appeals from an order of the district court denying a “petition for writ of habeas corpus (postconviction) pursuant to Nev. Rev. Stat. 34.900-990” filed on December 7, 2022. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Johnson argues the district court erred by denying his petition without first conducting an evidentiary hearing. In his petition, Johnson alleged a claim of factual innocence pursuant to NRS 34.900-.990 and alleged two state habeas claims. A claim of factual innocence is separate from any state habeas claim alleging fundamental miscarriage of justice to excuse a procedural bar and cannot be raised in the same pleading. *See* NRS 34.724(1); NRS 34.950. The district court appears to have addressed Johnson’s claims under the rules governing both types of petitions.

To the extent Johnson intended to file a petition for factual innocence pursuant to NRS 34.900-.990, he claimed he is actually innocent of committing conspiracy to commit robbery because newly discovered evidence from his co-conspirator’s case demonstrated that the State dismissed the charges against the co-conspirator. Johnson alleged he could not be convicted of conspiracy without a co-conspirator. He also appeared

to allege that the State's failure to name a co-conspirator in the charging document meant he could not be convicted of the offense.

A person who has been convicted of a felony may petition the district court for a hearing to establish that person's factual innocence. NRS 34.960(1). The petition must contain supporting affidavits or other credible documents indicating that newly discovered evidence exists which, if credible, establishes a bona fide issue of factual innocence. NRS 34.960(2)(a). A person is entitled to a hearing on their petition if the district court "determines . . . that there is a bona fide issue of factual innocence regarding the charges of which the petitioner was convicted." NRS 34.970(3).

Because the conviction of one accomplice or defendant is not reversible merely because another was not convicted, *see Hilt v. State*, 91 Nev. 654, 662, 541 P.2d 645, 650 (1975), and because the State is not required to prove the identity of the other members of the conspiracy nor include their identity in the charging document, *see Washington v. State*, 132 Nev. 655, 666, 376 P.3d 802, 810 (2016), Johnson failed to identify any newly discovered evidence that would establish his factual innocence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

To the extent Johnson intended to file a postconviction petition for a writ of habeas corpus, he claimed that counsel was ineffective and police failed to convey *Miranda*¹ warnings. Johnson's petition was filed more than 17 years after issuance of the remittitur on direct appeal on August 12, 2005. *See Johnson v. State*, Docket No. 42291 (Order of

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

Affirmance, July 11, 2005). Thus, Johnson's petition was untimely filed. *See* NRS 34.726(1). Moreover, Johnson'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 petitions.² *See* NRS 34.810(1)(b)(2); NRS 34.810(3).³ Johnson'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(4), 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).

Johnson claimed he had good cause to overcome the procedural bars because counsel failed to adequately investigate the co-conspirator and challenge Johnson's conviction for conspiracy to commit robbery. Johnson failed to demonstrate why these good-cause claims could not have been raised previously. Thus, this good-cause claim is itself untimely and would not constitute cause for his delay. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (holding a good-cause "claim itself must not be procedurally defaulted").

Johnson also alleged he could overcome the procedural bars because he is actually innocent of committing conspiracy to commit robbery.

²*See Johnson v. State*, No. 52693, 2010 WL 3838489 (Nev. Sep. 29, 2010) (Order of Affirmance). Johnson also filed a postconviction petition for a writ of habeas corpus in the district court on June 19, 2020. Johnson did not appeal from the district court's order denying that petition.

³The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. *See* A.B. 49, 82d Leg. (Nev. 2023).

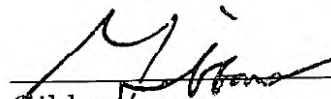
Johnson merely reiterates the same innocence claim discussed above. Johnson did not demonstrate actual innocence because he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (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). Therefore, we conclude the district court did not err by denying Johnson’s claims of ineffective assistance of counsel without conducting an evidentiary hearing. See *Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars).

Johnson also alleges on appeal that the district court erred by denying his postconviction habeas petition that was filed on June 19, 2020, and was denied by the district court on September 21, 2020. The notice of entry of the district court’s order denying the 2020 petition was served on Johnson in September 2020. Thus, to the extent he is appealing the district court’s 2020 order, the notice of appeal was more than two years late and, thus, untimely such that it failed to vest jurisdiction in this court. See NRS 34.575(1) (providing an appeal from the denial of a postconviction habeas petition “must be made within 30 days after service by the court of the written notice of entry of the order”); NRAP 4(b)(1)(A) (providing the timing to appeal in a criminal case); *Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (explaining that an untimely notice of appeal fails to vest jurisdiction in this court), *abrogated on other grounds by Rippo*, 134 Nev. at

426 n.18, 423 P.3d at 1100 n.18. Accordingly, we lack jurisdiction over any challenge from the denial of his 2020 postconviction habeas petition.

Finally, Johnson raises additional claims on appeal that were not raised in his December 7, 2022, petition. We decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jacqueline M. Bluth, District Judge
Jamaal Johnson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk