

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH N. WARREN A/K/A JOSEPH
NAPOLEAN WARREN, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52247

FILED

MAY 06 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On April 3, 1990, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court affirmed appellant's judgment of conviction on appeal. McCurdy v. State, 107 Nev. 275, 809 P.2d 1265 (1991).¹

Appellant unsuccessfully sought post-conviction relief in the district court by filing a proper person post-conviction petition for a writ of habeas corpus, which was denied on June 5, 1992. Appellant did not appeal this denial. He then unsuccessfully sought relief by way of a

¹McCurdy was appellant's co-defendant and the appeals were consolidated.

petition for a writ of error coram nobis; a second post-conviction petition for a writ of habeas corpus; and a motion to correct illegal sentence. Warren v. State, Docket No. 47669 (Order of Affirmance, December 13, 2006); Warren v. State, Docket No. 28281 (Order Dismissing Appeal, October 2, 1998); Warren v. State, Docket No. 25187 (Order Dismissing Appeal, January 20, 1994).

On April 18, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 26, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received a flawed jury instruction on the elements of first-degree murder because he was given the Kazalyn² instruction on premeditation. Kazalyn v. State, 108

²In Kazalyn, this court approved the following instruction on premeditation:

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate, and premeditated murder.

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Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 714 (2000).

Appellant filed his petition approximately 17 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two prior post-conviction petitions for a writ of habeas corpus. See NRS 34.810(2). Further, appellant's petition was an abuse of the writ because he raised new claims not raised and litigated in his first or second post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(b)(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3). To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Such an impediment "may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (internal quotation marks omitted)).

... continued

Kazalyn, 108 Nev. at 75-76, 825 P.2d at 583-84.

³The petition was also filed more than 15 years after the effective date of NRS 34.726. 1991 Nev. Stat., ch. 44, § 5, at 75-76. (Effective January 1, 1993).


To excuse his procedural defects, appellant claimed that this court's holding in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) should apply retroactively to his case based on the Ninth Circuit's recent decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In Byford, this court disapproved of the Kazalyn instruction on the mens rea required for a first-degree murder conviction based on willful, deliberate, and premeditated murder, and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. Several months later, this court determined that giving the Kazalyn instruction "was [not] error [nor did it violate] any constitutional rights" and that "with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief." Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). Contrary to our holding in Garner, the Ninth Circuit in Polk held that Byford applied retroactively because giving the Kazalyn instruction constituted constitutional error. Polk, 503 F.3d at 911.

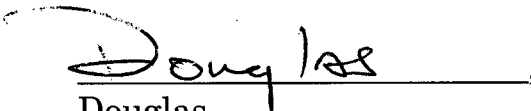
Even assuming that Polk provided good cause for raising his claim at this late date, appellant failed to demonstrate actual prejudice because Byford does not apply in the instant case. See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (concluding actual prejudice requires that any errors worked to appellant's actual and substantial disadvantage which affected the proceedings with error of constitutional dimensions). Byford only affected convictions that were not final at the time that Byford was decided as a matter of due process. See Garner, 116 Nev. at 788, 6 P.3d at 1025; see also Nika v. State, 124 Nev. ___, ___, 198

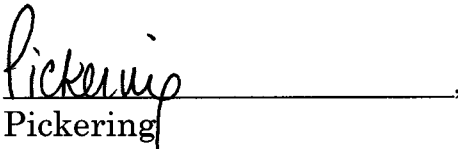
P.3d 839, 848 (2008). In Nika, this court rejected Polk's determination that the Byford instruction was constitutional error. Nika, 124 Nev. at ___, 198 P.3d at 849. Instead, this court reaffirmed its holding in Garner that Byford announced a change in state law rather than clarified existing state law. Id. When state law is changed, rather than clarified, the change only applies prospectively and to cases that were not final at the time of the change. Id. at ___, 198 P.3d at 850. Because appellant's conviction was final long before Byford was decided, the use of the Kazalyn instruction was not error in this case. Therefore, the district court did not err in denying appellant's petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Joseph N. Warren
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk