

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEAUNDRAY GASTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52768

FILED

NOV 03 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; James A. Brennan, Judge.

On July 20, 1994, 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 with the possibility of parole in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence. Gaston v. State, Docket No. 26027 (Order Dismissing Appeal, March 1, 1996). The remittitur issued on March 20, 1996. Appellant previously unsuccessfully sought relief by filing two post-conviction petitions for writs of habeas corpus. Gaston v. State, Docket No. 33153 (Order Dismissing Appeal, August 16, 2000) and Gaston v. State, Docket No. 41096 (Order of Affirmance, December 3, 2003).

On August 29, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and specifically pleaded laches. 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 November 18, 2008, the district court denied the appellant's petition. This appeal followed.

Appellant raised two claims in his petition: (1) he was improperly convicted of first-degree murder as there was no showing of specific intent to commit murder and was improperly found to have committed murder with a deadly weapon contrary to this court's holdings in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008), cert denied, No. 09-6028, 2009 WL 2566986 (U.S. October 3, 2009), and Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006); and (2) he was improperly convicted of first-degree murder as he received the Kazalyn instruction which merged the definitions of premeditation, deliberation and willful contrary to the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). See Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 714 (2000).

Appellant filed his petition more than twelve years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for writs of habeas corpus and an abuse of the writ because he raised new and different claims. See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches,

appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

In order to demonstrate good cause to excuse procedural defects in filing a post-conviction petition for a writ of habeas corpus, a petitioner must demonstrate that an impediment external to the defense excused the procedural defects. See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel.’” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Put in another way, a claim that was reasonably available to the petitioner during the time period for filing a timely petition would not constitute good cause to excuse procedural defects in a late petition. Hathaway, 119 Nev. at 253, 71 P.3d at 506. Actual prejudice requires a showing that the error worked to the petitioner’s actual and substantial disadvantage. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

In an attempt to excuse his procedural defects for claim one above, appellant argued that this court’s opinions in Sharma, Bolden and Mitchell were not decided until 2002, 2005, 2006, respectively, suggesting that he was unable to bring his claims arising from these decisions in a timely petition.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause for the delay. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects. Even assuming that this court’s decisions in Sharma, Bolden and

Mitchell constituted legal grounds not reasonably available in time for filing a petition within the one-year deadline from the issuance of the remittitur on direct appeal, appellant's 2008 petition was untimely filed from each of these decisions—approximately 6 years after Sharma, 2 1/2 years after Bolden and 1 1/2 years after Mitchell. Thus, appellant failed to demonstrate good cause for the entire length of his delay. Further, we note that in Mitchell, this court held that Sharma was a clarification of the law and therefore applied to cases that were final before it was decided. 122 Nev. at 1276, 149 P.3d at 38. Consequently, Sharma and Mitchell would not provide good cause in this case. Therefore, the district court did not err in denying this claim.


In an attempt to provide good cause for his second claim, appellant claimed that he had good cause because the Ninth Circuit's decision in Polk was not decided until 2007, suggesting that he was unable to bring the claim arising from this decision in a timely petition. Based upon our review of the record, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause for the delay. Appellant did not receive the flawed instruction from Kazalyn. Instead, the jury was fully instructed on the meanings of premeditation and deliberation. Therefore, the district court did not err in denying this claim.


Finally, appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Therefore, the district court properly denied the petition as procedurally barred.

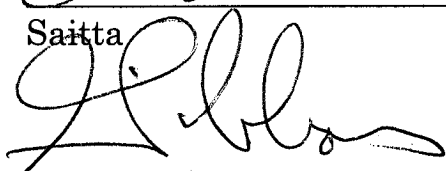
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. James A. Brennan, Senior Judge
DeAundray Gaston
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.