

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LAMONT MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52856

FILED

FEB 04 2010

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 appellant's post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant filed his petition on September 9, 2008, more than eight years after this court issued the remittitur from his direct appeal on April 5, 2000. See Moore v. State, 116 Nev. 302, 997 P.2d 793 (2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.² See NRS 34.810(1)(b); NRS 34.810(2). Appellant's petition was procedurally barred

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Moore v. State, Docket No. 39387 (Order of Affirmance, November 20, 2002).


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).

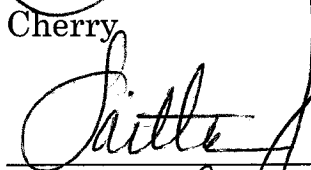
In his petition, appellant claimed that he received a flawed jury instruction on the elements of first-degree murder because the jury was given the Kazalyn instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000). In an attempt to excuse his procedural defects, appellant relied on Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), claiming that he could not file his claim until after Polk.

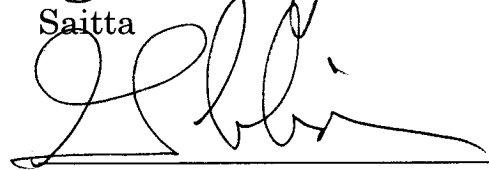
Appellant's reliance on Polk to establish good cause is misguided. Byford was decided on February 28, 2000, eleven days before this court issued its opinion in appellant's direct appeal. Byford, 116 Nev. 215, 994 P.2d 700; Moore, 116 Nev. 302, 997 P.2d 793. Accordingly, appellant could have raised this claim on direct appeal, or in his first petition for a writ of habeas corpus, but failed to do so. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Thus, appellant failed to establish cause for his delay in filing. In addition, as appellant was also convicted of robbery, he was clearly guilty of murder pursuant to NRS 200.030(1)(b). Thus, appellant failed to demonstrate prejudice. See Byford, 116 Nev. at 233-34, 994 P.2d at 712-13 (concluding that the giving of the Kazalyn instruction was not reversible error when the evidence was "clearly sufficient" to establish all elements of first-degree murder).

Appellant also failed to overcome the presumption of prejudice to the State. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


Cherry, J.


Saitta, J.


Gibbons, J.

cc: Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
James Lamont Moore
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We 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.