

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMARLO ANTWIN BERRY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52905

**FILED**

**SEP 23 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; Jackie Glass, Judge.

On July 31, 1995, the district court convicted appellant, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of 10 years for burglary, two consecutive terms of 15 years for robbery, and two consecutive terms of life with the possibility of parole for murder in the Nevada State Prison. All of the terms were ordered to run consecutively. This court dismissed appellant's appeal from his judgment of conviction and sentence. Berry v. State, Docket No. 27585 (Order Dismissing Appeal, June 17, 1997).

On January 14, 1999, appellant, with the help of counsel, filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After conducting a hearing on the petition, the district court denied appellant's petition on November 6, 1999. This court affirmed the denial of the petition. Berry v. State, Docket No. 35201 (Order of Affirmance, April 6, 2001).

On September 17, 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 December 12, 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 Kazalyn<sup>1</sup> instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000).

Appellant filed his petition more than 11 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Further, appellant's petition constituted an abuse of the writ as his claim was new and different from

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<sup>1</sup>In 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.

those claims raised in his previous post-conviction petition. See 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(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. (internal quotation marks omitted) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Additionally, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.

To excuse his procedural defects, appellant claimed that this court's holding in Byford, 116 Nev. 215, 994 P.2d 700, should apply retroactively to his case based on the Ninth Circuit's 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,

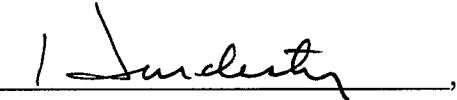
56 P.3d 868 (2002). Contrary to our holding in Garner, the Ninth Circuit in Polk held that Byford applied retroactively because giving the Kazalyn instruction constituted constitutional error. Polk, 503 F.3d at 911.

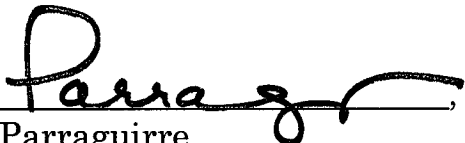
Even assuming that Polk provided good cause for raising his claim at this late date, appellant failed to demonstrate actual prejudice because Byford does not apply in the instant case. See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (concluding actual prejudice requires that any errors 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. at \_\_\_, 198 P.3d at 849-850. 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. Further, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court denying the petition as procedurally barred and barred by laches.


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.

  
\_\_\_\_\_, C.J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Jackie Glass, District Judge  
DeMarlo Antwin Berry  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk