IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52964

FILED

NOV 17 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant William Lester Witter's third post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

A jury convicted Witter of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, attempted sexual assault with the use of a deadly weapon, and burglary and sentenced him to death. This court affirmed the convictions and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), receded from in part by Byford v. State, 116 Nev. 215, 248 n.11, 249, 994 P.2d 700, 722 n. 11, 722 (2000). After unsuccessfully seeking post-conviction relief in both state and federal court, Witter filed the instant petition in the district court on April 28, 2008. The district court denied the petition as procedurally barred, and this appeal followed.

Witter's sole claim in his petition below is that the premeditation instruction given, commonly known as the Kazalyn instruction, unconstitutionally conflated the concepts of deliberation and premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). The issue was appropriate for direct appeal and thus subject to dismissal pursuant to NRS 34.810(1)(b)(2) absent a demonstration of good cause and

prejudice. Moreover, as he had previously raised the claim in his direct appeal and it was denied on the merits, further consideration of the claim is barred by the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Witter argues that the district court erred in denying his post-conviction petition in concluding that (1) he failed to demonstrate good cause and prejudice to overcome the applicable procedural bars and (2) the law of the case barred consideration of his claim.

Good cause and prejudice

Witter contends that the Ninth Circuit Court of Appeals decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided good cause to again raise his claim regarding the failure of the district court to specifically define the terms "willful" and "deliberate." We disagree.

In Byford, we 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. Recently, we addressed Polk and concluded in Nika v. State, 124 Nev. 1272, 1286-87, 198 P.3d 839, 849-50 (2008), cert. denied, 558 U.S. ___, 130 S. Ct. 414 (2009), that Byford does not apply to cases that were final when it was decided. Witter's conviction was final nearly four years before Byford was decided and therefore Byford does not apply. Accordingly, Witter cannot demonstrate good cause to overcome the applicable procedural bars with respect to this claim.

We further conclude that the district court did not err in finding that Witter failed to demonstrate prejudice. In Byford, this court set forth a first-degree murder instruction that defined willfulness as "the intent to kill," and deliberation as "the process of determining upon a course of action to kill as a result of thought, including weighing the

reasons for and against the action and considering the consequences of the action." 116 Nev. at 236, 994 P.2d at 714. No particular span of time was necessary for an act to be willful and deliberate, but the act "must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur." Id. While Witter's attack was extremely violent, the evidence did not indicate that Witter's actions were the result of an "unconsidered and rash impulse." Id. at 237, 994 P.2d at 715. Instead, Witter engaged in calculated efforts to complete his sexual assault, which included concocting a story to explain any apparent distress and electing to murder the victim when he did not accept the ruse. Given this evidence, Witter did not demonstrate that he would not have been convicted of first-degree murder had the jury been instructed on deliberateness and willfulness. Moreover, as the evidence demonstrated that the killing occurred during the attempted commission of a sexual assault and burglary, Witter failed to demonstrate that he would not have been convicted of first-degree murder under the felony-murder theory. See NRS 200.030(1)(b).

Law of the case doctrine

Next, Witter contends that the district court erred in concluding that his claim was barred by the law-of-the-case doctrine because Polk was an intervening change in the law that permitted the district court to depart from the holding in his case. We disagree.

When an appellate court states a principle or rule of law, that principle or rule becomes the law of the case and must be followed throughout its subsequent appeals. Hall, 91 Nev. at 315, 535 P.2d at 798. However, a court may "'depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.'" Hsu v. County of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). "[W]hen the controlling law of

this state is substantively changed during the pendency of a remanded matter at trial or on appeal, courts of this state may apply that change to do substantial justice." Id. at 632, 173 P.3d at 729-30. This court's resolution to apply a decision retroactively may constitute good cause for failure to raise such a claim sooner. See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (stating that good cause might be shown where the "legal basis for a claim was not reasonably available at the time of any default"). Witter fails to demonstrate a manifest injustice that would excuse departure from the law-of-the-case doctrine because this court has determined that Byford is not retroactive to cases on collateral review even considering the decision in Polk. See Nika, 124 Nev. 1272, 198 P.3d 839.

Having considered Witter's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Valorie Vega, District Judge
Eighth District Court Clerk
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas