

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES E. NELLUMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53407

FILED

FEB 09 2011

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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on May 2, 2008, almost eight years after issuance of the remittitur on direct appeal on July 6, 2000. Nellums v. State, Docket No. 33639 (Order Dismissing Appeal, June 9, 2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition is successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constitutes an abuse of the writ as he raises claims new and different from those raised in his previous petition.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition is procedurally barred absent a

¹Nellums v. State, Docket No. 42506 (Order of Affirmance, June 13, 2005).


demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).


Appellant argues the district court erred in determining that he failed to demonstrate good cause to overcome the procedural bars because the Ninth Circuit Court of Appeals' decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and this court's decision in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), cert. denied, 558 U.S. ___, 130 S. Ct. 414 (2009), demonstrate that he received a flawed jury instruction on the elements of first-degree murder as 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).

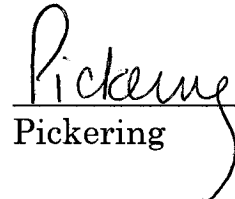
Appellant's argument is without merit. This court applied Byford to appellant's case on direct appeal and concluded that, while the jury was improperly instructed pursuant to Kazalyn, the evidence presented at trial was sufficient to establish premeditation and deliberation and alternatively, there was overwhelming evidence that appellant committed the murder during the commission of a robbery. Nellums v. State, Docket No. 33639 (Order Dismissing Appeal, June 9, 2000). The doctrine of law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument." Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Thus, appellant fails to establish good cause to excuse his procedural defects. Further, as sufficient evidence existed to establish premeditation and deliberation, appellant fails to demonstrate prejudice. See Byford, 116 Nev. at 233-34, 994 P.2d at 712-13. Therefore, the district court did

not err in dismissing appellant's petition as procedurally barred.
Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Attorney General/Carson City
Clark County District Attorney
The Law Office of Dan M. Winder, P.C.
Eighth District Court Clerk