

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERTO GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53441

RUDIBERTO GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53839

ALBERTO GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53943

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying three post-conviction petitions for writs of habeas corpus.¹ Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

¹These appeals have 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Docket No. 53441

Appellant Alberto Guerrero filed his petition on October 20, 2008, almost seven years after issuance of the remittitur on direct appeal on December 21, 2001. See Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001). 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, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of laches. 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, over a year before this court issued its order in appellant's direct appeal. Byford, 116 Nev.

²See Guerrero v. State, Docket No. 41024 (Order of Affirmance, March 25, 2004).

215, 994 P.2d 700; Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001). 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.³ See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Thus, appellant failed to establish cause for his delay in filing.⁴

Moreover, appellant's petition was not timely filed from the decision in Polk. Appellant filed his petition on December 9, 2008, more than one year after Polk was decided on September 11, 2007, and

³To the extent that appellant claimed that his limited ability to speak English and the fact that there were no Spanish speaking interpreters gave him good cause, appellant failed to demonstrate an impediment external to the defense. See Hathaway, 119 Nev. at 254, 71 P.3d at 507. Further, appellant previously filed a timely post-conviction petition in English and failed to demonstrate why this claim could not have been included in that petition. See Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002) (finding that petitioner's alleged inability to speak English was no excuse for delay when the petitioner had previously filed several post-conviction petitions in state court, even if the petitioner had received assistance in drafting those petitions). Finally, to the extent that appellant claimed that his legal materials may have been withheld by the Nevada Department of Corrections for five months, appellant failed to demonstrate good cause for the entire seven-year delay in filing his petition. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506.

⁴Even assuming that appellant had timely filed his petition, appellant failed to demonstrate actual prejudice. The error in giving the so-called Kazalyn instruction was harmless based on the facts of the case. The victim in this case had an altercation with appellants at their home and left soon after. Appellants took off after the victim in separate cars. Outside of the victim's home, Alberto shot the victim with a .22 caliber gun and Rudiberto shot the victim with a shotgun.

appellant failed to demonstrate good cause for the entire length of the delay.

Finally, we conclude that appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Therefore, the district court did not err in denying this petition as procedurally barred.

Docket No. 53839

Appellant Rudiberto Guerrero filed his petition on February 24, 2009, seven years after issuance of the remittitur on direct appeal on December 21, 2001. See Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001). 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, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.⁵ See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of laches. NRS 34.800(2).

In his petition, appellant argued that the instruction given on deliberation was flawed and based his good cause argument on Chambers v. McDaniel 549 F.3d 1191 (9th Cir. 2008). Appellant's reliance on Chambers to establish good cause is misguided. Byford was decided on

⁵See Guerrero v. State, Docket No. 41023 (Order of Affirmance, March 23, 2004).

February 28, 2000, over a year before this court issued its order in appellant's direct appeal. Byford, 116 Nev. 215, 994 P.2d 700; Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001). 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, 119 Nev. at 252-53, 71 P.3d at 506. Thus, appellant failed to establish cause for his delay in filing.⁶

Moreover, appellant's reliance upon the Chambers decision was misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. Specifically, the Chambers court discussed and applied the decision in Polk, which itself discussed this court's decision in Byford. Because it is the substantive holdings in Polk and Byford that appellant sought to apply in this case, it is those cases that provide the marker for filing timely claims and not a later case, Chambers, which merely discussed and applied those cases. Appellant's 2009 petition was filed a year and a half after entry of Polk and more than nine years after this court's decision in Byford. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay. Therefore, the district court did not err in denying this claim as procedurally barred.

⁶Even assuming that appellant had timely filed his petition, appellant failed to demonstrate actual prejudice. The error in giving the so-called Kazalyn instruction was harmless based on the facts of the case. As stated above in footnote 4, the victim in this case had an altercation with appellants at their home and left soon after. Appellants took off after the victim in separate cars. Outside of the victim's home, Alberto shot the victim with a .22 caliber gun and Rudiberto shot the victim with a shotgun.

Next, appellant claimed that his procedural defects should be excused because his claims were based on this court's decision in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), which was decided after this court issued remittitur on his direct appeal. Appellant further claimed that he could not have raised his claims pursuant to Sharma until this court issued its decision in Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006) (concluding that Sharma applied retroactively). Appellant's reliance on Mitchell is misguided. Appellant could have filed his claims pursuant to Sharma as soon as it was decided in 2002. See Hathaway, 199 Nev. at 252-53, 71 P.3d at 506. Further, even if Mitchell was relevant to establish good cause, appellant waited more than two years after this court's decision in Mitchell to file his claim. Thus, appellant failed to demonstrate good cause for his delay in raising this claim. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

We note that because the jury found appellant guilty of conspiracy to commit murder, the jury necessarily found that appellant possessed the requisite intent to commit murder. Thus, Sharma is inapplicable to this case, and appellant cannot demonstrate he would be prejudiced by the denial of this petition as procedurally barred.

Finally, appellant claimed that he was actually innocent pursuant to this court's holding in Sharma. Appellant failed to establish that "it is more likely than not that no reasonable juror would have convicted [appellant]" in light of this decision. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Thus, appellant failed to establish any fundamental miscarriage of justice that would result from this court's failure to consider these claims. See Mazzan, 112 Nev. at 842, 921 P.2d at

922. We further conclude that appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Therefore, the district court did not err in denying this petition as procedurally barred.

Docket No. 53943

Appellant Alberto Guerrero filed his petition on February 24, 2009, seven years after issuance of the remittitur on direct appeal on December 21, 2001. See Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001). 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 a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.⁷ See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of laches. NRS 34.800(2).

Appellant's petition in this case was almost identical to the petition filed in Docket No. 53839 and raised the exact same claims. For the reasons stated above in Docket No. 53839, appellant failed to demonstrate good cause and prejudice to overcome the procedural bars and failed to overcome the presumption of prejudice to the State.

⁷See Guerrero v. State, Docket No. 41024 (Order of Affirmance, March 25, 2004); Guerrero v. State, Docket No. 53441 (consolidated for disposition with the current case).

Therefore, the district court did not err in denying the petition as procedurally barred.

For the foregoing reasons, we

ORDER the judgments of the district court AFFIRMED.⁸

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Alberto Guerrero
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁸We have reviewed all documents that appellant Alberto Guerrero 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.