

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL SCOTT KLEIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54438

**FILED**

JUL 15 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 a post-conviction petition for a writ of habeas corpus and a motion for the appointment of counsel.<sup>1</sup> Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Appellant filed his petition on June 15, 2009, more than 17 years after the remittitur from his direct appeal issued on December 3, 1991. Klein v. State, Docket No. 21223 (Order Dismissing Appeal, October 24, 1991). Thus, appellant's petition was untimely filed.<sup>2</sup> See NRS 34.726(1). Moreover, appellant's petition was successive because he previously filed three post-conviction petitions for a writ of habeas corpus.<sup>3</sup>

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<sup>1</sup>This 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).

<sup>2</sup>We note that the petition was untimely from the effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-76.

<sup>3</sup>Klein v. State, Docket No. 24410 (Order Dismissing Appeal, March 27, 1997); Klein filed a post-conviction petition for a writ of habeas corpus in the district court on April 16, 2001, but voluntarily withdrew his appeal

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See NRS 34.810(1)(b)(2); NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as he raised claims that were new and different from those claims raised in his previous post-conviction petitions. 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(1)(b)(2); 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).

First, appellant claimed he had good cause to excuse the procedural defects because he was denied access to the prison law library and denied assistance of legally trained clerks. Appellant failed to demonstrate an impediment external to the defense that should excuse the procedural defects. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). As appellant previously filed proper person petitions, the prison's alleged failure to provide access to the library or to prison law clerks did not explain the entire 17-year delay. Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988); see also Lewis v. Casey, 518 U.S. 343, 351-353 (1996).

Second, appellant claimed that the Ninth Circuit Court of Appeals decisions in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), provided good cause

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from the district court's denial of that petition. Klein v. State, Docket No. 38478 (Order Dismissing Appeal and Vacating Prior Order Directing Transmission of Record on Appeal in Docket No. 38478, November 16, 2001); Klein v. State, Docket No. 52546 (Order of Affirmance, August 25, 2009).

to excuse his raising a claim challenging the premeditation and deliberation jury instruction.

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 v. State, 116 Nev. 215, 994 P.2d 700 (2000). 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 almost two years 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.

Appellant's reliance upon Byford is further misplaced in this case. Byford only affected convictions that were not final at the time that Byford was decided as a matter of due process. See Garner v. State, 116 Nev. 770, 788, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); see also Nika v. State, 124 Nev. 1272, 1284-85, 198 P.3d 839, 848 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 414 (2009). In Nika, this court rejected Polk's determination that the Kazalyn instruction was constitutional error. Nika, 124 Nev. at 1286, 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 1287, 198 P.3d at 849-50. 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 1287, 198 P.3d at 850. Because appellant's conviction was final long

before Byford was decided, the premeditation and deliberation instruction was not error in this case.

Appellant's claim that a fundamental miscarriage of justice excused the procedural defects was without merit as he failed to demonstrate that he was actually innocent. Calderon v. Thompson, 523 U.S. 538, 559 (1998); 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). Appellant further failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in applying the procedural bars under NRS 34.726, 34.800, and 34.810(1)(b)(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

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<sup>4</sup>Appellant failed to demonstrate that the district court abused its discretion by denying his motion for the appointment of counsel. See NRS 34.750.

We 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.

cc: Hon. Doug Smith, District Judge  
Paul Scott Klein  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk