

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD T. ALLGOOD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54499

**FILED**

MAR 11 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 third post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant filed his petition on May 1, 2009, almost twelve years after entry of the judgment of conviction on July 22, 1997. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously pursued two post-conviction petitions for writs of habeas corpus.<sup>2</sup> See NRS

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

<sup>2</sup>Allgood v. State, Docket No. 33139 (Order of Affirmance, October 9, 2000); Allgood v. State, Docket No. 45900 (Order of Affirmance, February 10, 2006).

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). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Appellant claimed that the Ninth Circuit Court of Appeals decision in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), provided good cause 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 v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007), 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 of 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 more than eighteen months 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. \_\_\_, \_\_\_, 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<sup>3</sup> 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. 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. Appellant further failed to overcome the presumption of prejudice pursuant to NRS 34.800(2).

Finally, to the extent that appellant claimed that he was actually innocent because of the flawed jury instructions, and that this overcame the previously discussed procedural defects, appellant's claim fell short of demonstrating actual innocence because it is a claim of legal innocence, not factual innocence, and appellant did not show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Therefore,

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<sup>3</sup>Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford, 116 Nev. at 235, 994 P.2d at 714.

the district court did not err in denying appellant's petition as procedurally time barred and successive. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

*Hardesty*, J.  
Hardesty

*Douglas*, J.  
Douglas

*Pickering*, J.  
Pickering

cc: Hon. Michael Villani, District Judge  
Donald T. Allgood  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk