

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. CARPINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54500

FILED

JUN 09 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.¹ Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant filed his petition on May 11, 2009, more than twenty years after the remittitur issued on direct appeal on January 18, 1989.² Carpino v. State, Docket No. 19004 (Order Dismissing Appeal, December 27, 1988). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1). Further, because the State specifically pleaded laches,

¹This 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).

²Appellant's petition was also filed more than sixteen years after the effective date of NRS 34.726.

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 decisions in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), and Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), 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, 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 Kazalyn³ 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, jury instruction 7 was not error in this case. Appellant further failed to overcome the presumption of prejudice pursuant to NRS 34.800(2). Therefore we conclude that the district court did not err in denying the petition as procedurally barred pursuant to NRS 34.726 and NRS 34.800. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

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

cc: Eighth Judicial District Court Dept. 8, District Judge
Joseph M. Carpino
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk