

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MCDOWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54544

**FILED**

**MAR 10 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 appellant's post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant filed his petition on March 31, 2009, more than twenty-one years after this court issued the remittitur from his direct appeal on November 10, 1987.<sup>2</sup> 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.<sup>3</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). To the extent

---

<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>See McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987).

<sup>3</sup>See McDowell v. State, Docket No. 38750 (Order of Affirmance, July 11, 2002).

appellant raised claims that were new and different from those raised in his previous petitions, those claims were an abuse of the writ. 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); 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 first claimed that his procedural defects should be excused because his claims were based on this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) (disapproving use of the Kazalyn instruction), which was decided after this court issued the remittitur in his direct appeal. Appellant further claimed that he could not raise his claim pursuant to Byford until the Ninth Circuit Court of Appeals issued its decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007).

Even assuming that Polk provided good cause for raising his claim at this late date, appellant failed to demonstrate actual prejudice because Byford does not apply in the instant case. Byford only applies to 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, 788-89, 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). Because appellant's conviction was final long before Byford was decided, the use of the Kazalyn instruction was not error in this case.

Next, appellant asserted 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 also decided after


this court issued the remittitur in his direct appeal. Appellant further claimed that he did not have good cause to raise his claims pursuant 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 to establish good cause is misguided. Appellant could have filed his claims pursuant to Sharma as soon as it was decided in 2002. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). 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)

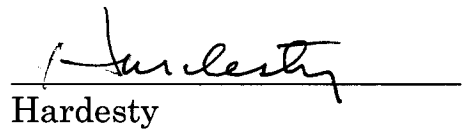
We also note that because the jury found appellant guilty of conspiracy to commit murder, the jury necessarily found that appellant possessed the requisite intent to commit murder. Thus, Sharma is inapplicable to this case, and appellant cannot demonstrate he would be prejudiced by the denial of this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

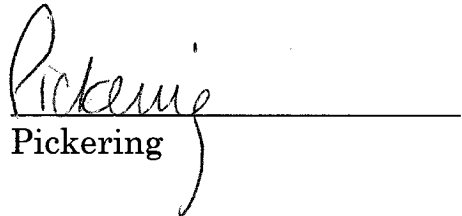
Finally, appellant claimed that he was actually innocent pursuant to this court's holdings in Byford and Sharma. For the reasons discussed above, appellant failed to establish that "it is more likely than not that no reasonable juror would have convicted [appellant]" in light of these decisions. See 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). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.  
Parraguirre

 J.  
Hardesty

 J.  
Pickering

cc: Hon. Michelle Leavitt, District Judge  
Roy McDowell  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk