IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY CHRISTOPHER ROWE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54809

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant filed his petition on March 17, 2008, almost nine years after the remittitur issued on direct appeal on August 10, 1999. Rowe v. State, Docket No. 29700 (Order Dismissing Appeal, July 15, 1999). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was also successive and an abuse of the writ because he previously litigated a post-conviction petition for a writ of habeas corpus.[1] 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). A petitioner, unable to satisfy the good cause and prejudice requirements,

[1]Rowe v. State, Docket No. 41113 (Order of Affirmance, July 1, 2004). In his petition appellant re-raised a claim relating to the premeditation and deliberation jury instruction. The remaining claims were new and different from those previously litigated.

may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); see also Calderon v. Thompson, 523 U.S. 538, 559 (1998).

Appellant offers no cogent good cause argument.[2] Rather, appellant argues that a fundamental miscarriage of justice should overcome the procedural bars due to the allegedly flawed jury instructions. 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, 523 U.S. at 559; Mazzan, 112 Nev. at 842, 921 P.2d at 922; Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

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[2]To the extent that appellant appears to argue that he had good cause because he needed to exhaust state remedies for purposes of a federal habeas corpus petition, and he received ineffective assistance of post-conviction counsel in the first habeas corpus proceedings, these claims do not demonstrate an impediment external to the defense sufficient to excuse the procedural defects. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Although appellant cited to several cases decided after his conviction, appellant provided no good cause arguments relating to these claims. We note that the 2007 amendments to NRS 193.165 do not apply to offenses committed before July 1, 2007. State v. Dist. Ct. (Pullin), 124 Nev. 564, 571, 188 P.3d 1079, 1084 (2008).

Further, in regards to the claim involving Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), we note that appellant's reliance upon Byford is 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[3] 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 before Byford was decided, giving the Kazalyn instruction was not error in this case. Further, even assuming there was error in giving the Kazalyn instruction, any error was harmless in this case because appellant was convicted of second-degree murder, not first-degree murder.[4] Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 323 (2008); Collman v. State, 116 Nev. 687,

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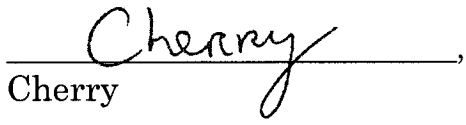
[3]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford, 116 Nev. at 235, 994 P.2d at 714.

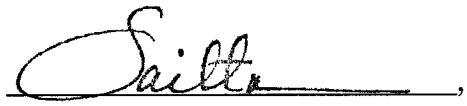
[4]In the instant case, appellant, who was intoxicated, after fighting with the victim, entered a trailer and retrieved a shotgun, exited the trailer and put the shotgun to the victim's head, and pulled the trigger, killing the victim.

722, 7 P.3d 426, 449 (2000); Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1267 n.26, 1269, 147 P.3d 1101, 1108 n.26, 1109 (2006). Therefore we conclude that the district court did not err in denying the petition as procedurally barred pursuant to NRS 34.726 and NRS 34.810.[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[5]Appellant offers no cogent argument on appeal for his request to revisit various holdings of this court, and we decline his invitation to revisit these holdings.