IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ANTHONY JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54863

FILED

JAN 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant argues that the district court erred in concluding that his petition was procedurally barred without cause for the delay. Appellant filed his petition on January 16, 2009, more than 12 years after entry of the judgment of conviction on July 1, 1996.[1] Thus, appellant's petition is untimely filed. See NRS 34.726(1). Moreover, appellant's petition is successive because he has previously filed two post-conviction petitions for a writ of habeas corpus, and it constitutes an abuse of the writ as he raises claims new and different from those raised in his previous petitions.[2] See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition is procedurally barred absent a demonstration of good cause and

[1]No direct appeal was taken.

[2]Jones v. State, Docket No. 30756 (Order Dismissing Appeal, September 11, 2000); Jones v. State, Docket No. 43554 (Order of Affirmance, March 29, 2005).

actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant is required to overcome the rebuttable presumption of prejudice to the State. NRS 34.800(2).

To excuse the procedural defects, appellant argues that errors the district court committed during the proceedings for his 1997 habeas petition constitute an impediment external to the defense that excuses the delay. The instant petition was filed approximately 12 years after the district court denied the first petition and appellant does not provide an explanation for the entire 12-year delay in raising claims regarding the denial of that petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). In addition, appellant does not provide an explanation for why he could not have raised claims challenging the district court's denial of his 1997 petition in his 2003 petition or why he could not raise his claims challenging the judgment of conviction in his first timely petition. NRS 34.810(1)(b)(3).[3] Therefore, appellant fails to demonstrate good cause to excuse the delay.

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[3]To the extent appellant argues that Byford v. State, 123 Nev. 67, 156 P.3d 691 (2007), provides good cause to excuse the delay in raising his claim that the district court did not allow appellant to view the proposed order for the denial of his 1997 petition, appellant does not provide an explanation for the two-year delay in seeking relief under that decision. Accordingly, appellant fails to demonstrate good cause to overcome the procedural bars because he did not raise this claim within a reasonable time after Byford was decided. Hathaway, 119 Nev. at 252, 71 P.3d at 506. Further, appellant's own assertions indicate he learned of the alleged errors in the denial of the 1997 petition when he acquired the transcripts in 2003 and appellant makes no arguments he has good cause for waiting to present this argument.

Next, appellant claims that he is actually innocent. First, appellant argues that he is innocent as expert witness testimony presented at trial demonstrated that appellant did not have the intent to kill because he acted impulsively due to withdrawal from cocaine and alcohol. The expert witness testimony was presented at trial and, given the verdict, was rejected by the jury. As the expert witness testimony was presented to the jury, it is insufficient to demonstrate that appellant is actually innocent. Schlup v. Delo, 513 U.S. 298, 324 (1995).

Second, appellant argues he is actually innocent because the jury was improperly instructed on premeditation and deliberation, as discussed in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008). 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, 235, 994 P.2d 700, 714 (receding from the reasonable doubt instruction provided in Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)). However, appellant's argument is misplaced 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 before Byford was decided, the use of the Kazalyn instruction was not error in this case.

Further, appellant's claim that, in light of the decisions in Polk and Chambers, the giving of the Kazalyn instruction in this case resulted in a fundamental miscarriage of justice lacks merit. 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 fails to demonstrate that, had the jury not received the Kazalyn instruction, "it is more likely than not that no reasonable juror would have convicted him."[4] Calderon, 523 U.S. at 559 (quoting Schlup, 513 U.S. at 327); accord 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 denying the petition as procedurally barred.

Finally, appellant argues that the district court's order erroneously states that appellant waived his claims of ineffective assistance of counsel as part of the stipulation. To the extent the district court's order may have caused confusion, it is clear from the record that appellant did not waive claims of ineffective assistance of trial counsel in the stipulation. Rather, when appellant waived his right to a direct appeal in the stipulation, he necessarily waived his right to raise claims of ineffective assistance of appellate counsel. Appellant did not waive his claims of ineffective assistance of trial counsel in the stipulation and his ineffective assistance of trial counsel claims raised in his first petition were considered and rejected on the merits. See Jones v. State, Docket No. 30756 (Order Dismissing Appeal, September 11, 2000). Therefore,

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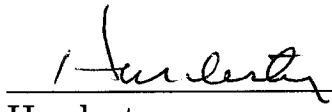
[4]Notably, appellant provides only a small portion of the trial transcripts for this court's review and thus necessarily fails to meet his burden.

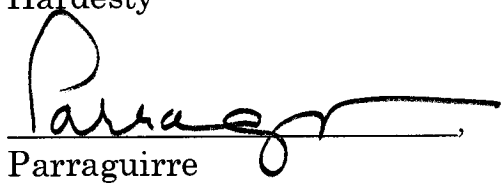
appellant fails to demonstrate any prejudice stemming from the district court's order. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas
Eighth District Court Clerk