

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD ARTHUR WINFREY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55070

FILED

JAN 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
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; Donald M. Mosley, Judge.

Appellant filed his petition on September 10, 2008, ten years after issuance of the remittitur on direct appeal on May 28, 1998. Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.¹ See 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). Moreover, because the State specifically pleaded laches, appellant was

¹Winfrey v. State, Docket No. 34799 (Order of Affirmance, December 12, 2001); Winfrey v. State, Docket No. 45193 (Order of Affirmance, July 22, 2005).


required to overcome the rebuttable presumption of laches. NRS 34.800(2).


Appellant claims that the district court erred in denying his petition because he had good cause to overcome the procedural bars. He claims that this court's holding in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), should apply retroactively to his case based on the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). Even assuming that Polk provides good cause for raising his claim at this late date, appellant fails 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. 1272, 198 P.3d 839 (2008). Because appellant's conviction was final before Byford was decided, the use of the Kazalyn instruction was not error in this case. To the extent that appellant appears to be claiming that he has good cause because he raised a first-degree murder instruction claim on direct appeal, appellant fails to demonstrate that he is entitled to relief. As stated above, his conviction was final before Byford was decided, and the first-degree murder instructions given at trial were a correct statement of the law at the time of his conviction.² Further, appellant fails to cite to any case or

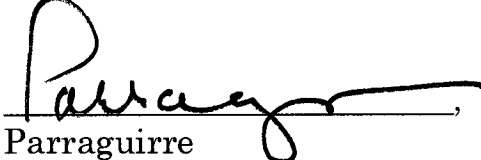
²Appellant's argument that he was actually innocent because he lacked the requisite intent is similarly flawed. The first-degree murder instructions given at trial were a correct statement of the law, and the jury found that he had the requisite intent. Therefore, appellant fails to demonstrate a constitutional violation that "has probably resulted in the
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statutory law to support his contention that raising a claim on direct appeal would provide good cause for raising the claim again in an untimely and successive post-conviction petition. Therefore, the district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Glynn B. Cartledge
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986).