IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LAMAR BAGLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55087

FILED

JUN 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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 writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant filed his petition on September 22, 2009, over eight years after this court's July 10, 2001, issuance of the remittitur from his direct appeal. See Bagley v. State, Docket No. 35100 (Order of Affirmance, June 12, 2001). Appellant's petition was therefore untimely filed. See NRS 34.726(1). Appellant's petition was also successive because

[1]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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

he had filed a previous post-conviction petition for writ of habeas corpus.[2] See NRS 34.810(1)(b)(2); NRS 34.810(2). Thus, 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).

Appellant argued he had good cause to excuse his procedural defects because Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), should have applied to his appeal as a matter of due process. We agree that Byford, decided before appellant's case became final, should have applied to appellant's case and therefore constituted good cause. See Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 850 (2008), cert. denied, ___ U.S. ___, 130 S. Ct. 414 (Oct. 13, 2009); Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002).

However, appellant failed to demonstrate actual prejudice. A petitioner must demonstrate "not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Instructional error is subject to harmless error review. Cortinas v. State, 124 Nev. __, ___, 195 P.3d 315, 323 (2008), cert. denied, ___U.S. ___, 130 S. Ct. 416 (2009). Thus appellant is not entitled to relief if this court can

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[2]Bagley v. State, Docket No. 43587 (Order of Affirmance, January 25, 2005).

determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967); Flanagan v. State, 112 Nev. 1409, 1419, 930 P.2d 691, 697-98 (1996).

Evidence adduced at trial was that the victim owed appellant money and appellant had twice inquired after the victim in the month preceding the murder. On the day of the murder, appellant drove to the victim's location and briefly spoke with him. Appellant then pulled a loaded firearm from behind him, cocked it and held it to the victim's chest for one to ten seconds. After the victim and a witness told appellant to put the gun away, appellant fired a round into the victim's chest. As the victim ran away and collapsed, appellant watched and/or tracked him with the firearm before calmly walking back to his car. In returning a murder verdict, the jury clearly rejected appellant's arguments for a manslaughter conviction. The jury was therefore faced with deciding whether the murder was in the first or second degree.[3] In light of this record, we are convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24; Flanagan, 112 Nev. at 1419, 930 P.2d at 697-98. Accordingly, we conclude appellant did not demonstrate actual prejudice so as to excuse the procedural defects.

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[3]We note that appellant did not challenge the instructions for voluntary manslaughter, involuntary manslaughter or murder in the second degree.

Finally, to the extent appellant is arguing that he suffered a fundamental miscarriage of justice, he did not show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[4]

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Anthony Lamar Bagley
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]See Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (declining to reverse correct result simply because it was based on the wrong reason).