

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY J. BURRIOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55364

FILED

MAY 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *Angerson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on October 7, 2009, more than seven years after issuance of the remittitur on direct appeal on July 5, 2002. Burriola v. State, Docket No. 34844 (Order Granting Rehearing and Modifying Order, June 10, 2002). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated two post-conviction petitions for a writ

¹This 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).

of habeas corpus.² See NRS 34.810(1)(b); 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)(2); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of laches. NRS 34.800(2). Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally barred for the reasons discussed below.

First, appellant first argued that he had good cause due to newly discovered evidence of the trial judge's bias.³ Appellant relied upon charges brought by the Nevada Commission on Judicial Discipline in 2004 regarding the trial court judge's conduct in unrelated cases. The 2004 charges would not provide good cause in this case as the charges involve unrelated cases, and any claims of bias based on actions in this case were reasonably available to be raised in a timely petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Second, appellant argued that he had good cause due to fraud in the first post-conviction proceedings. Appellant argued that he did not want post-conviction counsel in the first proceedings and that the court

²Burriola v. State, Docket No. 44015 (Order of Affirmance, September 13, 2005). No appeal was taken from the denial of his first petition, which was filed in 2002.

³The trial judge is not the same as the judge who decided the petition underlying this appeal.

failed to resolve his proper person claims. This good cause argument was considered and rejected by this court in reviewing his 2004 habeas corpus petition. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Third, appellant argued that he had good cause because the law library did not satisfy constitutional requirements. Appellant failed to demonstrate that this constituted an impediment external to the defense in this case. See Hathaway, 119 Nev. at 252, 71 P.3d at 506. Notably, appellant has filed two previous post-conviction petitions and a number of supporting documents.

Fourth, appellant argued that he had good cause because he was untrained and uneducated in legal matters. Appellant's limited training and education in the law does not provide good cause. See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

Fifth, appellant appeared to claim that the State withheld evidence regarding a witness. However, appellant failed to demonstrate that any evidence was withheld or that it was material, and thus, appellant failed to demonstrate good cause and prejudice to excuse the procedural defects. See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

Sixth, appellant argued that he had good cause due to new case law regarding the premeditation and deliberation jury instruction as discussed in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007) and Chambers v. McDaniel, 549 F.3d 1191 (9th. Cir. 2008).

Appellant's reliance upon the Chambers decision was misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. 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, 994 P.2d 700 (2000). Because it is the substantive holdings of Polk and Byford that appellant sought to apply in this case, it is those cases that provide the marker for filing timely claims and not a later case, Chambers, which merely discussed and applied those cases.⁴ Although appellant was correct that the holding in Byford was applicable in his case because his conviction was not final when Byford was decided, see Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 848 (2008), cert. denied, ___ U.S. ___, 130 S. Ct. 414 (2009), appellant's good cause argument regarding Polk and Byford fails because the 2009 petition was filed more than two years after entry of Polk and almost nine years after this court's decision in Byford. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay. Appellant further failed to demonstrate actual prejudice because any error in the premeditation and deliberation

⁴To the extent that appellant claimed that he was relying on a discussion in Chambers regarding a jury instruction that defined second-degree murder as "all other kinds of murder," appellant's reliance on Chambers is misplaced as appellant's jury instruction did discuss the lesser intent requirement of second-degree murder. See 549 F.3d at 1200. Therefore, appellant did not demonstrate good cause or prejudice based on the second-degree murder jury instruction in this case.

jury instruction was harmless and did not affect his substantial rights as he was convicted of second-degree murder. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993).

Finally, appellant failed to overcome the presumption of prejudice pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Anthony J. Burriola
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵We have received the motion for enlargement of time, and no good cause appearing, we deny the motion.