

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY LARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55702

FILED

SEP 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingerson*
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; Elissa F. Cadish, Judge.

Appellant filed his petition on August 5, 2008, more than eight years after issuance of the remittitur on direct appeal on June 19, 2000. Lara v. State, Docket No. 31651 (Order Dismissing Appeal, April 26, 2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition 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 petition.¹ See NRS 34.810(1)(b)(2); NRS

¹Lara v. State, 120 Nev. 177, 87 P.3d 528 (2004).

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

Appellant asserts that the Ninth Circuit Court of Appeals' decision Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and this court's decision in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), provide good cause to raise his claim that he received a flawed jury instruction on the elements of first-degree murder because the jury was given the Kazalyn instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000).

Appellant's reliance on Polk to establish good cause is misguided. The decision in Polk discussed and applied this court's decision in Byford. Because it is the substantive holding in Byford that appellant seeks to apply in this case, it is that case that provides the marker for filing timely claims. Byford was decided on February 28, 2000, approximately two months before this court issued its decision in appellant's direct appeal. Accordingly, appellant could have raised this claim on direct appeal or in his first petition for a writ of habeas corpus, but failed to do so. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d

503, 506 (2003). Under these circumstances, appellant fails to demonstrate good cause for the entire length of his delay. See NRS 34.726(1).

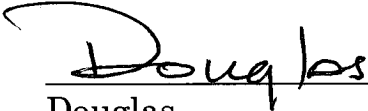
Further, even assuming Nika provides good cause, appellant fails to demonstrate actual prejudice, Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993), because there was substantial evidence of appellant's guilt of first-degree murder.² See Byford, 116 Nev. at 233-34, 994 P.2d at 712-13 (concluding that giving the Kazalyn instruction was not reversible error when the evidence was "clearly sufficient" to establish all elements of first-degree murder). In addition, appellant fails to overcome the presumption of prejudice to the State.

Finally, appellant argues that he is actually innocent because of the flawed jury instructions, and that this overcomes the previously discussed procedural defects. 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's claim relating to the

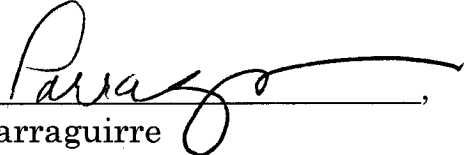
²Witnesses testified that appellant displayed a firearm, stated his intent to shoot a "fool" in a blue Cadillac, and soon after fired multiple shots into the Cadillac as it drove by, killing the 14-year-old victim.

jury instructions is not a claim regarding factual innocence and 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 in light of . . . new evidence.” 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). Therefore, the district court correctly denied the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

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