


IN THE SUPREME COURT OF THE STATE OF NEVADA

EDMOND WADE GREEN,
Appellant,
vs.
JACK PALMER, WARDEN, LOVELOCK
CORRECTIONAL CENTER,
Respondent.

No. 55786

FILED

DEC 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant filed his petition on May 20, 2009, almost 10 years after issuance of the remittitur on direct appeal on September 8, 1999.¹ 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.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a

¹Green v. State, Docket No. 31909 (Order Dismissing Appeal, August 12, 1999).

²Green v. State, Docket No. 46469 (Order of Affirmance, January 9, 2007).

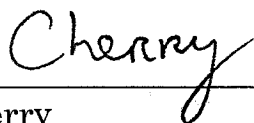
demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).


Appellant's reliance on the Ninth Circuit Court of Appeals' decisions in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008) and Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), to establish good cause is misguided. 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)). Because it is the substantive holdings of Polk and Byford that appellant seeks to apply in this case, it is those cases that provide the marker for filing timely claims. Appellant's 2009 petition was filed more than twenty months after entry of Polk and approximately nine years after this court's decision in Byford. Under these circumstances, appellant fails to demonstrate good cause for the entire length of his delay. See NRS 34.726(1).

Further, even if Polk and Chambers provided 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. ___, ___, 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.

Appellant's claim that, in light of the decisions in Chambers and Polk, the giving of the Kazalyn instruction in this case resulted in a fundamental miscarriage of justice also lacks merit. Given the evidence presented against appellant at trial, he 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." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Attorney General/Carson City
Merchant Law Firm, Ltd.
Washoe County District Attorney
Second Judicial District Court Clerk