

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY EDWARD PETTY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56071

FILED

NOV 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant filed his petition on September 1, 2009, more than 7 years after issuance of the remittitur on direct appeal on July 2, 2002. 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. 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). A petitioner, unable to satisfy the good

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).

cause and prejudice requirements, may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual 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 claimed that new case law discussing first-degree murder jury instructions on the elements of willful, premeditation, and deliberation excused his procedural defects. Appellant specifically relied on Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Appellant failed to demonstrate an impediment external to the defense excused his procedural defects as his claims were reasonably available to be raised in a timely petition. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Notably, appellant received the first-degree murder jury instruction set forth in Byford.² Thus, Byford and a later case applying Byford would not provide good cause for a late and successive petition in the instant case.³ To the extent that appellant claimed ineffective assistance of trial and appellate counsel excused his procedural defects, those claims were

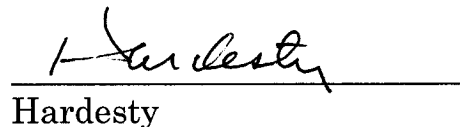
²To the extent that appellant complained about the jury instructions given at his first trial, any errors relating to the first trial were rendered moot when appellant was granted a new trial.

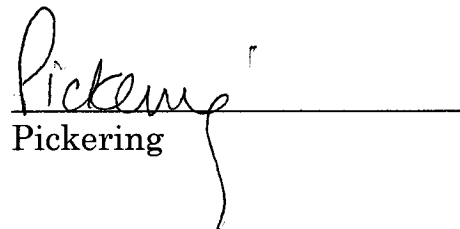
³To the extent that the district court determined appellant had good cause to raise a Byford claim until 2007 when Polk was decided, the district court erred in this case for the reason set forth above.

themselves procedurally barred and would not provide good cause in the instant case. Id. at 252, 71 P.3d at 506. Finally, appellant failed to demonstrate the he was actually innocent because he failed to show that 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; see also Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan, 112 Nev. at 842, 921 P.2d at 922. We therefore 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.

 C.J.
Parraguirre

 J.
Hardesty

 J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Eighth District Court Clerk
Anthony Edward Petty
Attorney General/Carson City
Clark County District Attorney