

IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNELL RAY EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56140

FILED

MAY 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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 January 26, 2010, almost 13 years after issuance of the remittitur on direct appeal on June 23, 1997.² 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.³ See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a

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).

²Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996).

³Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

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 (2000) (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 sought to apply in this case, it is those cases that provide the marker for filing timely claims. Appellant's 2010 petition was filed more than two years after entry of Polk and approximately ten years after this court's decision in Byford. Under these circumstances, appellant failed 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 failed 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. 1272, 1287, 198 P.3d 839, 850 (2008). Because appellant's conviction was

final before Byford was decided, the use of the Kazalyn instruction was not error in this case.

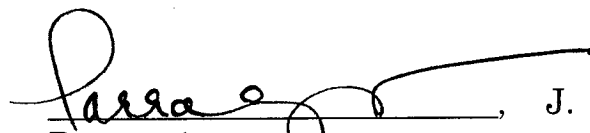
To the extent appellant also claimed that, in light of the decisions in Chambers and Polk, the giving of the Kazalyn instruction in this case resulted in a fundamental miscarriage of justice, appellant's claim lacked merit. Given the evidence presented against appellant at trial, and appellant's failure to present any new evidence, 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).

Finally, we note that appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). 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.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

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