

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE W. LUSTER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56231

FILED

MAR 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
T. Lindeman
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; Kenneth C. Cory, Judge.

Appellant filed his petition on March 6, 2009, more than nine years after issuance of the remittitur on direct appeal on January 25, 2000. Luster v. State, 115 Nev. 431, 991 P.2d 466 (1999). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated 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

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).

in his previous petition.² 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).

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), and this court's decision in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), 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, 994 P.2d 700 (2000). Nika discussed the holdings of Polk and Byford, but did not itself announce a new substantive holding regarding the premeditation and deliberation jury instructions. Because it is the substantive holdings of Polk and Byford that appellant seeks to apply in this case, it is these cases that provide the marker for filing timely claims. Appellant's 2009 petition was filed more than one year after the decision in Polk and approximately 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.³ See NRS 34.726(1).

²Luster v. State, Docket No. 46872 (Order of Affirmance, July 5, 2006).


³We further note that appellant could have raised a Byford claim in his first timely petition.

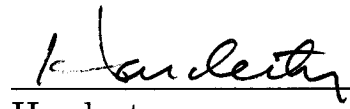
Moreover, even assuming that appellant could demonstrate good cause, appellant failed to demonstrate actual prejudice—“errors of trial . . . [that] worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The decision in Byford was applicable to appellant because his conviction was not final when Byford was decided. See Nika, 124 Nev. at 1287, 198 P.3d at 850. Nevertheless, appellant failed to demonstrate that any error worked to his actual and substantial disadvantage because overwhelming evidence of appellant’s guilt of first-degree murder—a willful, premeditated, deliberate killing—was present in the record.⁴ Thus, not giving the Byford jury instructions was harmless in the instant case. Therefore, we conclude

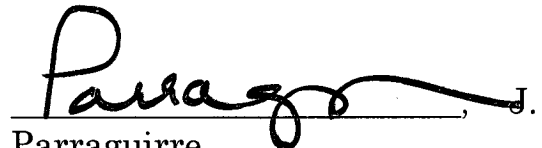
⁴The district court specifically identified the following facts showing that the killing was willful, premeditated, and deliberate: (1) appellant’s hunt for T. Campos and A. Campos weeks before the killing; (2) the kidnapping of a R. Humpheys, believed by appellant to have information as to the whereabouts of the Camposes, a couple of weeks before the killing; and (3) the witnesses’ descriptions of the killing, which involved appellant shooting the victim, a man that had traded vehicles with T. Campos, seven to eight times, with several of the shots occurring after the victim had already fallen to the ground. While one witness described a scuffle prior to the shooting, the majority of the witnesses described a verbal argument only and described the victim as turning away from appellant towards the restaurant when appellant shot him. The pathologist described defensive wounds among the injuries that the victim suffered during the shooting.

that the district court did not err in determining that the petition was procedurally barred.⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Kenneth C. Cory, District Judge
George W. Luster, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵Although the State pleaded laches pursuant to NRS 34.800(2), it does not appear that the district court applied laches in the instant case.