

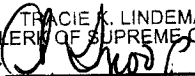
IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN LEWIS DOLEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56399

FILED

JAN 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: 
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; Doug Smith, Judge.

Appellant filed his petition on April 9, 2010, more than eighteen years after issuance of the remittitur on direct appeal on September 5, 1991. Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991). Thus, appellant's petition was untimely filed.² See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a petition for post-conviction relief, and it constituted an abuse of the

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).

²Appellant's petition was further untimely from the effective date of NRS 34.726. 1991 Nev. Stat., ch. 44, § 5, at 75-76; Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

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 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'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 seeks to apply in this case, it is those cases that provide the marker for filing timely claims.⁴ 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 fails to demonstrate good cause for the entire length of his delay. See NRS 34.726(1).

³Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996).


⁴Moreover, we note that appellant filed his petition more than one year after entry of the decision in Chambers.

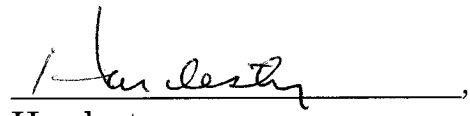
Further, even if Polk and Chambers provided good cause for raising his claim at this late date, appellant failed to demonstrate actual prejudice because Byford does not apply in the instant case. Byford only applies to convictions that were not final at the time that Byford was decided as a matter of 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, 1285, 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.⁵ Moreover, we note that the first-degree murder conviction was charged as open murder and the State presented multiple theories, including felony murder. Because the murder was committed during the course of a robbery and appellant was convicted of robbery, any issues relating to the jury instructions for premeditation and deliberation would be rendered harmless as his actions met the definition of first-degree murder. Payne v. State, 81 Nev. 503, 505-06, 406 P.2d 922, 924 (1965).


⁵Appellant's conviction was final when it was affirmed by this court on direct appeal in 1991. The fact that appellant later received a new penalty hearing, and an amended judgment of conviction was entered, does not alter the finality of the conviction in 1991; rather, the new penalty hearing and entry of the amended judgment of conviction only provided good cause to raise claims relating to the new penalty hearing and amended judgment of conviction within a timely fashion from proceedings on the amended judgment of conviction. See Sullivan v. State, 120 Nev. 537, 540-41, 96 P.3d 761, 764 (2004); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133 (1998).

Next, appellant claimed that he had good cause because of this court's decision in Sharma regarding the liability of an aider and abettor in a specific intent crime. Because appellant's petition was filed more than seven years after the Sharma decision, Sharma would not provide good cause as it does not explain the entire length of his delay. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Doug Smith, District Judge
Marvin Lewis Doleman
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk