

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMON J. ARMSTRONG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56483

FILED

SEP 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on July 29, 2008, more than ten years after issuance of the remittitur on direct appeal on March 26, 1998. Armstrong v. State, Docket No. 28547 (Order Dismissing Appeal, February 27, 1998). 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.¹ 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

¹Armstrong v. State, Docket No. 34317 (Order of Affirmance, June 11, 2001).

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. NRS 34.800(2).

First, appellant asserts that the Ninth Circuit Court of Appeal's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provides good cause to raise his claim that he received a flawed jury instruction on the elements of first-degree murder because the jury was given the Kazalyn instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000).

Appellant's reliance on Polk to establish good cause is misguided because Byford does not apply in the instant case.² Byford only applies to convictions that were not final at the time that Byford was decided as a matter of due process. 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

²Further, to the extent that appellant relies on Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), he is also misguided. Chambers does not provide good cause because it merely applies the decision in Polk, which itself discussed this court's decision in Byford. 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. While appellant was timely from Polk, as discussed, Polk does not provide good cause for appellant's untimely petition. Further, Byford was decided eight years prior to the filing of the instant petition. Therefore, appellant failed to demonstrate good cause for the entire length of his delay. See NRS 34.726(1).


this case. Therefore, the district court did not err in denying this good cause claim.

To the extent that 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. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal 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's claim relating to the jury instructions is not a claim regarding factual innocence and appellant fails to demonstrate 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 (quoting Shlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini, 117 Nev. at 887, 34 P.3d at 537; Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, the district court did not err in denying this claim.

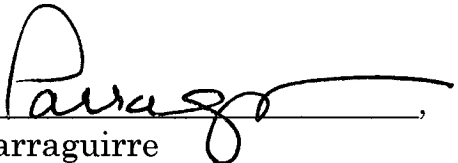
Appellant also claimed that he had good cause because the district court failed to appoint post-conviction counsel to aid him with his first post-conviction petition for a writ of habeas corpus. Appellant failed to demonstrate good cause because he failed to demonstrate that the district abused its discretion in refusing to appoint counsel. See NRS 34.750(1). Further, it has been seven years since the denial of appellant's first petition was affirmed on appeal, and appellant failed to demonstrate good cause for the entire length of his delay in raising this claim. Therefore, the district court did not err in denying this good cause claim.

Finally, 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.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk