IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MARISCAL,
Appellant,
vs.
WARDEN, SOUTHERN DESERT CORRECTIONAL CENTER, BRIAN WILLIAMS; AND THE STATE OF NEVADA,
Respondents.

No. 57494

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant filed his petition on February 3, 2009, thirteen years after issuance of the remittitur on direct appeal on April 23, 1996. Mariscal v. State, Docket No. 26400 (Order Dismissing Appeal, April 3, 1996). 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). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Appellant claims that the Ninth Circuit Court of Appeals decisions in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Chambers

v. McDaniel, 549 F.3d 1191 (9th. Cir. 2008), provided good cause to excuse his raising a claim challenging the premeditation and deliberation jury instruction.[1]

Appellant's reliance upon the Chambers decision is misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. 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). 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 and not a later case, Chambers, which merely discussed and applied those cases. Appellant's 2009 petition was filed more than eighteen months after entry of Polk and more than 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. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Appellant's reliance upon Byford is further misplaced in this case. Byford, as a matter of due process, only affected convictions that

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[1]We note that an amended judgment of conviction was filed on April 6, 2007, pursuant to a new penalty hearing. On February 15, 2008, a second amended judgment of conviction was filed to fix an error regarding appellant's credit for time served. The amended and the second amended judgments of conviction do not provide good cause for appellant's claims because the claims relating to the jury instructions could have been raised prior to when the judgments of conviction were amended. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) ("Absent a showing of good cause as defined by [NRS 34.726], untimely post-conviction claims that arise out of the proceedings involving the initial conviction or the direct appeal and that could have been raised before the judgment of conviction was amended are procedurally barred.").

were not final at the time that Byford was decided. See Garner v. State, 116 Nev. 770, 788, 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, 1286, 1301, 198 P.3d 839, 849, 859 (2008). In Nika, this court rejected Polk's determination that the Kazalyn[2] instruction was constitutional error. Nika, 124 Nev. at 1286, 198 P.3d at 849. Instead, this court reaffirmed its holding in Garner that Byford announced a change in state law rather than clarified existing state law. Id. When state law is changed, rather than clarified, the change only applies prospectively and to cases that were not final at the time of the change.[3] Id. at 1288, 198 P.3d at 850. Because appellant's conviction was final long before Byford was decided, giving the Kazalyn jury instruction was not error in this case.

Appellant also claims that, in light of the decisions in Chambers and Polk, the use of the Kazalyn instruction in this case resulted in a fundamental miscarriage of justice because the jury would have found him guilty of second-degree murder rather than first-degree murder. This claim lacks 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.

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[2]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford, 116 Nev. at 235, 994 P.2d at 714.

[3]Appellant argues that this court, in Nika, wrongly decided that Byford did not involve federal law, and therefore, that whether Byford was retroactive did not matter, and that Byford should have been considered a clarification rather than a change in the law. We decline appellant's invitation to reconsider our holding in Nika.

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 Schlup 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, appellant failed to overcome the presumption of prejudice pursuant to NRS 34.800(2). Accordingly, we conclude that the district court did not err in denying the petition as procedurally barred pursuant to NRS 34.726, NRS 34.810, and barred by laches pursuant to NRS 34.800, and we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Brent T. Adams, District Judge
Glynn B. Cartledge
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk