

IN THE SUPREME COURT OF THE STATE OF NEVADA

CREAD LYONS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57533

FILED

MAY 10 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anderson*
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. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant Cread Lyons, Jr., filed his petition on September 29, 2008, over 13 years after issuance of the remittitur on direct appeal on February 14, 1995. Lyons v. State, Docket No. 24705 (Order Dismissing Appeal, January 24, 1995). Thus, his petition was untimely filed. See NRS 34.726(1). Lyons' petition was also successive because he had previously filed a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(b)(2), (2). Accordingly, Lyons' petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (3). In addition, because the State specifically pleaded laches, Lyons was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Lyons 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 raise

his claim that he was deprived of due process when the jury was given the Kazalyn¹ instruction on premeditation. While Lyons cites both Polk and Chambers in support of his argument, the Chambers decision merely discussed and applied the earlier Polk decision, which itself discussed this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Thus, the Chambers decision did not announce any new proposition and does not provide the marker for filing a timely claim. Lyons' 2008 petition was filed more than one year after entry of Polk, and more than eight years after this court's decision in Byford, and he fails to provide any explanation for the entire length of his delay. See NRS 34.726(1).


Further, Lyons did not demonstrate that the Polk decision provided good cause for raising his claim at this late date. In Polk, the Ninth Circuit held that Byford, which disapproved of the Kazalyn instruction, applied retroactively to the petitioner because giving the Kazalyn instruction was constitutional error in the petitioner's case. Polk, 503 F.3d at 911. Subsequently, this court concluded in Nika v. State, 124 Nev. 1272, 1286-89, 198 P.3d 839, 849-51 (2008), that Byford constituted a change in state law that had no retroactive application to convictions that were final when Byford was decided. Because Lyons' conviction was final before Byford was decided, that case does not apply to him. Therefore, Lyons did not establish good cause to overcome the procedural bars, and the district court properly denied his petition.²


¹Kazalyn 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).

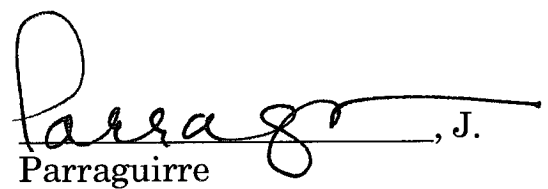
²In his reply brief on appeal, Lyons argues that appellate counsel was ineffective for failing to challenge the Kazalyn instruction on direct
continued on next page . . .

Having considered Lyons' claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


Douglas, J.


Gibbons, J.


Parraguirre, J.

cc: Hon. James M. Bixler, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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appeal. However, because Lyons did not raise this argument below, we decline to consider it here in the first instance. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).