IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES LEE RANDOLPH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57959

FILED

JAN 24 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a second post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Charles Lee Randolph's judgment of conviction stems from his robbery and murder of Shelly Lokken, a bartender at Doc Holliday's bar, in Las Vegas on May 5, 1998. He was convicted of conspiracy to commit robbery, burglary while in the possession of a firearm, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon and sentenced to death.

This court affirmed Randolph's convictions and death sentence on appeal, *Randolph v. State*, 117 Nev. 970, 36 P.3d 424 (2001), and the district court's denial of his first post-conviction petition for a writ of habeas corpus, *Randolph v. State*, Docket No. 46864 (Order of Affirmance, March 13, 2008). In his second post-conviction petition for a writ of habeas corpus Randolph raised and re-raised a number of direct appeal and post-conviction claims that were denied by the district court because Randolph failed to establish good cause and prejudice to overcome the

applicable procedural default rules, *see* NRS 34.726(1); NRS 34.800; NRS 34.810; *Pellegrini v. State*, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001), and Randolph failed to establish that his post-conviction counsel was ineffective, *see Crump v. Warden*, 113 Nev. 293, 303-04, 934 P.2d 247, 253 (1997) (explaining that where appointment of post-conviction counsel is mandated by statute, ineffective assistance of that counsel may provide good cause to file a second petition); *Means v. State,* 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (explaining the two-part test for ineffective-assistance claims under *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). "We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. ___, 275 P.3d 91, 95 (2012), *cert. denied*, 568 U.S. ___, 133 S. Ct. 988 (2013).

On appeal, Randolph raises seven direct appeal and post-conviction claims that have been resolved in our prior dispositions.[1] These

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[1]These claims include: (1) the prosecutor's mischaracterization of the reasonable doubt standard was structural error, (2) the district court erroneously instructed the jury on aiding and abetting and vicarious co-conspirator liability thereby allowing the jury to convict Randolph based on a legally invalid alternative theory of liability, (3) the use of a *Kazalyn* instruction on premeditation and deliberation violated due process and clearly established federal and state law and the district court erred by refusing Randolph's proposed alternative instruction, (4) the district court erroneously allowed the State to change its theory of the case without notice by instructing the jury on aiding and abetting and vicarious co-conspirator liability, (5) the district court committed judicial misconduct throughout the trial, (6) trial counsel was ineffective for failing to appropriately challenge the instructions on aiding and abetting, vicarious coconspirator liability and felony murder, and (7) trial counsel was ineffective for allowing Randolph to concede his guilt to felony murder.

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claims were properly dismissed by the district court because they were raised six and one-half years after we issued the remittitur on direct appeal from the judgment of conviction, NRS 34.726(1), the State affirmatively pleaded laches and Randolph's delay is presumed to prejudice the State, NRS 34.800, they fail to allege new or different grounds for relief, NRS 34.810(2), and they are barred by the law of the case, *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.").

Randolph also raises several new direct appeal and post-conviction claims in his successive petition.[2] Claims 8, 9, 10, and 11 were also properly dismissed by the district court because they were raised six and one-half years after we issued the remittitur on direct appeal from the

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...continued
See Randolph v. State, 117 Nev. 970, 36 P.3d 424 (2001); *Randolph v. State*, Docket No. 46864 (Order of Affirmance, March 13, 2008).

[2]These claims include: (8) the State made Randolph incompetent by prescribing and administering the antidepressant Elavil during the trial, (9) the district court's canvass regarding Randolph's concession to felony murder was inadequate, (10) trial counsel was ineffective for conceding more facts during closing arguments than Randolph authorized, (11) appellate counsel was ineffective because he had no meaningful communication with Randolph which prevented him from challenging the aiding and abetting and vicarious coconspirator liability instructions, (12) the first post-conviction evidentiary hearing was "structurally unsound and defective," and (13) this court erred by reweighing the aggravating and mitigating factors and determining that the jury would have imposed the death penalty beyond a reasonable doubt despite the *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), error.

judgment of conviction, NRS 34.726(1), the State affirmatively pleaded laches and Randolph's delay is presumed to prejudice the State, NRS 34.800, and they could have been raised on direct appeal or in Randolph's first post-conviction petition, NRS 34.810(1)(b). Claim 13 was properly dismissed because it could have been raised in a petition for rehearing. NRAP 40(c); *see also State v. Haberstroh*, 119 Nev. 173, 183, 69 P.3d 676, 682 (2003) (allowing appellate reweighing); *Canape v. State*, 109 Nev. 864, 881-82, 859 P.2d 1023, 1034-35 (1993) (same). Finally, claim 12 was properly dismissed because it could have been raised in Randolph's appeal from the denial of his first post-conviction petition. NRS 34.810(1)(b)(3).

Randolph has the burden of pleading and proving specific facts that demonstrate good cause and actual prejudice to overcome the procedural default rules. NRS 34.726(1); NRS 34.810(3); *see also* NRS 34.800(1) (explaining how to overcome the presumption of prejudice to State). Despite this heavy burden, Randolph's opening brief is devoid of any discussion of good cause and he does not attempt to explain how or why the district court erred by applying the procedural default rules. *Cf. Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) (explaining that this court will not accept conclusory catchall attempts to assert ineffective assistance of counsel which are presented in a perfunctory fashion). Furthermore, Randolph's cursory attempt to argue good cause for the first time in his reply brief and incorporate the good-cause arguments he made in his petition by reference is prohibited by this court's rules and subject to sanction. NRAP 28(c); NRAP 28(e)(2); NRAP 28(j); *see also Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) (explaining that arguments made for the first time in a reply brief prevent the respondent from responding to appellant's contentions with specificity).

Even if this court were to consider the good-cause arguments made in Randolph's petition and reply brief, he has only demonstrated good cause with regard to one claim.[3] In his reply brief, Randolph argues that he is entitled to a new trial because the trial court gave an unconstitutional instruction on premeditation and deliberation. This claim was resolved on direct appeal and is procedurally barred absent a showing of good cause and prejudice. NRS 34.726(1); NRS 34.800; NRS 34.810(2), (3); *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); *Hall*, 91 Nev. at 316, 535 P.2d at 799. The premeditation instruction given–known as the *Kazalyn*[4] instruction–was an accepted instruction until *Byford v. State,* 116 Nev. 215, 234-38, 994 P.2d 700, 713-15 (2000), announced a change in state law that applied prospectively to murder convictions that were not final when *Byford* was decided. *Nika v. State,* 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008). Because Randolph's conviction was not yet final when *Byford* was decided, *see Colwell v. State,* 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), and he raised his claim within a reasonable time after it became available, *see Hathaway*, 119 Nev. at

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[3]In order to establish good cause for filing a second post-conviction petition based on ineffective assistance of post-conviction counsel, Randolph was required to show that post-conviction counsel was deficient for failing to raise meritorious ineffective-assistance-of-trial-or-appellate-counsel claims. *See Means,* 120 Nev. at 1011, 103 P.3d at 32 (explaining the two-part test for ineffective-assistance claims under *Strickland,* 466 U.S. at 687); *see also Crump,* 113 Nev. at 303-04, 934 P.2d at 253 (recognizing that ineffective assistance of post-conviction counsel may provide good cause if counsel was appointed by statutory mandate). He failed to do so. Accordingly, Randolph has not shown that ineffective assistance of post-conviction counsel provides good cause for claims 1-13.

[4]*Kazalyn v. State*, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

252-53, 71 P.3d at 506, as the petition was filed four months after our decision in *Nika*, he has good cause to re-raise this claim in his second post-conviction petition.

Randolph nonetheless is not entitled to relief because he failed to show actual prejudice. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). Although this court indicated on appeal from the judgment of conviction that *Byford* did not apply, the court's summary of the "strong" evidence "that the murder was deliberate and premeditated" comports with the definitions of deliberation and premeditation set forth in *Byford*. *Randolph*, 117 Nev. at 986, 36 P.3d at 434. Furthermore, the evidence of first-degree murder under an alternative theory of felony murder was indisputable because Randolph conceded guilt on that theory. Therefore, the *Kazalyn* instruction was harmless, *see Byford*, 116 Nev. at 233, 994 P.2d at 712 (finding any error in giving *Kazalyn* instruction harmless where evidence was "clearly sufficient to establish deliberation and premeditation"), and Randolph cannot show that the error "worked to his *actual* and substantial disadvantage," *Riker*, 121 Nev. at 232, 112 P.3d at 1075.

Randolph also argues that this court should reconsider eight of his claims because he is actually innocent of first-degree murder and the death penalty. "To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death

penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.* at 887, 34 P.3d at 537 (citing *Sawyer v. Whitley,* 505 U.S. 333, 336 (1992)). However, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316; *see also Calderon v. Thompson*, 523 U.S. 538, 560 (1998) (explaining that challenges to the underlying crime or the death sentence both require new evidence). Randolph did not present any new evidence with respect to any of his claims. In the absence of new evidence, Randolph has failed to establish that failure to consider the merits of his procedurally defaulted claims would result in a fundamental miscarriage of justice and he is therefore not entitled to relief on these grounds.

The only claim raised by Randolph that is not procedurally barred is his claim that post-conviction counsel was ineffective for failing to adequately prepare for and conduct an evidentiary hearing on his first post-conviction petition.[5] *McKague v. Whitley*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). Randolph has the burden of proving by a preponderance of the evidence that counsel's performance was deficient

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[5]Although we discuss Randolph's claim here, we note that this claim may not be cognizable as a free-standing claim. *See* NRS 34.724(1) ("Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State . . . may . . . file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . . .").

and resulted in prejudice. *See Means*, 120 Nev. at 1011-12, 103 P.3d at 32-33. We give deference to the district court's factual findings regarding ineffective assistance of counsel if they are supported by substantial evidence and not clearly wrong but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one." *Avery v. State*, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006).

Randolph did not request an evidentiary hearing to establish the deficiency of his post-conviction counsel and none was held. Randolph also did not argue deficiency or prejudice during the hearing on his petition. After considering Randolph's arguments, the district court denied Randolph's claim of ineffective assistance of counsel because he failed to show prejudice.

We cannot say that the district court erred by denying his claim of ineffective assistance of counsel for several reasons. First, most of the allegations contained in Randolph's petition are based on factual allegations outside the record. Because Randolph did not request an evidentiary hearing, the district court did not make any findings of fact related to those allegations and Randolph has therefore failed to establish that post-conviction counsel was deficient. *Means*, 120 Nev. at 1013, 103 P.3d at 33 (explaining that petitioner "must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence" and "the petitioner must establish that those facts show counsel's performance fell below a standard of objective reasonableness"). Second, Randolph has failed to explain how the outcome of the proceedings would have been different had post-conviction counsel

presented a medical expert, requested a new evidentiary hearing, or more diligently prepared for the evidentiary hearing. *Id.* (explaining that "petitioner must establish prejudice by showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different"). Finally, counsel's failure to file a writ of mandamus or prohibition did not prejudice Randolph because the same issue was addressed by this court on appeal from the district court's denial of Randolph's first petition. *See Randolph v. State*, Docket No. 46864 (Order of Affirmance, March 13, 2008).

Having reviewed the record and Randolph's claims,[6] we conclude that the district court did not err by denying his second post-conviction petition for a writ of habeas corpus, and we

ORDER the judgment of the district court AFFIRMED.[7]

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

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[6]Randolph also argues cumulative error. Because we have found no error, there are no errors to cumulate.

[7]The Honorables Mark Gibbons, Chief Justice, and Michael L. Douglas, and Michael A. Cherry, Justices, did not participate in the decision in this matter.

cc: Hon. Michelle Leavitt, District Judge
James A. Colin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk