

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES EDWARD CROSS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58153

**FILED**

**SEP 15 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant filed his petition on July 30, 2010, almost ten years after issuance of the remittitur on direct appeal on September 6, 2000. Cross v. State, Docket No. 32533 (Order Dismissing Appeal, August 11, 2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated 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.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a

---

<sup>1</sup>This 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).

<sup>2</sup>Cross v. State, Docket No. 45194 (Order of Affirmance, December 21, 2005).

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 claimed that he had good cause because he did not receive legal assistance at the State prisons and he did not have physical access to the law library. Appellant failed to demonstrate that this constituted an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Appellant failed to demonstrate that the prison's resources and procedures for access to the law library were inadequate in light of appellant's previous litigation of a post-conviction petition for a writ of habeas corpus.

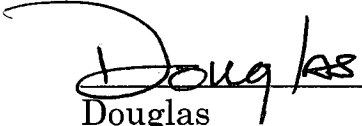
Next, appellant claimed that he had good cause because the district court failed to appoint counsel for his first post-conviction petition. First, appellant provides no explanation for why he failed to raise this claim earlier, and thus, he failed to demonstrate good cause for the entire length of his delay. Further, because the appointment of counsel was discretionary, see NRS 34.750(1), and because appellant failed to demonstrate an abuse of discretion in failing to appoint counsel, appellant failed to demonstrate that this excused his procedural defects.

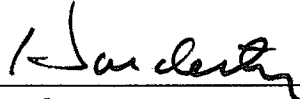
Next, appellant claimed that the Ninth Circuit Court of Appeals' decisions in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), and Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and this court's decision in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), provided good cause to excuse his raising a claim challenging the premeditation and deliberation jury instruction.

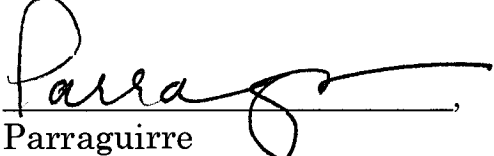
Appellant's reliance upon the Chambers decision was misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. In Chambers, the

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 sought 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. Although appellant was correct that the holding in Byford was applicable to his case because his conviction was not final when Byford was decided, see Nika, 124 Nev. at 1287, 198 P.3d at 850, the aforementioned decisions did not provide good cause to excuse the procedural defects in the instant case. Appellant's July 30, 2010 petition was filed more than one year from each of these decisions, and appellant did not provide a reasonable explanation for why he could not litigate his claim within one year from these decisions. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay. Finally, appellant failed to overcome the presumption of prejudice pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Linda Marie Bell, District Judge  
James E. Cross  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk