

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY R. AMATI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58248

**FILED**

JAN 16 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Tony Amati was charged with several counts of murder, attempted murder, and battery, all with the use of a deadly weapon, resulting from a crime spree that occurred between May 27, 1996, and August 20, 1996. Amati objected at trial to the first-degree murder instruction (the Kazalyn<sup>1</sup> instruction), claiming that it did not adequately define “deliberate” as a separate element. The district court gave the instruction over Amati’s objection, and on March 13, 2000, a judgment of conviction was entered finding Amati guilty of one count each of murder with the use of a deadly weapon and attempted murder with the use of a

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<sup>1</sup>Kazalyn v. State, 108 Nev. 67, 828 P.2d 578 (1992).

deadly weapon. On February 28, 2000, this court in Byford v. State rejected the Kazalyn instruction for failing to separately define “deliberate” when defining premeditation. 116 Nev. 215, 994 P.2d 700 (2000). In his timely direct appeal, Amati argued that because his case was not final when Byford was decided, he was entitled to a new trial with the Byford instruction. This court concluded that because Byford was not law at the time of trial, Amati was not entitled to relief and affirmed the judgment of conviction. See Amati v. State, Docket No. 35794 (Order of Affirmance, October 5, 2001). On September 11, 2007, the Ninth Circuit concluded that the Kazalyn instruction violated the federal constitution because it alleviated the state of its burden to prove all of the elements of a crime beyond a reasonable doubt. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). On December 31, 2008, this court rejected the rationale underlying Polk but concluded that Byford applied to all cases that were not final when it was decided. Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 414 (2009).

On July 28, 2010, Amati filed the instant petition, again arguing that, because his case was not final when Byford was decided, he was entitled to a new trial with an instruction that adequately defined deliberation as well as premeditation. Because Amati filed his petition more than eight years after this court issued the remittitur from his direct appeal, the instant petition was untimely filed. See NRS 34.726(1). Moreover, the petition was successive because he had previously filed a post-conviction petition. See NRS 34.810(1)(b)(2); NRS 34.810(2).

Accordingly, Amati's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, Amati was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). The district court concluded that Amati failed to demonstrate good cause and prejudice.

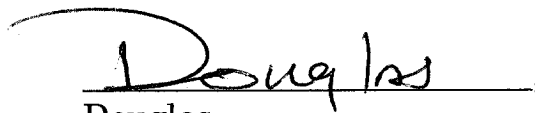
Amati claims that the district court erred because Nika constituted a new legal basis to file his petition and he filed within a year after the Supreme Court denied certiorari in Nika. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel.'" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))). The district court rejected Amati's argument that it was reasonable to file his petition within a year of Nika's denial of certiorari and determined that because Amati did not file until almost two years after Nika was announced by this court he failed to file the petition in a reasonable time after the new legal basis was discovered. Having considered his argument, we conclude that Amati did not file his petition within a reasonable time after the law changed. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506 (providing that a petitioner must raise a claim based on new facts within a reasonable time period of learning of the new facts). Moreover, we have also held that "proper respect for the finality of convictions demands that this ground for good cause be limited to previously unavailable constitutional claims," Clem v.

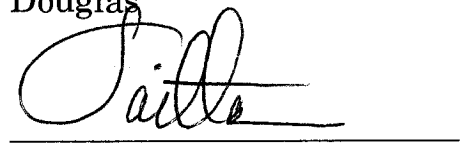
State, 119 Nev. 615, 621, 81 P.3d 521, 525–26 (2003), and as Nika makes clear, Byford does not implicate constitutional concerns. Nika, 124 Nev. at 1288, 198 P.3d at 850.

Having considered Amati's contention, and concluded that it does not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

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

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Douglas W. Herndon, District Judge  
Kristina M. Wildeveld  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk