

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSS ERIC BARTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59805

FILED

SEP 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Maline*
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.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on May 20, 2011, more than fourteen years after issuance of the remittitur on direct appeal on January 8, 1997. Barton v. State, Docket No. 27076 (Order Dismissing Appeal, December 20, 1996). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated several post-conviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims

¹This 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).

new and different from those raised in his previous petition.² 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). To demonstrate actual prejudice, a petitioner must demonstrate any error worked to his actual and substantial disadvantage. See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).


Appellant claimed that new law, Ramirez v. State, 126 Nev. ___, 235 P.3d 619 (2010) (holding that failure to instruct a jury that there was required to be an immediate and direct causal connection between the defendant's unlawful act or acts and victim's death was improper and that the error required reversal 1) where only one of the two felonies in question could serve as a basis for a second-degree-felony-murder conviction and the State failed to specify the predicate felony, and 2) there was conflicting evidence regarding who inflicted the mortal wounds), excused his procedural defects. Appellant claimed that there was no predicate felony specified in his case.

Even assuming, without deciding, that Ramirez provided good cause in this case, appellant failed to demonstrate actual prejudice because this case involved an open murder charge and there was a factual

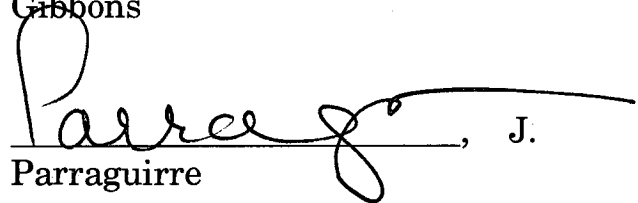
²Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001); Barton v. State, Docket No. 53122 (Order of Affirmance, February 4, 2010); Barton v. State, Docket No. 57967 (Order of Affirmance, July 15, 2011).

and legal basis for a second-degree murder conviction under either theory presented at trial. Moreover, appellant failed to overcome the presumption of prejudice to the State under NRS 34.800(2). Therefore, we conclude that the district court did not err in denying the petition as procedurally barred and barred by laches. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Ross Eric Barton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk