

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY LEE FOGGY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60777

FILED

NOV 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Appellant filed his petition on January 4, 2012, more than thirteen years after issuance of the remittitur on direct appeal on October 13, 1998. Foggy v. State, Docket No. 28324 (Order Dismissing Appeal, September 24, 1998). 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.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Foggy v. State, Docket No. 35464 (Order of Affirmance, November 16, 2001).

barred absent a 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).

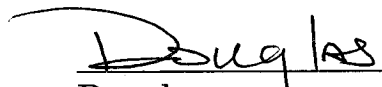
Appellant first claimed that his petition was not subject to any procedural bars because it was filed within one year from entry of the amended judgment of conviction on June 13, 2011. Appellant reasoned that entry of the amended judgment of conviction rendered the original judgment of conviction and any subsequent proceedings a nullity. Appellant's argument lacked merit. The judgment of conviction was amended in 2011 to specify the minimum term for parole eligibility. NRS 34.726 does not include entry of an amended judgment of conviction as one of the triggers for filing a timely post-conviction petition, and appellant's original judgment of conviction was not a nullity because it failed to specify the minimum term for parole eligibility. Because appellant's claims do not challenge the amendment to the judgment of conviction, the amended judgment of conviction would not provide good cause in the instant case for filing an untimely and successive petition. See Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).


Next, appellant claimed that he had good cause to raise his claim challenging the premeditation and deliberation jury instruction because of the decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). The decision in Polk would not provide good cause in the instant case. First, appellant's petition was filed more than four years after the decision in Polk, and appellant provided no explanation for the delay in raising this claim. More importantly, the Polk decision would not provide good cause as his conviction was final before Byford v. State, 116 Nev. 215, 994 P.2d


700 (2000) was decided, and thus, the court did not err in giving the Kazalyn jury instruction.³ See Nika v. State, 124 Nev. 1272, 1286-89, 198 P.3d 839, 849-51 (2008) (recognizing that Byford constituted a change in state law that had no retroactive application to convictions that were final when Byford was decided).

Next, appellant claimed that he could overcome application of the procedural bars because he was actually innocent. Appellant did not demonstrate actual innocence because he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Appellant failed to overcome the presumption of prejudice to the State. We therefore conclude that the district court did not err in denying appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

³Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

cc: Hon. Jerome T. Tao, District Judge
Henry Lee Foggy
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk