

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62746

FILED

DEC 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: 
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 Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Because appellant filed his petition more than ten years after this court issued its remittitur on direct appeal from the judgment of conviction and he has previously filed post-conviction petitions for writs of habeas corpus, the petition was untimely under NRS 34.726(1) and successive under NRS 34.810(2). Therefore, the petition was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

In an attempt to overcome the procedural bars, appellant argued that the Ninth Circuit decisions in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), and *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008),

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).

provide good cause to excuse the delay in his challenge to the *Kazalyn*² instruction used during his trial. Appellant asserted that the legal basis for his challenge did not reasonably exist before *Polk* and *Chambers* were decided.³ See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (“An impediment external to the defense may be demonstrated by 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))).

On February 28, 2000, this court rejected the *Kazalyn* instruction in a published opinion. *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 714 (2000). On September 11, 2007, the Ninth Circuit concluded that the *Kazalyn* instruction violated the federal constitution by allowing a jury to find a person guilty of first-degree murder without finding all of the elements of the crime beyond a reasonable doubt. *Polk*, 503 F.3d at 913. And 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, 1287, 198 P.3d 839, 850 (2008).

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

³*Chambers* did not announce a new legal basis; it merely discussed and applied the legal basis announced in *Polk*. Therefore, *Chambers* does not provide good cause to excuse the procedural bars to appellant’s petition.

Appellant filed the instant petition on January 5, 2011, more than two years after *Nika* was decided, more than three years after *Polk* was decided, and more than ten years after *Byford* was decided. We conclude that appellant failed to file his petition within a reasonable time after the legal basis for his challenge became available. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (petitioner must raise a new claim within a reasonable time period after it becomes available).⁴ Moreover, we have 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 *Nika* makes it clear that *Byford* did not announce a new constitutional rule, *Nika*, 124 Nev. at 1288, 198 P.3d at 850.⁵

⁴Even if Voss’s claim had been timely raised, he would not be entitled to relief. Voss was convicted of first-degree murder after the jury found that he had carried the victim away with the specific intent of killing her. The jury’s finding necessarily means that Voss acted with willfulness, deliberation, and premeditation even as *Byford* defines these terms. See *Byford*, 116 Nev. at 236-37, 994 P.3d at 714-15. Furthermore, we concluded on direct appeal that sufficient evidence supported Voss’s murder and kidnapping convictions. *Voss v. State*, Docket No. 32830 (Order Vacating in Part and Remanding in Part, May 24, 2000).

⁵To the extent that appellant also claims that he is actually innocent, we conclude that he has failed to make a colorable showing of actual innocence and that the district court did not err by rejecting his claim. See generally *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

