

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE COLEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62896

FILED

DEC 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angel*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant Donald Lee Coleman's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Coleman contends that the district court erred by dismissing his habeas petition because the State's use of the *Kazalyn* instruction at his trial violated his right to due process. *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), *receded from by* *Byford v. State*, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000) (disapproving of the *Kazalyn* instruction and providing district courts with new instructions to use in the future); *see Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007) (concluding that *Kazalyn* instruction was unconstitutional because it diminished the State's burden to prove all of the elements of first-degree murder beyond a reasonable doubt). *But see Babb v. Lozowsky*, 719 F.3d 1019, 1029-30 (9th Cir. 2013) (disapproving of holding in *Polk* and noting its effective overruling by *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008)), *cert. denied*, 571 U.S. ___, 82 U.S.L.W. 3257 (Nov. 4, 2013). Without expressly making the argument on

appeal, Coleman claims that the Ninth Circuit's holding in *Polk* provides the good cause necessary to excuse the procedural bars to a consideration of his petition on the merits. We disagree.

Coleman's petition was untimely because it was filed more than 15 years after we resolved his direct appeal. See NRS 34.726(1); *Coleman v. State*, Docket No. 25815 (Order Dismissing Appeal, December 19, 1995). Coleman's petition was also successive. See NRS 34.810(1)(b)(2); see generally *Coleman v. State*, Docket No. 31410 (Order of Affirmance, June 18, 2001). The district court initially granted Coleman's "Motion to File Successive Writ of Habeas Corpus," finding that he "has shown good cause that his request to file a successive Writ is timely made and is not an abuse of the writ." Subsequently, however, in granting the State's motion to dismiss Coleman's petition, the district court relied upon this court's holding in *Nika*, where, among other things, we stated that *Byford* does not apply to cases that were final when it was decided, 124 Nev. at 1276, 198 P.3d at 842. Coleman's conviction was final more than four years before *Byford* was decided. Therefore, we conclude that Coleman cannot demonstrate good cause and prejudice sufficient to excuse the procedural bars to his petition, and the district court did not err by rejecting his claim. See *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) ("We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law

to those facts de novo.”), *cert. denied*, ___ U.S. ___, 133 S. Ct. 988 (2013).¹

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Patrick Flanagan, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹We also deny Coleman’s request to reconsider our holding in *Nika*.