

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLYDE LEWIS, A/K/A LOUIS
RANDOLPH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73706

FILED

JUN 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Clyde Lewis appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 22, 2017.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Lewis was convicted, pursuant to a 1997 jury verdict, of burglary, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon.² The instant petition was filed 15 years after issuance of the remittitur on direct appeal on February 11, 2002. Lewis' petition was therefore untimely filed. See NRS 34.726(1). His petition was also successive because he raised claims that could have been raised in earlier

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²Lewis was originally tried in 1995 on these three counts plus a count of battery with the use of a deadly weapon. The jury found him guilty of the latter charge but was unable to reach a verdict on the remaining three counts. A judgment of conviction for the battery count was filed in 1995, and no direct appeal was taken. None of Lewis' claims in the instant petition touch on the battery count or the 1995 judgment of conviction.

proceedings.³ See NRS 34.810(1)(b)(2); NRS 34.810(2). Lewis' 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). Moreover, because the State specifically pleaded laches, Lewis was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Lewis contends the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Lewis claimed he had good cause to excuse the procedural bars because he received ineffective assistance from appellate counsel. However, a claim of ineffective assistance of counsel that is itself procedurally barred cannot constitute good cause to excuse a procedural defect. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). We therefore conclude the district court did not err in rejecting this argument without first conducting an evidentiary hearing.

Lewis also claimed the United States Supreme Court's decisions in *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claims regarding the first-degree-murder jury instruction he received. Lewis claimed retroactive effect should be given to

³See *Lewis v. State*, Docket No. 65186 (Order of Affirmance, July 22, 2014); *Lewis v. State*, Docket No. 60522 (Order of Affirmance, December 12, 2012); *Lewis v. State*, Docket Nos. 30567, 33145 (Order of Affirmance, February 7, 2001).

the decision in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). However, Lewis' conviction was not yet final when *Byford* was decided, and *Byford* was thus available to raise on direct appeal⁴ or as a claim of ineffective assistance of counsel in a timely postconviction petition for a writ of habeas corpus. See *Nika v. State*, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008). Retroactivity was therefore not at issue. See *Bunkley v. Florida*, 538 U.S. 835, 840 (2003); *Nika*, 124 Nev. at 1287, 198 P.3d at 850. Accordingly, the retroactivity decisions of *Welch* and *Montgomery* could not provide good cause to overcome the procedural bars to Lewis' claims.⁵

Even if *Welch* and *Montgomery* constituted good cause for the first-degree-murder claims, Lewis could not have demonstrated actual prejudice. The Nevada Supreme Court held sufficient evidence supported that Lewis actively participated in the robbery and was thus responsible for the victim's death on a theory of felony murder. See *Lewis v. State*, Docket Nos. 30567, 33145 (Order of Affirmance, February 7, 2001). Thus any error in the premeditation jury instruction was harmless. See *State v. Contreras*, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002) ("The felonious intent involved in the underlying felony is deemed, by law, to supply the malicious intent necessary to characterize the killing as a murder, and because felony murder is defined by statute as first-degree murder, no proof of the traditional factors of willfulness, premeditation, or deliberation is required for a first-degree murder conviction."). We therefore conclude the district

⁴*Byford* was decided on February 28, 2000. Lewis' opening brief on appeal was filed nearly six months later, on August 16, 2000.


⁵Lewis' petition is also untimely from *Nika*.


court did not err in rejecting this argument without first conducting an evidentiary hearing.


To the extent Lewis now contends the ineffective assistance of postconviction counsel constitutes good cause, this argument was not raised below, and we need not consider it on appeal in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). However, we note Lewis was not entitled to the appointment of postconviction counsel and thus had no right to the effective assistance of postconviction counsel. See *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014).

Finally, Lewis has failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). We therefore conclude the district court did not err by denying Lewis' petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.⁶


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁶We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Nova v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

We also deny Lewis' request to extend his prison copy limit.

cc: Hon. Stefany Miley, District Judge
Clyde Lewis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk