


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES E. NELLUMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74399

FILED

SEP 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

James E. Nellums appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 2, 2017.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Nellums contends the district court erred by denying his petition as procedurally barred without first conducting an evidentiary hearing. Nellums filed his petition nearly 17 years after issuance of the remittitur on direct appeal on July 6, 2000. *See Nellums v. State*, Docket No. 33639 (Order Dismissing Appeal, June 9, 2000). Nellums' petition was therefore untimely filed. *See* NRS 34.726(1). It was also successive as he has previously filed postconviction petitions for a writ of habeas corpus.² NRS 34.810(1)(b)(2); NRS 34.810(2). Nellums' petition was therefore procedurally barred absent a demonstration of good cause and actual

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

²*See Nellums v. State*, Docket No. 53407 (Order of Affirmance, February 9, 2011); *Nellums v. State*, Docket No. 42506 (Order of Affirmance, June 13, 2005).

prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, Nellums was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). To warrant an evidentiary hearing, Nellums had to raise claims supported by specific factual allegations that, if true and not repelled by the record, would have entitled him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); *see Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) (applying the standard in the context of overcoming procedural bars).

Nellums' underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He argued the United States Supreme Court's decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse his procedural bars because they changed the framework under which retroactivity is analyzed. Nellums' petition was not filed within a reasonable time of these decisions. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (holding a goodcause argument must not itself be untimely). We therefore conclude *Welch* and *Montgomery* do not provide good cause to excuse Nellums' procedural bars.

As a separate and independent ground to deny relief, Nellums' conviction was not yet final when *Byford* was decided, *see Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); *see also* U.S. Sup. Ct. R. 13, such that retroactivity was not at issue in Nellums' case. Accordingly, any new retroactivity case law could not constitute cause for the delay. Moreover, Nellums cannot demonstrate undue prejudice because the Nevada Supreme Court applied *Byford* to Nellums' case on direct appeal and concluded the

evidence was sufficient to support a conviction for willful, deliberate, and premeditated murder and, further, that there was overwhelming evidence he had committed felony murder such that reversal was not warranted. See *Nellums v. State*, Docket No. 33639 (Order Dismissing Appeal, June 9, 2000). That holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

Nellums also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because “there is a significant risk that [he] stands convicted of an act that the law does not make criminal.” A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). “It is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). Nellums claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not factual innocence. Accordingly, Nellums failed to demonstrate he is actually innocent such that failing to consider his claims on the merits would result in a fundamental miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800.³

³In his informal brief, Nellums contends the district court failed to consider his reply brief, which he was entitled to file pursuant to NRS 34.750(4). Nellums’ claim lacks merit. First, any reply was due within 15 days of the date of service by the State. See NRS 34.750(4). Nellums did not file either his request for an extension of time to file his reply or his reply itself until after the 15 days had passed. Second, the record shows the

For the foregoing reasons, we conclude the district court did not err by denying Nellums' petition as procedurally barred without first conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
James E. Nellums
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

district court did consider Nellums' untimely reply before issuing its final, written decision.

⁴The Honorable Jerome T. Tao did not participate in the decision in this matter.