

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT EARL JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73801

FILED

JUL 17 2018

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

ORDER OF AFFIRMANCE

Robert Earl Jones appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017.¹ Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Jones filed his petition nearly 17 years after issuance of the remittitur on direct appeal on June 20, 2000. *See Jones v. State*, Docket No. 33748 (Order Dismissing Appeal, May 25, 2000). Jones' petition was therefore untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See* NRS 34.726(1). Further, because the State specifically pleaded laches, Jones was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Jones' underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He claimed the United States Supreme Court's decisions in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*,

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

___ 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. However, Jones' 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 is not at issue in Jones' case. Accordingly, any new retroactivity case law could not constitute cause for the delay. Further, Jones cannot demonstrate undue prejudice because the Nevada Supreme Court applied *Byford* to Jones' case on direct appeal and concluded the evidence was sufficient to support a conviction for willful, deliberate, and premeditated murder such that reversal was not warranted. See *Jones v. State*, Docket No. 33748 (Order Dismissing Appeal, May 25, 2000). That holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).


Jones 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). Jones claimed that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not factual innocence. Accordingly, Jones 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 34.800.²

For the foregoing reasons, we conclude the district court did not err by denying Jones' petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Robert Earl Jones
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²In his informal brief, Jones contends the district court failed to afford him the opportunity mandated by NRS 34.800(2) to respond to the State's assertion of laches. Jones' contention is belied by the record before this court. Jones responded to the State's assertion in a document filed on August 15, 2017, and the district court's order indicates it considered that document.

³We 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).