

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD J. PHELPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73757-COA

FILED

JAN 17 2019

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

ORDER OF AFFIRMANCE

Edward J. Phelps appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 1, 2017.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Phelps filed his petition 18 years after issuance of the remittitur on direct appeal on April 20, 1999. *See Phelps v. State*, Docket No. 29985 (Order Dismissing Appeal, March 24, 1999). Phelps' petition was therefore untimely filed. *See* NRS 34.726(1). Phelps' petition was also successive and an abuse of the writ.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Phelps' petition was therefore 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). Further, because the State specifically pleaded laches, Phelps was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²*See Phelps v. State*, Docket No. 37052 (Order of Affirmance, December 10, 2001).

Phelps claimed the 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 the procedural bars to his underlying claims. First, Phelps claimed he is entitled to the retroactive application of the 2007 amendments to NRS 193.165. *Welch* and *Montgomery* address situations where a court interpreted a statute or made a constitutional ruling, see *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726-27, but the changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension, *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008). Thus, the cases do not provide good cause to reach Phelps' NRS 193.165 claim.


Second, Phelps claimed he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Assuming, without deciding, that *Welch* and *Montgomery* constituted cause, Phelps failed to demonstrate prejudice. The purpose of the opinion in *Byford* was to create a clear distinction between first- and second-degree murder. 116 Nev. at 235, 994 P.2d at 713. Phelps was convicted of only second-degree murder. He thus failed to demonstrate that the lack of a *Byford* instruction "worked to [his] actual and substantial disadvantage." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018).


Phelps 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." Specifically, Phelps claimed that "[t]he facts in this case established that [he] only committed a second-degree murder." Because

Phelps was only convicted of second-degree murder, he failed to demonstrate he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. See *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Stefany Miley, District Judge
Edward J. Phelps
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk