

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WADE MORSE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
GREGORY SMITH,
Respondent.

No. 54897

FILED

MAY 07 2010

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Appellant filed his petition on October 19, 2009, more than ten years after the remittitur issued from his direct appeal on August 11, 1999. Morse v. State, Docket No. 32296 (Order Dismissing Appeal, July 16, 1999). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously pursued post-conviction relief.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Morse v. State, Docket No. 51826 (Order of Affirmance, July 31 2009); Morse v. State, Docket No. 38713 (Order of Affirmance, February 12, 2002).

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Appellant claimed that this court's decision in Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 848 (2008), cert. denied, ___ U.S. ___, 130 S. Ct. 414 (2009), provided good cause to excuse his raising a claim challenging the premeditation and deliberation jury instruction.

Appellant's reliance upon the Nika decision was misplaced as Nika did not announce a substantive rule regarding the correct jury instructions, but rather discussed decisions entered previously. Specifically, Nika discussed the decision in Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007), which itself discussed this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Because it is the substantive holdings of Polk and Byford that appellant sought to apply in this case, it is those cases that provide the marker for filing timely claims. Appellant's 2009 petition was filed almost two years after entry of Polk and more than nine years after this court's decision in Byford. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay.

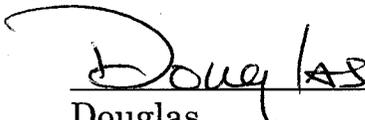
Any reliance upon Byford was further misplaced in this case. Byford only affected convictions that were not final at the time that Byford was decided as a matter of due process. See Garner v. State, 116 Nev. 770, 788, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). In Nika, this court rejected Polk's determination that the Kazalyn³ instruction was constitutional error. Nika, 124 Nev. at ___, 198 P.3d at 849. Instead, this court

³Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford, 116 Nev. at 235, 994 P.2d at 714.

reaffirmed its holding in Garner that Byford announced a change in state law rather than clarified existing state law. Id. When state law is changed, rather than clarified, the change only applies prospectively and to cases that were not final at the time of the change. Id. at ___, 198 P.3d at 850. Because appellant's conviction was final before Byford was decided, the lack of the jury instruction set forth in Byford was not error in this case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Andrew J. Puccinelli, District Judge
Robert Wade Morse
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

⁴We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.