

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTIS LONDELL MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75771-COA

FILED

MAY 15 2019

FILED BY: KATHA A. GROWN
CLERK OF THE COURT
BY: *[Signature]*
CHIEF CLERK

ORDER OF AFFIRMANCE

Artis Londell Moore appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 17, 2017.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Moore filed his petition more than 16 years after issuance of the remittitur on direct appeal on August 7, 2000. *See Moore v. State*, Docket No. 34052 (Order Dismissing Appeal, July 10, 2000). Moore's petition was therefore untimely filed. *See* NRS 34.726(1). His petition was also successive.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Moore's 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).

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

²*See Moore v. State*, Docket No. 69329 (Order of Affirmance, April 14, 2017); *Moore v. State*, Docket No. 67296-COA (Order of Affirmance, May 20, 2015); *Moore v. State*, Docket No. 54521 (Order of Affirmance, May 7, 2010); *Moore v. State*, Docket No. 44514 (Order of Affirmance, December 1, 2006).


Moore's 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*, 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 retroactivity framework. However, Moore's 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 Moore's case. Accordingly, any new retroactivity case law could not provide good cause.


Further, this court recently held that *Welch* and *Montgomery* do not constitute good cause to raise a *Byford* claim. *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). But even if the cases did constitute good cause for the first-degree-murder claim, Moore could not have demonstrated actual prejudice. The Nevada Supreme Court held that the evidence at trial "clearly establish[ed] first-degree murder based on felony murder." *Moore v. State*, Docket No. 69329 (Order of Affirmance, April 14, 2017). This holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Because there was clear evidence Moore was guilty of felony murder, 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.").

Moore also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because he only committed second-degree murder. 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). Because, as discussed above, there was clear evidence that Moore was guilty of first-degree murder based on felony murder, he cannot demonstrate “that it is more likely than not that no reasonable juror would have convicted him” absent the alleged constitutional error. *See id.* (stating the test for actual innocence). We therefore conclude the district court did not err by denying Moore’s petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

cc: Hon. Michelle Leavitt, District Judge
Artis Londell Moore
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk