

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

* * * *

FILED

AUG 02 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

Brendan Nasby,
Appellant,

No. 70626

vs.

The State Of Nevada,
Respondent.

Dist. Ct. No. 98C154293-2

NRAP RULE 40. PETITION FOR REHEARING

BRENDAN JAMES NASBY

I.D. NO. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(APPELLANT IN PROSE)

RECEIVED

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ELIZABETH A. BROWN

17-901571

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JURISDICTION

On July 12, 2017, this Court's Order Of Affirmance was filed.

On July 28, 2017, Appellant mailed the instant Petition For Rehearing to the Clerk of this Court.

This Court has jurisdiction to revisit its own orders and correct its own mistakes, upon Petition for rehearing or sua sponte.

ISSUES PRESENTED

Issue One: This Court Failed To Address Nasby's Challenge To The 8th Judicial District Court's Jurisdiction.

Issue Two: This Court Exceeded Its Appellate Jurisdiction.

Issue Three: This Court Applied The Incorrect Law, Analysis, And Standard Of Review.

Issue Four: This Court's Factual Determinations Are Incorrect And Need To Be Corrected For The Record.

I. STATEMENT OF THE CASE.

On January 5, 2016, Appellant Brendan James Nasby (hereinafter "Nasby") filed his 4th, and instant, post-conviction petition. Nasby also filed a Motion for Appointment of Counsel, a Motion to Extend Prison Copywork Limit, a Memorandum of Points and Authorities in Support of Petition, an Affidavit in Support of Petition, a Supplemental ~~Memorandum~~ Memorandum of Points and Authorities in Support of Petition, and a Notice to the Clerk, Court, and all interested parties. On February 23, 2016, the State filed a response to Nasby's 4th petition. Nasby filed a Reply on March 10, 2016. On April 4, 2016, the court denied the petition. The district court filed a Finding of Facts, Conclusions of Law and Order on May 9, 2016, reflecting its oral pronouncement. The Clerk entered the Final Order on May 13, 2016. On May 18, 2016, Nasby filed a Motion to Alter or Amend Judgment NRCP 59(e). The State filed its response to Nasby's 59(e) motion on June 2, 2016. On June 8, 2016, the district court denied Nasby's 59(e) motion. On June 9, 2016, Nasby filed his Notice of Appeal. On June 30, 2016, the district court filed its order denying Nasby's 59(e) Motion. Nasby filed his Opening Appeal Brief on December 23, 2016. This Court issued its Order of Affirmance on July 12, 2017. What followed is the instant Petition for Rehearing.

II. SUMMARY OF THE ARGUMENT.

In this Petition for rehearing, Nasby presents four issues, in which, he identifies, (A) when this Court has overlooked or misapprehended a material fact in the record or a material question of law in the case, and (B) when this Court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. (NRAP 40(c)(2)(A)(B)) see Also - In Re Dunleavy, 104 Nev. 764, 769 P2d 1271 (1988).

1st, Nasby turns to this Court's failure to address an issue in his Opening Brief. In his Opening Brief, Nasby challenged the jurisdiction of the 8th Judicial District Court to, not only review his habeas petition, but to try

1 and convict him of 1st degree murder under an inapplicable law (Kazalyn).
2 2nd, Nasby addresses how this Court exceeded its appellate jurisdic-
3 tion by making factual determinations regarding the element of delibera-
4 tion, and affirming the lower court's Order based on determinations not made
5 in the lower court's decision.

6 3rd, Nasby addresses this Court's misapplication of law, analysis, and re-
7 view standard. This Court fails to recognize the actual claim that Nasby raised
8 in his habeas petition, which was that Byford was not applied on direct review.
9 Because Nasby objected to the Kazalyn instruction at trial, and raised
10 the issue on Direct Appeal, he has preserved the issue for Direct Review.
11 It was not until Nika, *infra* was decided, that Nasby was entitled to
12 Byford's application on Direct Review. This Court applied a habeas analysis
13 to Nasby's claim when, in fact, he was entitled to a Direct Review analysis.
14 Under Direct Review standards, the burden is ~~not~~ on the State (which they did not
15 attempt to meet), and Nasby's claim maintains a presumption of prejudice.
16 Chapman, *infra*. Thus, Nasby need only demonstrate good cause for the delay in
17 his filing (which he has done), while prejudice is presumed. Nasby also addresses
18 the fact that everything the Nevada Supreme Court based its decision on in reject-
19 ing his Byford issue on Direct Appeal, was completely overruled by the Court's
20 Nika decision. This Court's erection of an entirely new barrier, which was not
21 present at the time of Direct Review, violates *ex post facto*.

22 Finally, Nasby addresses this Court's incorrect description of factual occur-
23 ances, regarding the element of deliberation, and request that those incorrect facts
24 be corrected for the record.

25 III. SUPPORTING FACTS AND ARGUMENT.

26 The time to file a petition for rehearing is 18 days after the filing of decision,
27 and a petition for rehearing is timely if mailed or sent by commercial carrier
28 to the clerk within the time fixed for filing. This Court's Order of Affirmance

1 was filed on July 12, 2017. July 30, 2017 is the last day for Nasby to
2 file this petition for rehearing. July 30, 2017, falls on a Sunday,
3 thus July 31, 2017 is the actual last day for filing this petition. On
4 this 28th day of July, 2017, Nasby mailed the instant petition
5 for rehearing to the Clerk of this Court.

6 Issue One: This Court Failed To Address Nasby's Challenge To The 8th Judicial District Court's Jurisdiction.
7

8 Without conflict of authority, it is well settled that when an inferior
9 court erroneously determines that it has jurisdiction, its judgments and
10 orders will be set aside by the higher courts. Gamble v. Silver Peak Mines,
11 35 Nev. 319; 133 P.936 (1912).

12 Issue One, of Nasby's Opening Brief, contained a challenge to the 8th Judicial
13 District Court's jurisdiction. See - (Appellant's Opening Brief (hereinafter "A.O.B.")
14 pg. 17). This Court failed to address this issue in its Order of Affirmance. As
15 this Court can not pass on a challenge to jurisdiction, Nasby respectfully re-
16 quest this Court now address this issue.

17 Issue Two: This Court Exceeded Its Appellate Jurisdiction.

18 This Court's jurisdiction is restricted to questions of law alone (Hosier
19 v. State, 121 Nev. 409, 117 P.3d 212 (2005)), and its review is restricted to the
20 decisions and determinations of the lower court. See - Burden v. Zant, 510 U.S.
21 132, 126 LEd 2d 611, 114 S.Ct. 654 (1994) where the court held that court of app-
22 eals mistakenly upheld denial of habeas relief, where denial was based
23 on finding not made by the district court.

24 This Court made a determination that Nasby "cannot demonstrate actual pre-
25 judice" and "Accordingly," concluded the district court did not err by deny-
26 ing Nasby's petition as procedurally barred. See - (Order Of Affirmance, pg. 4-5).
27 However, the district court did not determine that Nasby could not demonst-
28 rate prejudice. It only determined that Nasby "has failed to demonstrate

1 good cause" or actual innocence. See - (Finding Of Fact, Conclusions Of Law And
2 Order, pg. 5-7). The district court never made an analysis of prejudice, be-
3 cause it stopped its analysis at determining that Nasby lacked good cause.

4 Although this Court stopped short of determining that Nasby actually did
5 demonstrate good cause, when it said: "Even assuming inadequate access to
6 legal materials constituted good cause" (See - Order Of Affirmance, pg. 4) — if
7 this Court felt it necessary to apply an actual prejudice analysis, without
8 one being done in the lower court, one would assume that this Court disagreed
9 with the lower court's determination regarding good cause. If this is true,
10 this Court should have remanded Nasby's habeas petition back to the
11 district court with instructions to make an actual prejudice analysis.

12 Instead, this Court further exceeded its jurisdiction, by making factual
13 determinations, much of which are incorrect, regarding a necessary element
14 of first degree murder (deliberation). See - (Order of Affirmance, pg. 4).

15 As Nasby had a jury trial, a jury ought to determine if the State proved
16 deliberation — not an appellate court. In fact, Nasby has a 6th Amendment
17 Right to have all facts regarding the elements of the crime charged, deter-
18 mined "by an impartial jury of the State and district wherein the crime shall
19 have been committed". (U.S. Const. Amend 6). An appellate court certainly
20 exceeds its jurisdiction if it becomes the fact finder.

21 Because this Court exceeded its appellate jurisdiction, Nasby request this
22 Court vacate its affirmance of the lower court's order and remand for further
23 proceedings and analysis.

24 Issue Three: This Court Applied The Incorrect Law, Analysis, And Standard Of Review.

25 This Court reviewed Nasby's habeas petition as if his Byford claim was one
26 for habeas review. Although Nasby did raise the Byford issue in two prior
27 habeas petitions, the actual issue that Nasby raised in this habeas petition,
28 was that Byford v. State was not applied to his case on Direct Review. See -

1 (A.O.B., pg. 18).

2 On Direct Review, the only explanation for Nasby's Byford issue lack-
3 ing merit, given by the Nevada Supreme Court, was that Byford did not apply
4 to Nasby's case because Nasby was tried prior to the decision in Byford
5 v. State, 116 Nev. 215; 994 P.2d 700 (2000), and thus, the Byford instructions
6 were not required. The Nevada Supreme Court cited Garner v. State, 116
7 Nev. —, 6 P.3d 1013 (2000) as authority. The Nevada Supreme Court's
8 ruling in Nasby's case, on direct review, is completely overruled by
9 Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), but now — this Court
10 erects an entirely different barrier, which did not exist at the time Nasby
11 timely raised and preserved the issue. However, the ~~Fourth~~ Due Process
12 Clause of the Constitution protects Nasby from this Court applying law
13 that is detrimental to him ex post facto. Stevens v. Warden, 114 Nev. 1217, 1221;
14 969 P.2d 945, 948 (1998). Thus, the appropriate analysis to be applied to Nasby's
15 Byford issue, is one for Direct Review — not collateral review.

16 Because Nasby objected to the Kazalyn instruction at trial and raised
17 the issue on Direct Appeal, Nasby preserved this issue for Direct Appellate
18 Review. Under Direct Review Standards, the burden is not on Nasby to demonstrate
19 prejudice. Nasby has the presumption of prejudice; especially in light of the
20 U.S. Supreme Court's rulings in Welch, *infra* and Montgomery, *infra*. The
21 burden, under Direct Appellate Review Standards, is on the State to prove that
22 the erroneous jury instructions could not have contributed to the conviction.
23 Chapman v. California, 386 U.S. 18, 23-24; 17 L.Ed.2d 705, 710 (1967). See Also—
24 the analysis of Welch v. U.S., 578 U.S. —, 194 L.Ed.2d 387, 400-01 (2016) and Mont-
25 gomery v. Louisiana, 136 S.Ct. 718, 732-735; 193 L.Ed.2d 599, 618-21 (2016) and comp-
26 are to Byford v. State, 116 Nev. 215, 234; 994 P.2d 700, 713 (2000). The State has
27 never even attempted to meet its burden.

28 Since actual prejudice is presumed in this case, Nasby need only

1 meet the good cause requirement of NRS Ch. 34 — which he has done, al-
2 though this Court has yet to confirm the demonstration.

3 Issue Four: This Court's Factual Determinations Are Incorrect And Need
4 To Be Corrected For The Record.

5 In this Court's factual determinations, regarding the element of deliberation,
6 this Court determined facts that are incorrect and not supported by the record.
7 First, this Court stated that "On the night the victim was killed, Nasby and his
8 codefendants were at Nasby's residence and Nasby was giving orders". However,
9 no one ever testified at trial that "Nasby was giving orders" on the night of
10 the murder. And, although the victim was only shot twice, this Court determined
11 the following list of factual occurrences: "Once in the desert and while the
12 victim was looking for something they could use as target practice, Nasby moved
13 up from behind the victim and shot the victim from behind. The victim fell
14 down to one knee, Nasby moved closer to the victim, and shot the victim
15 again. Nasby and his codefendants then got back into the car, but as the
16 car was starting to turn around, Nasby exited the car, walked over to the
17 victim, stood over the victim's head, and shot the victim a third time, this
18 time in the victim's head." See - (Order of Affirmance, pg. 4). Obviously, what-
19 ever source this Court relied on to make these factual determinations, is
20 unreliable, as the Court's entire list of occurrences result in the victim be-
21 ing shot three times, when in fact, the victim was only shot twice. Perhaps
22 an evidentiary hearing in the lower court would be appropriate. See
23 Also - (Testimony of "Dr. Jordan" at Nasby's trial, regarding how many times the
24 victim was shot). (Trial Transcripts, Vol. III, pgs. 162-199).

25 26 IV. RELIEF SOUGHT.

27 Wherefore, Nasby request this Honorable Court: ① Address Issue One of Nasby's
28 Opening Brief regarding the challenge to the District Court's Jurisdiction;

- 1 ② Vacate its Order of Affirmance and re-enter an order addressing the
2 district court's determination that Nasby failed to demonstrate good cause;
3 ③ Declare that Nasby's Byford issue has a presumption of prejudice;
4 ④ Remand this case back to the district court for correction of fact-
5 ual determinations; ⑤ Grant Nasby all the relief sought in his Opening
6 Brief (See A.O.B., pg 28); and ⑥ Anything else this Court deems full
7 and fair.

8

9 V. CERTIFICATE OF COMPLIANCE.

10 1. I hereby certify that this brief complies with the formatting requirements
11 of NRAP 32(a)(4) and NRAP 32(a)(5) because: This ~~is~~ petition has been prepar-
12 ed in proportionally spaced handwriting.

13 2. I further certify that this petition complies with the page limitations
14 of NRAP 40(b)(3) because, excluding the parts of the petition exempted
15 by NRAP 32(a)(7)(C), it does not exceed 10 pages.

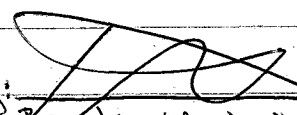
16 3. Finally, I hereby certify that I have read this appellate brief, and to the
17 best of my knowledge, information, and belief, it is not frivolous or interposed for
18 any improper purpose. I further certify that this petition complies with all appli-
19 cable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which re-
20 quires every assertion in the ~~brief~~ petition regarding matters in the record to
21 be supported by a reference to the page and volume number, if any, of the
22 transcript or appendix where the matter relied on is to be found. I under-
23 stand that I may be subject to sanctions in the event that the accompanying
24 petition is not in conformity with the requirements of the Nevada Rules
25 of Appellate Procedure.

26 Dated this 28th day of July, 2017.

27

Respectfully Submitted By:

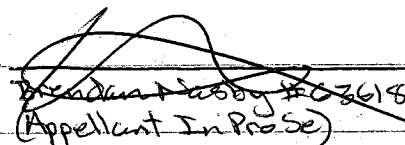
28


Brendan Nasby #G3618
(Appellant In Pro Se)

1 VI. VERIFICATION.

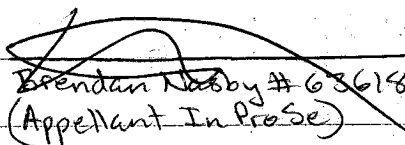
2 under penalty of perjury, the undersigned declares that he is the appellant,
3 "Nesby" named in the foregoing "NRAP Rule 40 Petition For Rehearing" and
4 knows the contents thereof, that the pleading is true of his own knowledge,
5 except as to those matters stated on information and belief, and as to such
6 matters he believes them to be true.

7 Dated this 28th day of July, 2017.

8 By: 
9 ~~Brendan Nesby #63618~~
10 (Appellant In Pro Se)

11 VII. CERTIFICATE OF SERVICE BY MAIL.

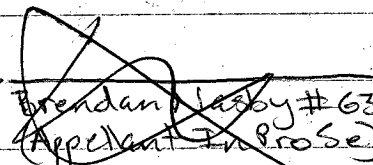
12 I, Brendan Nesby, hereby certify that on this 28th day of July, 2017,
13 I mailed a true and correct copy of the foregoing "NRAP Rule 40 Petition For Re-
14 hearing" addressed to: Clark County D.A.; P.O. Box 552211; Las Vegas, NV 89155-
15 211.

16 By: 
17 ~~Brendan Nesby #63618~~
18 (Appellant In Pro Se)

19 VIII. AFFIRMATION PURSUANT TO NRS 239B.030.

20 ~~The~~ The under signed does hereby affirm that the preceding "NRAP Rule
21 40. Petition For Rehearing" does not contain the social security number
22 of any person.

23 Dated this 28th day of July, 2017.

24 By: 
25 ~~Brendan Nesby #63618~~
26 (Appellant In Pro Se)
27
28