

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

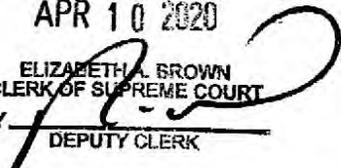
No. 78744-COA

BRENDAN JAMES NASBY,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK,
Respondent,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 80443-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE AND DENYING PETITION

Docket No. 78744-COA is an appeal from a district court order denying Brendan James Nasby's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge. Docket No. 80443-COA is an original petition for a writ of mandamus.

Docket No. 78744-COA

Nasby filed his petition on January 11, 2019, more than 17 years after issuance of the remittitur in his direct appeal. *See Nasby v. State*, Docket No. 35319 (Order of Affirmance, February 7, 2001). The State argued that Nasby's petition was not timely filed, it was successive, and it constituted an abuse of the writ. *See NRS 34.726(1); NRS 34.810(2)*. And

the State argued the petition should be denied because Nasby failed to demonstrate good cause and actual prejudice to overcome the procedural bars. *See* NRS 34.726(1); NRS 34.810(1)(b), (2), (3). The State also affirmatively pleaded laches. *See* NRS 34.800(2). The district court found that Nasby failed to demonstrate good cause to overcome the procedural bars and the petition was barred by laches because Nasby failed to overcome the presumption of prejudice to the State. Therefore, the district court denied Nasby's petition.

First, Nasby argues the district court erred by denying his postconviction petition for a writ of habeas corpus based on a finding that he did not establish good cause to overcome the procedural bars. Nasby argues that, because the district court order directing the State to file a response says "good cause appearing," the district court was precluded from denying his petition for failing to demonstrate good cause. Nasby asserts that, when a petition that is subject to procedural bars is filed, the district court must make a determination on its own regarding whether the petitioner has demonstrated good cause to overcome any procedural bars and, if the court finds no good cause has been demonstrated, it must summarily dismiss the petition. He further asserts that it is only when the district court finds that there is good cause to overcome a procedural defect that a district court can direct the State to file a response.

Nasby is mistaken. NRS 34.745(4) only directs the district court to summarily dismiss a petition when the petition is a second or successive petition and it is plain on the face of the documents before the district court that the petitioner is not entitled to relief based on any of the grounds set forth in NRS 34.810(2). When it is not plain on the face of the documents before the court that the petitioner is not entitled to relief under

NRS 34.810(2), nothing prohibits the district court from ordering the State to file a response to the petition. And, a response may assist the court in determining whether the petitioner has demonstrated good cause to overcome any procedural bars, particularly where, as here, the petition is subject to more than one procedural bar. Finally, it is clear from the record that the district court's use of "good cause appearing" was not a determination that the district court found Nasby had demonstrated good cause to overcome the procedural bars. Therefore, we conclude he is not entitled to relief on this claim.

Second, Nasby claims the district court abused its discretion by considering the State's claim of laches, ruling on his petition before the expiration of his time to file a reply, and denying his petition based on laches. Nasby also asserts the district court abused its discretion by failing to address his "Reply to State's Response to Petition for Writ of Habeas Corpus; NRCP 12(f) Motion to Strike; and if necessary, NRCP 59(e) Motion to Alter or Amend Judgment" (reply).

NRS 34.800(2) requires the State to plead laches in a motion to dismiss and mandates that the petitioner be given an opportunity to respond to the pleading before a ruling on the motion is made. Pursuant to NRS 34.750(4), a petitioner has 15 days, after service of a motion to dismiss, to file a reply to the motion.

Here, the State did not raise its allegation of laches in a motion to dismiss; rather, the State alleged laches in its response to Nasby's petition. Therefore, the State's allegation of laches was not properly raised and should not have been considered by the district court. Further, even assuming the State's allegation of laches was properly raised, it was improper for the district court to conduct the hearing on Nasby's petition

before Nasby's time to file a reply had expired and conclude that dismissal of the petition was warranted based on laches. Nasby filed his reply shortly after the district court orally denied his petition and 11 days before the district court entered its written order denying the petition. Because the district court had considered the State's allegation of laches, we also conclude the district court erred by failing to address Nasby's reply in the written order denying Nasby's petition. Nevertheless, we conclude Nasby was not and no relief is warranted based on these claims because, as discussed below, the district court properly denied the petition pursuant to the application of other procedural bars.

Third, Nasby claims the district court erred by finding his petition was subject to the procedural bars and concluding he failed to demonstrate good cause. Nasby asserts that because he was alleging that his judgment of conviction is void, it was proper to file his petition pursuant to NRS 34.360 and, therefore, the petition was not subject to any procedural bars. He further asserts that, even if the petition was filed pursuant to NRS 34.720 and NRS 34.724, the petition was not subject to any procedural bars because he was alleging his conviction was void. Finally, he argues, even if the procedural bars did apply, he demonstrated good cause to overcome the procedural bars.

Contrary to Nasby's assertion, his claim that his judgment of conviction is void based on a *Kazalyn*¹ error is still a challenge to the validity of his conviction. Therefore, the petition was properly construed as a petition filed pursuant to NRS 34.724(2) and the petition was subject to the procedural bars.

¹*Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), *receded from by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000).

Nasby's underlying, substantive claim was that he was tried and convicted under an unauthorized or otherwise incorrect interpretation of NRS 200.030(1)(a) because the jury was given the *Kazalyn* instruction on premeditation for first-degree murder. Nasby argued that pursuant to the holding in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), he was entitled to the retroactive application of *Byford*, which held the State must prove willfulness, deliberation, and premeditation in order to obtain a conviction for first-degree murder.

Nasby appeared to argue the holdings in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), provided good cause to overcome the procedural bars and he should be able to raise his underlying claim because the cases changed the framework under which retroactivity was analyzed. These cases, however, did not provide good cause to overcome the procedural bars because they did not change the law as it applied to Nasby. *Nika* already held that the holding in *Byford* applied to individuals whose convictions were not final at the time *Byford* was decided, *see Nika*, 124 Nev. at 1287, 198 P.3d at 850, and Nasby's conviction was not 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. Further, Nasby could not demonstrate actual prejudice to overcome the procedural bars. This court applied *Byford* to Nasby's case and concluded he could not demonstrate actual prejudice based on the giving of the *Kazalyn* instruction because the evidence presented at trial was sufficient to establish beyond a reasonable doubt that the killing of the victim was premeditated and Nasby acted willfully and with deliberation when killing the victim. *See Nasby v. State*, Docket No. 70626 (Order of Affirmance, July 12, 2017). This holding is the law of the case.

See Hall v. State, 91 Nev. 315, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying Nasby's petition as procedurally barred.

Fourth, Nasby claims the district court erred by denying his motion for the appointment of counsel. Because Nasby's petition was procedurally barred, the underlying issue had already been resolved in a prior proceeding, the record demonstrates Nasby was able to comprehend the proceedings, and counsel was not necessary to proceed with discovery, we conclude the district court did not err by denying Nasby's request for counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

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In this original petition for a writ of mandamus, Nasby argues the order of affirmance that was issued in his direct appeal is void because the holding in *Nika* challenged the law that applied to him. He further argues that because his *Kazalyn* instruction challenge was erroneously denied on direct appeal, he has retained all rights relating to that claim, including the appointment of counsel to assist him with raising that claim. He asserts the district court's denial of counsel to assist him with this claim has resulted in a complete denial of due process. He further argues the district court abused its discretion by not actually reviewing his fourth postconviction petition for a writ of habeas corpus and this court abused its discretion in several ways when affirming the denial of that petition. Nasby also asks this court to decide whether the holding in *Nika* retroactively divested the district court of jurisdiction to try and convict him. Finally, Nasby requests the appointment of counsel to assist him.

Nasby's claims challenging the validity of his conviction are not properly raised in a petition for a writ of mandamus because such claims must be raised in a postconviction petition for a writ of habeas corpus filed in the district court for the county in which the conviction occurred. See NRS 34.724(2)(b); NRS 34.738(1). Further, Nasby had an adequate opportunity, by way of a direct appeal, a petition for rehearing, or a petition for review, to challenge prior orders that were issued by the district court and this court. Therefore, this court's intervention by way of extraordinary writ is not warranted to address such challenges. See NRS 34.170. We conclude Nasby has failed to meet his burden and demonstrate this court's intervention by way of extraordinary writ is warranted. See NRS 34.160; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Accordingly, we deny Nasby's request for counsel and, without deciding upon the merits of any claims raised, we deny the petition.

Having concluded Nasby is not entitled to any relief, we
ORDER the judgment of the district court AFFIRMED and the
PETITION DENIED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Brendan James Nasby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk