IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant/Cross-Respondent,
vs.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.

No. 43493

FILED

APR 07 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order partially granting and partially denying a post-conviction petition for a writ of habeas corpus in a death penalty case.[1] Eighth Judicial District Court, Clark County; Eighth Judicial District Court Dept. 11, Judge.

Appellant James Chappell was convicted by the district court on December 31, 1996, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The jury found four circumstances aggravated the murder: it was committed during a burglary and/or home invasion, it was committed during a robbery, it was committed during a sexual assault, and it involved torture or depravity of mind. Chappell was sentenced to death. On direct appeal this court struck the aggravator based on torture or depravity of mind, but affirmed Chappell's conviction and death sentence.[2]

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[1]The Honorable Michael Douglas, Justice, and the Honorable A. William Maupin, Justice, did not participate in the decision of this matter.

[2]See Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

06-07408

Chappell originally filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Chappell, and counsel filed a supplement to the petition.

After an evidentiary hearing, the district court partially granted and partially denied the petition. The district court found merit in Chappell's claim that his trial counsel were ineffective for failing to investigate and call several witnesses to testify on his behalf during his penalty hearing. That omitted testimony, the district court found, had a reasonable likelihood of impacting the jury's decision to return a death sentence. It therefore ordered a new penalty hearing, vacating Chappell's death sentence. The district court, however, denied Chappell relief on those claims in his petition relating to the guilt phase of his trial, and upheld his conviction. Chappell appeals and the State cross-appeals. We address the State's cross-appeal first.

The State's cross-appeal

The State contends that the district court improperly granted relief on Chappell's claim that his trial counsel were ineffective for failing to investigate and call several witnesses to testify on his behalf during his penalty hearing. The State maintains that Chappell's trial counsel did not act unreasonably in this matter and that even if the omitted witnesses had testified during the hearing, their testimony "would not have changed the outcome of the case." The State therefore maintains that the district court erroneously granted Chappell a new penalty hearing. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.[3] To establish that counsel's assistance was ineffective, a two-part test must be satisfied.[4] First, it must be shown that the performance of the petitioner's trial counsel was deficient, falling below an objective standard of reasonableness.[5] Second, there must be prejudice.[6] Prejudice is demonstrated by showing that, but for the errors of the petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different.[7] Both parts of the test do not need to be considered if an insufficient showing is made on either one.[8]

Here, Chappell's trial counsel acknowledged during the evidentiary hearing that Chappell had provided him with a list of several potential witnesses who could have testified favorably about his character and his long relationship with the victim, Deborah Panos. Although Chappell's trial counsel did some investigation, he conceded that he "had a hard time finding these people. And quite frankly, the ones that we did find, I was still focusing on the killing and not the long relationship. I had no idea that the trial [was] going to be about the long relationship." Thus,

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[3]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[5]See Strickland, 466 U.S. at 687.

[6]Id.

[7]Id. at 694.

[8]Id. at 697.

most of these potential witnesses were never contacted by Chappell's trial counsel and did not testify at his penalty hearing.

Chappell's post-conviction counsel, however, was able to locate six of these omitted witnesses and obtain affidavits from five of them. These witnesses generally described in the affidavits what they would have testified to during Chappell's penalty hearing.[9] Many of them also averred that they would have been willing to testify, but they were never contacted or asked to do so.

These affidavits were submitted to the district court for review. The district court found that these witnesses "could have described CHAPPELL and the dynamics of his relationship with the victim and their children," and that the inclusion of their testimony during Chappell's penalty hearing would have probably resulted in the jury returning a sentence other than death.

It is well-settled that a defendant has a right to present all relevant evidence mitigating a death sentence during a penalty hearing,[10] and presenting to the jury "the fullest information possible regarding the defendant's life and characteristics is essential to the selection of an appropriate sentence."[11] A defendant's trial counsel therefore has a duty

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[9]A total of seven affidavits were obtained by Chappell's post-conviction counsel. One of these witnesses testified during the penalty phase of Chappell's trial, but not the guilt phase. Another affidavit was prepared by an investigator who had contacted and spoken with a seventh potential witness.

[10]See NRS 175.552(3); see also NRS 200.035.

[11]Wilson v. State, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989).

to make all reasonable investigations into such evidence or to make a reasonable decision not to do so.[12]

We conclude that the district court appropriately found that the failure of Chappell's trial counsel to investigate the omitted witnesses and to call them to testify during Chappell's penalty hearing constituted conduct that fell below an objective standard of reasonableness. Chappell faced a death sentence and had provided his trial counsel with a list of witnesses who could have testified favorably on his behalf during his penalty hearing. His trial counsel had a duty to thoroughly investigate and act upon this information or make a reasonable decision not to do so. It appears that he did neither, making only a slight effort to determine whether these witnesses could have provided testimony that may have benefited his client. That Chappell's post-conviction counsel was able to locate them and obtain affidavits further supports this conclusion.

Also consistent with the district court's decision, our independent review of the affidavits reveals a reasonable probability that Chappell was prejudiced by counsel's deficient performance. The jury in this case heard much evidence and argument from the State about Chappell's bad character, criminal history, and abusive relationship with Panos. The testimony of the omitted witnesses would have countered that argument, providing the jury with a more complete picture of Chappell and the history of the former couple's relationship, which, as the district court found, had a reasonable probability of altering his sentence. The district court's decision to find Chappell's trial counsel ineffective was

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[12]See Strickland, 466 U.S. at 691.

supported by substantial evidence and not clearly wrong.[13] We affirm its decision.[14]

Given the new penalty hearing that is required, two claims that Chappell raises in this appeal regarding his original penalty hearing warrant comment. First, he contends that his trial and appellate counsel were ineffective in failing to challenge the improper expression by the victim's aunt of her belief that Chappell should be sentenced to death.[15] We need not decide whether this failure constituted ineffective assistance of counsel, but we caution the State to prevent such inflammatory testimony in the new hearing. Second, Chappell contends that the instruction given to the jury regarding the proper use of "other matter" character evidence admitted during the penalty hearing was inadequate. He has failed to demonstrate either good cause for not raising this claim

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[13]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); cf. Wilson, 105 Nev. at 115, 771 P.2d at 586 (concluding that the failure of defendant's trial counsel to present more evidence mitigating his sentence constituted ineffective assistance and warranted a new penalty hearing).

[14]Chappell also contends on appeal that the district court improperly denied him relief on this claim as it related to the performance of his trial counsel during the guilt phase. Given the overwhelming evidence of Chappell's guilt, see Chappell, 114 Nev. at 1407, 972 P.2d at 840, however, we conclude that he is unable to make the necessary showing of prejudice, i.e., that there was a reasonable likelihood that had these witnesses testified during the guilt phase of his trial, the result would have been different. We affirm the district court's decision on this claim.

[15]See Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

on direct appeal or prejudice, and it is procedurally barred.[16] In fact, the pertinent case law that Chappell invokes was not decided until after his trial.[17] But we take this opportunity to alert the parties to our 2001 decision in Evans v. State where we provided appropriate jury instructions regarding the use of this evidence.[18]

A new penalty hearing is warranted in this case. We reject the State's cross-appeal and affirm the decision below in this respect. We turn to Chappell's appeal.

Chappell's appeal

Because we affirm the district court's decision to grant Chappell a new penalty hearing, we conclude that Chappell's other claims of ineffective assistance of counsel relating to the penalty phase do not warrant further discussion.

Chappell also contends on appeal that the district court improperly denied his claims of ineffective assistance of trial counsel with respect to the guilt phase: failure to object to the exclusion of African-Americans from the prospective jury pool; failure to object to a jury instruction regarding premeditation and deliberation; failure to object to a jury instruction regarding malice; failure to object to remarks by the prosecutor during arguments to the jury, including an erroneous quantification of the reasonable doubt standard; failure to object to

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[16]See NRS 34.810.

[17]See Evans v. State, 117 Nev. 609, 634-37, 28 P.3d 498, 515-17 (2001); see also Hollaway v. State, 116 Nev. 732, 745-46, 6 P.3d 987, 996 (2000).

[18]See Evans, 117 Nev. at 635-37, 28 P.3d at 516-17.

portions of Chappell's cross-examination by the prosecutor; and failure to move to strike the State's notice of intent to seek death on the basis that the State was unconstitutionally motivated by race in pursuing a death sentence against him.

We have carefully reviewed each of these claims and conclude that Chappell has failed to demonstrate that the performance of his trial counsel with respect to them both fell below an objective standard of reasonableness and prejudiced the outcome of the guilt phase of his trial. In reaching this conclusion, we note that overwhelming evidence supported Chappell's conviction[19] and that any errors in the jury instructions or the prosecutor's remarks were harmless beyond a reasonable doubt, whether Chappell's trial counsel objected to them or not.[20] Chappell has also failed to support with specific factual allegations his assertion that the State's decision to seek the death penalty against him was racially motivated[21] or explain how a motion based on such an assertion had any likelihood of success. We therefore conclude that the district court properly denied Chappell relief on these claims.[22]

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[19]See Chappell, 114 Nev. at 1407, 972 P.2d at 840.

[20]We note that this court has consistently rejected the claims of error Chappell raises respecting the instructions. See Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 483 (2000).

[21]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[22]Chappell also raises these same issues as claims of ineffective assistance of appellate counsel. See Kirksey, 112 Nev. at 998, 923 P.2d at

continued on next page . . .

Chappell also appeals from the district court's denial of issues that he framed as direct appeal claims. NRS 34.810(1)(b)(2) provides that a claim shall be dismissed if the defendant's conviction was the result of a trial and the claim could have been raised on direct appeal, unless both good cause and prejudice are established to excuse this failure[23] or the denial of his claim on procedural grounds would result in a fundamental miscarriage of justice.[24]

He contends that his constitutional rights were violated because African-Americans were underrepresented on his jury and did not represent a fair cross-section of the community. Chappell, however, essentially raised this issue on direct appeal, and it was rejected by this court. Our prior determination on this matter is the law of the case and precludes relitigation of the issue.[25]

He further contends that Nevada's death penalty scheme fails to constitutionally narrow the class of persons eligible to receive a death sentence because it contains statutory aggravating circumstances that are numerous and vague. Chappell has failed to demonstrate good cause as to why this claim was not raised on direct appeal and prejudice, and it is also procedurally barred.

. . . *continued*
1113-14. For the same reasons we affirm the district court's decision to deny them.

[23]See NRS 34.810(3); Evans, 117 Nev. at 646-47, 28 P.3d at 523.

[24]See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[25]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

We conclude that the district court properly denied Chappell relief on these direct appeal claims, as he failed to overcome the procedural bar of NRS 34.810 or to otherwise demonstrate that invoking that bar to these claims' review would result in a fundamental miscarriage of justice.

McConnell issue

We finally address Chappell's challenge to the validity of the three aggravating circumstances pending against him. He contends that his trial and appellate counsel were ineffective for failing to object to "[t]he use of overlapping aggravating circumstances to impose death." To the extent that he contends the aggravators based on robbery and burglary are duplicative of each other, he is not entitled to relief.[26]

Chappell also claims specifically that the three felony aggravators found by the jury are invalid pursuant to our 2004 decision, McConnell v. State.[27] The State responds that this claim is not cognizable because it was not raised in the district court. The State also asserts that McConnell announced a new rule that should not apply retroactively to Chappell's conviction, which has been final since 1999. Finally, the State argues that even if McConnell applies, the aggravating circumstances should remain viable because there was overwhelming evidence of premeditation and deliberation in this case.

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[26]See Bennett v. Dist. Ct., 121 Nev. ___, ___ n.4, 121 P.3d 605, 608 n.4 (2005).

[27]120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied, McConnell v. State (McConnell II), 121 Nev. ___, 107 P.3d 1287 (2005).

As we explain below, we conclude that Chappell's McConnell claim has merit and that two of the three aggravators pending against him violate the holding in McConnell as a matter of law and cannot be realleged. In reaching this conclusion, we recognize that Chappell did not cite McConnell in challenging his aggravators in his habeas petition before the district court—he is raising this issue for the first time on appeal. However, McConnell was not decided at the time Chappell filed his petition below, and that decision renders two of the three aggravators invalid as a matter of law. The State has had an opportunity to address this issue on appeal during briefing and oral arguments. The interests of justice and judicial economy warrant resolving the issue now, prior to any new penalty hearing.[28] We further recognize that this court has not decided whether McConnell applies retroactively to final cases.[29] However, because we affirm the district court's decision to grant Chappell a new penalty hearing, Chappell's conviction in regard to his sentence is not final, and retroactivity is not an issue.[30]

> In McConnell, this court advised that if the State
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> charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did

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[28]See Bennett, 121 Nev. at ___, 121 P.3d at 608.

[29]See McConnell II, 121 Nev. at ___, 107 P.3d at 1290.

[30]See Bennett, 121 Nev. at ___, 121 P.3d at 608-09.

> not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.[31]

Chappell was charged with open murder based upon the theories of premeditated and deliberate murder and/or felony murder. The felonies underlying the felony-murder theory were one count of burglary and/or one count of robbery with the use of a deadly weapon. The jury found Chappell guilty of first-degree murder with the use of a deadly weapon, but the verdict form does not indicate which theory or theories it relied upon to do so. Following Chappell's direct appeal, three aggravators found by the jury in support of his death sentence remained valid:

> The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary and/or Home Invasion.
>
> The murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery.
>
> The murder was committed while the person was engaged in the commission of or an attempt to commit any Sexual Assault.[32]

Under McConnell, this court does not determine whether there was adequate proof of premeditation and deliberation on Chappell's part, but rather whether the record establishes conclusively that no juror

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[31]McConnell, 120 Nev. at 1069, 102 P.3d at 624.

[32]At the time of Chappell's trial, sexual assault was included in the list of enumerated felonies under NRS 200.033(4). That subsection was later amended, and sexual assault was removed from subsection (4) and made into its own distinct aggravating circumstance in subsection (13). See 1997 Nev. Stat., ch. 356, § 1, at 1293-94.

relied on felony murder to find first-degree murder. The record here carries no such assurance. We conclude that McConnell squarely applies to Chappell's case and renders infirm the aggravators based on the robbery and burglary, the predicate felonies that supported the felony-murder theory. However, our conclusion does not extend to the aggravator based upon sexual assault.

The critical consideration is McConnell's ban on the State's "selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance."[33] Here, the State did not rely upon sexual assault to support the theory of felony murder, and this omission was certainly not an attempt to circumvent McConnell since Chappell's trial was held long before that opinion. But most important, there is evidence in the record that could support finding not only that Chappell committed a sexual assault but that he did so with a criminal purpose distinct from the burglary and robbery. Therefore, based on the record before us, we conclude that the aggravator based upon sexual assault remains viable.

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[33]McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25 (quoting People v. Harris, 679 P.2d 433, 449 (Cal. 1984), rejected by People v. Proctor, 842 P.2d 1100, 1129-30 (Cal. 1992)).

Therefore, a single aggravator remains for the State to pursue if it decides to again seek a sentence of death against Chappell during the new penalty hearing.[34] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Rose

_____, J.
Becker

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[34]See generally NRS 175.552.