IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE LEE A. GATES, DISTRICT JUDGE,
Respondents,
and,
JIMMY TODD KIRKSEY,
Real Party in Interest.

No. 43559

ORDER GRANTING PETITION IN PART AND DENYING PETITION IN PART

This is an original petition by the State for a writ of prohibition or mandamus challenging an order of the district court granting an evidentiary hearing in a post-conviction habeas proceeding.

The district court denied the State's motion to dismiss an untimely and successive habeas petition by Jimmy Todd Kirksey, the real party in interest, and ordered an evidentiary hearing. Kirksey is sentenced to death. He presents new evidence that the district judge who accepted his guilty plea in 1989 prepared a report by a psychiatrist that found Kirksey competent. He says that this shows that the judge was biased and establishes good cause and prejudice excusing any procedural bars.

In 1988, appellant Jimmy Todd Kirksey beat and kicked Michael Foxx, rupturing an aneurism in Foxx's brain, killing him. Kirksey pleaded guilty to first-degree murder without a plea agreement

despite being informed that the State would seek the death penalty.[1] At the penalty hearing before a three-judge panel, the State alleged one aggravating circumstance: Kirksey had previously been convicted of a felony involving the use or threat of violence to the person of another. Kirksey instructed his attorney not to challenge the aggravating circumstance, present mitigating evidence, or make any statement on his behalf. In addition to evidence of the murder of Foxx, the State presented evidence of Kirksey's misdeeds in California. He robbed and attempted to kill a pizza delivery man and robbed an elderly couple, beating the husband. He was also involved in the murder of a bar owner and in the beating and stabbing death of his estranged girlfriend. The State also presented evidence that Kirksey had threatened to kill again if he was not executed. During the hearing, Kirksey told the three-judge panel that he considered execution no worse than life imprisonment, he admitted his guilt in the California incidents, and he expressed a lack of remorse. The panel found three aggravating circumstances and no mitigating evidence and sentenced Kirksey to death.[2] On direct appeal, this court concluded that two of the aggravating circumstances should not have been considered, but affirmed Kirksey's conviction and sentence.[3] Remittitur issued on December 18, 1991.[4]

---

[1]State ex. 1 (Transcript of Change of Plea, 10/2/89).

[2]State exs. 2 (Findings and Sentence, 11/28/89) and 3 (Judgment of Conviction, 1/12/90).

[3]Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991).

[4]State ex. 4 (Remittitur, 12/18/91).

In 1992, Kirksey petitioned the district court for post-conviction relief. The district court held an evidentiary hearing and heard testimony from six of Kirksey's witnesses and accepted an offer of proof as to the testimony of the others. The State presented no evidence. The district court denied Kirksey's petition,[5] and this court affirmed.[6]

In March 2003, Kirksey filed his current post-conviction petition for writ of habeas corpus in the district court.[7] The State moved to dismiss the petition as procedurally barred.[8] The district court heard argument, denied the motion, and scheduled an evidentiary hearing on Kirksey's claims.[9] The State then petitioned this court for extraordinary relief.

Kirksey's central claim concerns the contact in 1989 between the original district judge in this case, Judge Jack Lehman, and one of the psychiatrists who evaluated Kirksey's competency before he pled guilty. This general matter was initially raised in Kirksey's first post-conviction petition when he argued that his direct-appeal counsel had been ineffective in failing to assert a violation of due process based on Judge Lehman's ex parte communication with the psychiatrist.[10] Kirksey now contends that new evidence requires reconsideration of this issue.

---

[5]State ex. 5 (Decision and Order, 4/14/93).

[6]Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[7]State ex. 7 (Petition for Writ of Habeas Corpus, 3/6/03).

[8]State ex. 13 (State's Motion to Dismiss, 4/18/03).

[9]State exs. 15 (Transcript of Argument, 6/30/03) and 16 (Order Denying State's Motion, 8/20/03).

[10]Kirksey, 112 Nev. at 997, 923 P.2d at 1113.

At the time of Kirksey's last appeal, the record before this court showed the following. Before trial, two psychiatrists assessed Kirksey's competency. In June 1989, Dr. Jack Jurasky reported that Kirksey's intelligence was in the normal range and that he had a severe "Personality Disorder of the Antisocial type" and was very dangerous.[11] Dr. Jurasky concluded that Kirksey "at present is in possession of mental faculties so as to enable him to comprehend the nature of the charges against him, rationally aid in the conduct of his defense, recall evidence, advise with counsel, and to testify if called upon to do so."[12] Dr. Franklin Master's initial report was dated May 23, 1989. He concluded that Kirksey was highly intelligent but suffered from major depression with suicidal ideation: "For this reason, even though Mr. Kirksey would on the surface appear to be coherent and goal-directed, I see him as not competent in view of his significant clinical depression and desire to be executed by the state."[13] A hearing was held on June 21, 1989.[14] Given the two reports, defense counsel asked that Kirksey be sent to Lakes Crossing for further evaluation. Judge Lehman informed the parties that he would contact Dr. Master and "if necessary, obtain[ ] a supplemental report from him."[15]

Dr. Master's supplemental report was dated the next day, June 22, 1989. It was in the form of a short letter and stated in pertinent

---

[11]State ex. 8 (Re: Psychiatric Evaluation, 6/2/89), p.2.

[12]Id.

[13]State ex. 9 (Re: Jimmy Todd Kirksey, 5/23/89), p.3.

[14]Real Party in Interest (RPI) ex. 1 (Transcript of Hearing, 6/21/89).

[15]Id. at 5.

part: "Mr. Kirksey is competent to assist his attorney in his own defense during a trial."[16] Judge Lehman sent a copy of the report to both counsel with a letter dated June 23, 1989, stating: "Enclosed please find a supplemental report I received from Dr. Masters . . . ."[17]

In deciding Kirksey's prior post-conviction appeal, this court denied relief on this issue, explaining in part: "Although Judge Lehman's ex parte communication with Dr. Masters was inappropriate, there is no evidence that the communication resulted in bias or prejudice on the part of the judge. Additionally, there is no evidence that Dr. Masters was somehow coerced to change his opinion."[18]

Kirksey's new evidence shows that Judge Lehman may have prepared the supplemental report signed by Dr. Master. Diane Sanzo, who was Judge Lehman's secretary in 1989, said in a deposition in 2002 that she did not remember the report, but "it looks like something that I could have typed."[19] A forensic document examiner stated that the supplemental report and Judge Lehman's letter could have been prepared by the same instrument, while the supplemental report and Dr. Master's initial report were not prepared by the same instrument.[20] The supplemental report was not on Dr. Master's letterhead, as his initial report was, and actually misspells the psychiatrist's name as "Masters."

---

[16]State ex. 10 (Letter, 6/22/89).

[17]RPI ex. 2 (Cover Letter, 6/23/89).

[18]Kirksey, 112 Nev. at 1000, 923 P.2d at 1115 (footnotes omitted).

[19]RPI ex. 4 (Deposition, 2/22/02), p.18; see also RPI ex. 3 (Declaration of Diane Sanzo, 1/8/02).

[20]RPI ex. 5 (Report of Examination, 9/20/00).

Judge Lehman's letter contains the same misspelling. In 2001, Dr. Master stated in a declaration that he had little or no independent recollection of the case: "It is quite possible that the June 22, 1989 letter is a document that Judge Lehman prepared, or had prepared, for my signature."[21]

The following law governs our disposition of this case. This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion.[22] It may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction.[23] Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.[24] This court considers whether judicial economy and sound judicial administration militate for or against issuing either writ.[25] Mandamus and prohibition are extraordinary remedies, and the decision to entertain a petition lies within the discretion of this court.[26]

---

[21]State ex. 12 (Declaration of Dr. Franklin Master, 11/19/01), p.2.

[22]See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

[23]See NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

[24]See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338.

[25]See State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990).

[26]Hickey, 105 Nev. at 731, 782 P.2d at 1338.

Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.[27] "Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final."[28]

The procedural rules pertinent to this case are the following. NRS 34.726(1) provides in part that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal.[29] Because NRS 34.726 was enacted after Kirksey was convicted, the one-year filing period in this case extended from January 1, 1993, the effective date of NRS 34.726. Kirksey filed his petition nine years after that period expired. To show good cause, he must demonstrate that the delay was not his fault and that dismissal of the petition will unduly prejudice him.[30]

NRS 34.810(1)(a) provides that a post-conviction habeas petition must be dismissed if "[t]he petitioner's conviction was upon a plea of guilty and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(2) provides that a second or successive petition must be dismissed if "it fails to allege new or different

---

[27]State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).

[28]Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984).

[29]See Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

[30]NRS 34.726(1).

grounds for relief and . . . the prior determination was on the merits or, if new and different grounds are alleged, . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." To avoid dismissal, Kirksey must plead and prove specific facts that demonstrate good cause for his failure to present claims before or for presenting claims again and actual prejudice.[31] He cannot rely on conclusory claims for relief but must provide supporting specific factual allegations that if true would entitle him to relief.[32] And he is not entitled to an evidentiary hearing if the record belies or repels the allegations.[33]

To show good cause, Kirksey must demonstrate that an impediment external to the defense prevented him from complying with procedural rules.[34] Actual prejudice requires him to demonstrate "'not merely that the errors . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.'"[35] Absent a showing of good cause to excuse procedural default, this court will consider claims only if he demonstrates that failure to consider them will result in a fundamental miscarriage of justice.[36]

---

[31]NRS 34.810(3).

[32]Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

[33]Id.

[34]See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

[35]Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

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

Furthermore, the law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument.[37]

Finally, NRS 34.800(1) provides that a court may dismiss a petition if delay in its filing either prejudices the State "in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence" before the prejudice arose, or prejudices the State "in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred." If long enough, delay leads to a presumption of prejudice.[38]

First, we deny the State's petition in part because new information indicating that Judge Lehman drafted the supplemental report may provide good cause for Kirksey to raise claims regarding his competency and possible judicial bias. The doctrine of the law of the case does not preclude consideration of these claims because the facts alleged differ from the facts of the prior appeal. Thus, we conclude that an evidentiary hearing is warranted to determine the following: (1) whether the new information was discovered and presented in a reasonably timely manner; (2) if it was, whether the judge did in fact draft the report; and (3) if he did, whether Kirksey can establish any resulting prejudice.

In regard to the first issue, the district court must consider, under the relevant provisions of NRS 34.726, 34.800, and 34.810 set forth

---

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

[38]NRS 34.800(2).

above, whether Kirksey has good reason for not presenting this new information earlier and whether the State has been unduly prejudiced. The supplemental report was written in June 1989, and Kirksey did not file his current petition and set forth the new information until March 2003. The record before us does not indicate how or when Kirksey first discovered the information. The most relevant question appears to be whether an impediment external to the defense prevented the information from being discovered and presented earlier.

In regard to the second and third issues, we do not agree with Kirksey that proof that Judge Lehman drafted the supplemental report per se would establish bias on his part and thus cause and prejudice allowing Kirksey to overcome all procedural bars in regard to all his claims. Even if Kirksey proves that Judge Lehman drafted the report, he has not necessarily established improper bias.[39] If Dr. Master actually endorsed the report and it reflected his views, no bias would be evident.

Next, we grant the State's petition in part because a full evidentiary hearing on Kirksey's entire habeas petition is not warranted. At the hearing on the State's motion to dismiss, the district court directed the State to "respond substantively" to Kirksey's claims and ordered an evidentiary hearing.[40] When the State asked the court to set the matter for further argument on the issue of procedural bars, "rather than set it

---

[39]"[T]he Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05 (1997) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

[40]State ex. 15 at 7.

for a full-blown evidentiary hearing," the court refused, noting that "you can still show these issues were raised before."[41]

Consequently, although the State was not precluded from raising again the issue of procedural bars, the district court ordered an evidentiary hearing without any restriction in its scope. This forces the State to prepare for a evidentiary hearing that may reach the substance of any or all of Kirksey's claims: his habeas petition is 150 pages long and sets forth 39 claims and numerous subclaims.[42] But a hearing is warranted at this point only on the circumstances of Kirksey's discovery of the new information and possibly on Judge Lehman's role in the production of the supplemental report and his influence on Dr. Master's assessment of Kirksey's competency.

Finally, Kirksey's habeas petition includes a claim that his death sentence is invalid because he is mentally retarded.[43] He cites Atkins v. Virginia,[44] a 2002 United States Supreme Court opinion holding that the execution of mentally retarded criminals violates the Eighth Amendment proscription against cruel and unusual punishment. Kirksey is not precluded from litigating this claim. Following Atkins, the Nevada Legislature enacted legislation governing this matter. Under NRS 175.554(5), if there has been no prior determination of a claim of mental retardation by a person sentenced to death, that person may move to set aside the penalty on the grounds that he is mentally retarded. The

---

[41]Id. at 8.

[42]State ex. 7.

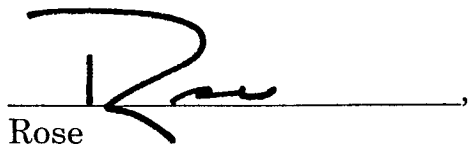
[43]Id. at 123.

[44]536 U.S. 304 (2002).

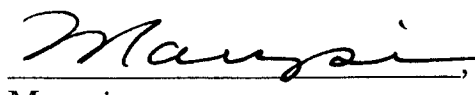
district court must then conduct a hearing as set forth in NRS 174.098 and decide the issue.[45] If the person is mentally retarded, the court must set aside the death sentence and order a new penalty hearing.[46]

Accordingly, we

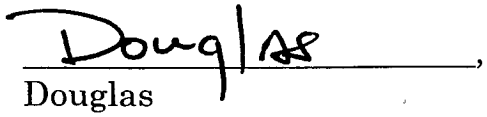
ORDER the petition DENIED IN PART AND GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to limit, consistently with this order, the evidentiary hearing on Kirksey's post-conviction petition for a writ of habeas.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Lee A. Gates, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Federal Public Defender
Clark County Clerk

---

[45]NRS 175.554(5).

[46]Id.