IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 43981

FILED

NOV 2 8 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On July 23, 1981, the district court convicted appellant Robert Ybarra, Jr., pursuant to a jury verdict, of first-degree murder, first-degree kidnapping with substantial bodily harm, battery with the intent to commit sexual assault with substantial bodily harm, and sexual assault with substantial bodily harm. Ybarra was sentenced to death for first-degree murder. The district court also sentenced him to three consecutive terms of life in prison without the possibility of parole on the remaining counts. This court dismissed Ybarra's direct appeal.[1] The remittitur issued on March 4, 1985.

Subsequently, Ybarra filed a petition for post-conviction relief, pursuant to former NRS Chapter 177, which the district court denied after

[1]Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

an evidentiary hearing on July 11, 1986. This court dismissed Ybarra's appeal on January 21, 1987.[2] On March 10, 1988, Ybarra filed a post-conviction petition for habeas relief, which the district court dismissed on December 30, 1988. This court dismissed Ybarra's appeal on June 29, 1989.[3] On April 26, 1993, Ybarra filed a second post-conviction habeas petition. The district court granted the State's motion to dismiss the petition on June 29, 1998. This court dismissed Ybarra's appeal on July 6, 1999.[4]

On March 6, 2003, Ybarra filed the instant habeas petition, his fourth state post-conviction petition. The district court granted the State's motion to dismiss the petition on July 20, 2004, concluding that it was procedurally barred. This appeal followed.

Ybarra filed his petition approximately 18 years after this court issued the remittitur from his direct appeal. Thus, Ybarra's petition was untimely filed.[5] Moreover, his petition was successive because he had previously filed three post-conviction petitions in the district court.[6] Ybarra's petition was procedurally barred absent a demonstration of good

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[2]Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

[3]Ybarra v. Director, Docket No. 19705 (Order Dismissing Appeal, June 29, 1989).

[4]Ybarra v. State, Docket No. 32762 (Order Dismissing Appeal, July 6, 1999).

[5]See NRS 34.726(1).

[6]See NRS 34.810(1)(b), (2).

cause and prejudice.[7] Further, because the State specifically pleaded laches, Ybarra was required to overcome the presumption of prejudice to the State.[8] Ybarra argues that the district court erred in several ways in concluding that his habeas petition was procedurally barred. We conclude that the district court properly dismissed the petition except in regard to one issue.

Ybarra initially claims that this court treats the application of procedural default rules as discretionary and has inconsistently applied them. He lists a host of this court's published and unpublished decisions to support his contention. Ybarra asserts that based on this alleged inconsistent application of procedural bar rules, this court must reverse the district court's order dismissing his petition and remand the matter for a hearing on his substantive claims. However, we considered and rejected a similar claim in State v. Dist. Ct. (Riker).[9] We are not persuaded by Ybarra's argument to abandon the mandatory procedural bar rules. Accordingly, we conclude that the district court did not err in denying his petition on this basis.

Second, Ybarra argues that he is "innocent" of aggravating circumstances found at trial and that refusing consideration of his claims would result in manifest injustice. The jury found as aggravating

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[7]See NRS 34.726(1); NRS 34.810(1)(b), (3).

[8]See NRS 34.800(2).

[9]121 Nev. ___, ___, 112 P.3d 1070, 1076-82 (2005); see Pellegrini v. State, 117 Nev. 860, 879-80, 34 P.3d 519, 532 (2001).

circumstances that Ybarra murdered his teenage victim during the commission of a sexual assault and a kidnapping. Ybarra contends that these two aggravators must be vacated as violative of double jeopardy principles because he was convicted of sexual assault and kidnapping and had punishment imposed "before the same offenses were re-prosecuted as aggravating factors and additional punishment was imposed because of them." We disagree. The death penalty is a permissible punishment if one or more aggravating circumstances, including those at issue in this case, are found and not outweighed by any mitigating circumstances.[10] Double jeopardy concerns are not implicated in this instance.[11]

Ybarra also argues that these aggravating circumstances implicate the reasoning in McConnell v. State.[12] He acknowledges that McConnell does not expressly apply here, as the State did not seek the first-degree murder conviction on a felony-murder theory. But he explains that the sexual assault and kidnapping aggravators are nonetheless improper because he received punishment for these offenses and that basing death eligibility on these offenses affronts the spirit of McConnell. However, we specifically stated in McConnell that our decision had no effect in cases where the State relies solely on a theory of deliberate,

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[10]See NRS 200.030(4)(a).

[11]See McKenna v. State, 114 Nev. 1044, 1058-59, 968 P.2d 739, 748-49 (1998).

[12]120 Nev. ___, 102 P.3d 606 (2004).

premeditated murder to secure a first-degree murder conviction.[13] We are not persuaded by Ybarra's attempted analogy to McConnell. Therefore, we conclude that the district court did not err in concluding that Ybarra failed to demonstrate good cause to excuse his procedural bars on this basis.

Third, Ybarra asserts that the previous-conviction aggravating circumstance is factually and legally insufficient. He contends that the district court erred in admitting a California order of probation as proof of a prior conviction for a felony involving the use or threat of violence to the person of another. This court previously concluded that this evidence was proper proof of an aggravating circumstance.[14] The doctrine of the law of the case bars further consideration of this claim, and Ybarra cannot avoid this doctrine by raising a "more detailed and precisely focused argument."[15] To the extent that Ybarra's instant claim might be considered distinct from his earlier one, he has not provided good cause for his failure to raise it previously.

Based on the foregoing discussion and the record presented, we conclude that Ybarra has not demonstrated good cause to overcome the procedural bars to his habeas petition and therefore the district court did

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[13]Id. at ___, 102 P.3d. at 624.

[14]See Ybarra, 100 Nev. at 177, 679 P.2d at 803. Specifically, Ybarra contended that the California probation order was inadmissible because it did not reflect on its face that counsel had represented him.

[15]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

not err in denying his petition on this basis. Moreover, as we explain, we largely affirm the district court's order on a number of other bases, including that Ybarra has failed to demonstrate actual prejudice pursuant to NRS 34.810(3).

Ybarra raises, among others, the following claims in his appeal: jury misconduct requires reversal of his conviction and sentence; the conviction and sentence are invalid because a juror refused to consider all sentencing options provided by law; the district court erred in refusing to excuse a juror for cause; the jury was not impartial; the district court erred in failing to conduct a competency hearing; Ybarra was improperly sentenced to consecutive terms for sexual assault and battery with the intent to commit sexual assault; the prosecutor committed a pattern of misconduct, rendering Ybarra's trial fundamentally unfair; the district court improperly instructed the jury on the defense of insanity; the statutorily mandated reasonable doubt instruction improperly minimized the State's burden of proof; his death sentence is invalid because of the reduced standard of reliability for admission of evidence at the penalty phase; his death sentence constitutes cruel and unusual punishment; execution by lethal injection constitutes cruel and unusual punishment; and the cumulative effect of the errors alleged mandate reversal of his conviction and sentence. However, these claims could have been raised on direct appeal.[16] Nothing in Ybarra's submissions demonstrates good cause

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[16]See NRS 34.810(1)(b)(2) (providing that the court shall dismiss a post-conviction petition for a writ of habeas corpus when the petitioner's

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for failing to raise these claims earlier or actual prejudice from the district court's refusal to consider them.

Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose death it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal. Although Ybarra cites recent decisions by the Supreme Court[17] and this court[18] to support this claim, the claim could also have been raised at the time of his trial.[19] Moreover, Ybarra failed to include in his appendix the instructions provided to the jury during the penalty phase. Thus, he failed to include critical documentation supporting his claim despite his submission of several thousand pages of documentation in his appendix. Therefore, Ybarra has not demonstrated good cause for failing to raise the claim earlier, nor does he show that he suffered actual prejudice.

. . . continued
conviction was the result of a trial and the claims could have been raised on direct appeal).

[17]Ring v. Arizona, 536 U.S. 584 (2002).

[18]Johnson v. State, 118 Nev. 787, 800-03, 59 P.3d 450, 460-61 (2002) (applying Ring, 536 U.S. 584, to Nevada statutory law).

[19]See NRS 200.030(4); Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996); 1977 Nev. Stat., ch. 585, § 1, at 1542, and § 13, at 1546. Further, even if Ring, 536 U.S. 584, created the basis for this claim, Ring does not apply retroactively. See Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 472-73 (2002).

Ybarra also re-raises the following claims: counsel was ineffective for failing to object to and in some instances inviting prosecutorial misconduct;[20] counsel was ineffective for failing to investigate and object to the admission of the victim's statements about the attack;[21] counsel was ineffective for failing to question the jurors regarding their opinions on an insanity defense;[22] and the district court erred in denying his motion for a change of venue.[23] As we have previously considered and rejected these claims, they warrant no further consideration.[24]

Ybarra also claims that his counsel was ineffective for failing to investigate and develop facts respecting his mental state and mitigation and that psychotropic medication rendered him incompetent throughout the trial and prejudicially altered his demeanor. He raised these claims in his third habeas petition, which the district court denied as procedurally barred. On appeal, we concluded that the district court did not err in denying Ybarra's petition. Based on the record we conclude that Ybarra has not demonstrated actual prejudice in this regard.

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[20]See Ybarra, 103 Nev. at 14-16, 731 P.2d at 357-58.

[21]See id. at 13-14, 731 P.2d at 357.

[22]See id. at 14, 731 P.2d at 357.

[23]See Ybarra v. State, Docket No. 12624 (Order Dismissing Appeal, October 10, 1980).

[24]See Hall, 91 Nev. at 316, 535 P.2d at 799.

Ybarra also argues that the jury and the district court were not impartial due to the district court's comment, "Ladies and gentlemen, unfortunately with respect to all of the counts read to you in open court, the defendant has pled not guilty and not guilty by reason of insanity." However, this claim was appropriate for direct appeal.[25] Moreover, Ybarra previously raised this matter in his third habeas petition, which the district court denied as procedurally barred. Finally, Ybarra has neglected to include relevant portions of the trial transcript in his voluminous appendix. Thus, even if we deemed it appropriate to consider the merits of this claim, Ybarra has failed to substantiate it. Therefore, we conclude that he failed to show actual prejudice in this regard.

Ybarra further claims that his conviction and sentence must be reversed because his trial and direct appeal were "conducted before judicial officers whose tenure in office was not during good behavior but whose tenure is dependent on popular election." However, he wholly fails to substantiate this claim with any specific factual allegations demonstrating actual prejudice.

Ybarra next asserts that his death sentence must be reversed due to cruel and unusual punishment suffered during his incarceration. However, he has not substantiated this claim with sufficient factual allegations demonstrating that the conditions of his confinement are so severe as to warrant reversal of his death sentence.

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[25]See NRS 34.810(1)(b)(2).

Ybarra also argues that this court failed to conduct a fair and adequate appellate review because this court's opinion respecting his direct appeal failed to explain how the mandatory review pursuant to NRS 177.055(2) was conducted in his case. However, this court conducted the mandatory review of Ybarra's death sentence in accordance with the law,[26] and he has failed to show that it was inadequate. Therefore, we conclude that he has not demonstrated actual prejudice on this basis.

Ybarra next asserts that his counsel failed to provide effective assistance on direct appeal. Specifically, he alleges that his counsel was remiss in failing to adequately frame certain direct appeal claims as federal constitutional issues. Ybarra speculates that he would have secured a more favorable outcome had counsel "federalized his claims." However, this speculation fails to demonstrate actual prejudice.

Ybarra also claims that he is incompetent to be executed. We conclude that the record before us belies this claim. He also asserts that he cannot be executed because he is mentally retarded. It appears that this issue has never been decided. The Supreme Court has held that the Eighth Amendment prohibits the execution of mentally retarded criminals.[27] And NRS 175.554(5) provides that a person sentenced to death may move to set his sentence aside on the grounds that he is mentally retarded if the matter has not been previously determined. The statute further provides that upon such a motion, the district court shall

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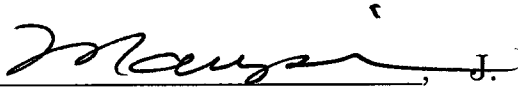
[26]See Ybarra, 100 Nev. at 176, 679 P.2d at 802-03.

[27]Atkins v. Virginia, 536 U.S. 304 (2002).

conduct a hearing pursuant to NRS 174.098 to determine the matter. Given this law, we conclude that this issue is not procedurally barred and remand to the district court for appropriate proceedings. In all other respects, we conclude that the district court properly dismissed Ybarra's petition.[28] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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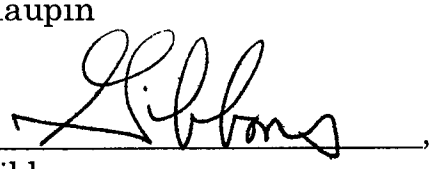

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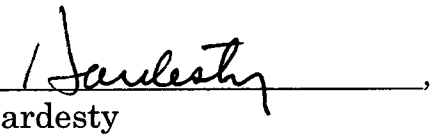

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cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Attorney General George Chanos/Reno
White Pine County District Attorney
White Pine County Clerk

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[28]Ybarra also claims that the district court erred in striking exhibits supporting his petition. In light of our order, we conclude that no relief is warranted on this claim.