

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ESPIREDION VALERIO,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 44535

FILED

JAN 18 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court convicted appellant John Espiredion Valerio, pursuant to a jury verdict, of murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Valerio was sentenced to death. This court dismissed his direct appeal.¹ The remittitur issued on September 26, 1989.

Subsequently, Valerio filed a petition for post-conviction relief, which the district court denied after an evidentiary hearing. This court denied his appeal.² Valerio then filed a post-conviction petition for a writ of habeas corpus, which the district court dismissed. This court affirmed the dismissal, concluding that his claims were procedurally barred.³

¹Valerio v. State, Docket No. 19008 (Order Dismissing Appeal, September 6, 1989).

²Valerio v. State, Docket No. 21886 (Order Dismissing Appeal, January 24, 1992).

³Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996).

On January 2, 2004, Valerio filed the instant habeas petition, his third state post-conviction petition.⁴ The district court denied his petition as procedurally barred, and this appeal followed. Valerio raises seven claims on appeal.

First, he contends that the order denying his habeas petition must be vacated because the district court violated the judicial code of conduct and his due process rights in adopting an order drafted by the District Attorney's Office. Specifically, he alleges that the district court violated Canon 3(B)(7) of the Nevada Code of Judicial Conduct (NCJC) because he was deprived of the opportunity to comment on the order before the district court signed it and also that the order inaccurately reflected the district court's oral rulings.

Valerio cites the following provision of NCJC Canon 3(B)(7): "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." He further relies on a portion of the Commentary accompanying this provision, which states: "A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions."

After receiving notice of the entry of district court's order, Valerio filed a motion to vacate the order. At a hearing on the motion, the

⁴Valerio has also sought federal post-conviction relief twice. The Ninth Circuit reversed the district court's order dismissing Valerio's second federal habeas petition, concluding that the district court improperly dismissed a claim based on procedural bars. See Valerio v. Crawford, 306 F.3d 742, 778-79 (9th Cir. 2002).

district court advised that it would review the order and issue a written ruling. Subsequently, the district court entered a written order denying Valerio's motion, stating that it had reviewed both the transcript of the hearing on Valerio's habeas petition and the written findings of fact and conclusions of law prepared by the State and determined that the written findings were consistent with its oral rulings.

This court has noted that "[t]he Commentary provides guidance to the purpose and meaning of the Canons and Rules by explanation and example," but "is not a statement of additional rules."⁵ Moreover, Valerio cites to no authority requiring the district court to orally pronounce every finding it intends to include in a written order. Further, in denying the motion to vacate the order, the district court rejected Valerio's arguments of inconsistency and confirmed that the order reflected its judgment. Therefore, we conclude that Valerio fails to demonstrate any inconsistency between the district court's oral rulings and the written order suggesting any violation of NCJC Canon 3(B)(7). The district court did not err in denying his petition on this basis.

Valerio next argues that the jury instruction on premeditation and deliberation was constitutionally infirm because it was vague and failed to distinguish between first- and second-degree murder. This is a matter appropriate for direct appeal, and thus, Valerio must demonstrate good cause for his failure to raise this claim earlier and actual prejudice from the district court's failure to consider it.⁶ Other than his meritless

⁵PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 436 n.5, 894 P.2d 337, 340 n.5 (1995), overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. ___, 112 P.3d 1063, 1069-70 (2005); see Preamble to NCJC.

⁶See NRS 34.810(1), (3).

assertion that he is immune from applicable procedural default rules, he ignores good cause and offers no explanation as to why he did not raise this allegation in his direct appeal.

We conclude that Valerio also fails to demonstrate actual prejudice. In Byford v. State, this court recognized that the Kazalyn⁷ instruction apparently given in Valerio's case "blur[red] the distinction between first- and second-degree murder."⁸ This court crafted an instruction to be given in all future cases where a defendant is charged with first-degree murder based on willful, deliberate, and premeditated killing. However, in Garner v. State, we stated that giving a Kazalyn instruction did not necessarily constitute error.⁹ Moreover, the Byford instruction applied prospectively, and "[t]hus, with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief."¹⁰

Although Valerio acknowledges our decisions in Byford and Garner, he argues that the challenged instruction violated the Eighth Amendment because by "erasing" the distinction between first- and second-degree murder in capital cases, it failed to genuinely narrow the

⁷Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), receded from in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

⁸116 Nev. at 235, 994 P.2d at 713.

⁹116 Nev. 770, 787-88, 6 P.3d 1013, 1024-25 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

¹⁰Id. at 789, 6 P.3d at 1025; see Leonard v. State, 117 Nev. 53, 75, 17 P.3d 397, 411 (2001).

class of persons eligible for the death penalty. First, Valerio misstates Byford's holding. The instruction did not "erase" this distinction.¹¹ Second, he fails to cite any relevant federal authority substantiating this claim, or adequately explain how the challenged instruction impeded the narrowing process.

We conclude that Valerio fails to demonstrate actual prejudice stemming from the giving of the Kazalyn instruction. Accordingly, the district court did not err in denying this claim.

Valerio next asserts that the implied malice instruction erroneously imposed a mandatory presumption of malice. Again, this is a matter appropriate for direct appeal, and Valerio has not demonstrated good cause for failing to raise this claim earlier or actual prejudice.¹² It appears that the jury was instructed in accordance with the definition found in NRS 200.020, which we have upheld as not creating a mandatory presumption.¹³ Valerio recognizes this court's prior rulings on this matter but argues that these decisions "do not adequately address the federal constitutional questions presented by this instruction; and this court is bound by the supremacy clause, U.S. Const. Art VI, to follow the federal constitution." However, we are unpersuaded that these questions undermine our prior rulings.

¹¹See Byford, 116 Nev. at 235, 994 P.2d at 713-14.

¹²See NRS 34.810(1).

¹³See Byford, 116 Nev. at 232, 994 P.2d at 712 (stating that implied malice instruction given pursuant to NRS 200.020(2) "is proper if the jury is properly instructed on the presumption of innocence"); Doyle v. State, 112 Nev. 879, 900-02, 921 P.2d 901, 915-16 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

Valerio also contends that the implied malice instruction was erroneous because the "description of the predicate facts upon which the presumption is based are unconstitutionally vague and overbroad." Specifically, he complains that the terms "abandoned and malignant heart convey nothing to a reasonable lay juror." However, this court rejected a similar claim in Leonard v. State, concluding that these terms did not deny a defendant a fair trial absent some evidence that the jury was confused by the instruction.¹⁴ Valerio has proffered no evidence suggesting that the jury was confused here.

Based on the foregoing, we conclude that Valerio has not demonstrated actual prejudice, and the district court did not err in dismissing this claim.

Valerio next claims that his conviction is invalid 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." He argues that because district court judges and the justices of this court are elected they do not meet the federal constitutional standards of impartiality required in capital cases. However, Valerio fails to state good cause for not raising this claim earlier or to substantiate this claim with any specific factual allegations demonstrating actual prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Valerio also complains that the deadly weapon enhancement penalty was invalid because it "directed the jury to find an element necessary to establish the deadly weapon enhancement in violation of the

¹⁴See 117 Nev. at 78-79, 17 P.3d at 413.

federal constitution." Valerio has again not demonstrated good cause for failing to raise this claim previously or actual prejudice.¹⁵ He neglects to include in his appendix any of the instructions given or any relevant facts respecting the murder or the weapon used. Therefore, he provides no context or basis for claiming that the instrument used in the murder was not a deadly weapon, and thus fails to show that instructing the jury that a knife is a deadly weapon resulted in any prejudice.

Valerio also claims that the deadly weapon instruction was unconstitutionally vague, "produce[ing] inconsistent and unequal application of the statute." Specifically, he claims that the "terms 'capable of producing' or 'likely to produce' death or great bodily harm allow any [factfinder] to determine that anything constitutes a deadly weapon." However, considering the record before us, we conclude that Valerio fails to demonstrate actual prejudice, even assuming error in the instruction.

Based on the foregoing, we conclude that the district court did not err in denying this claim.

Valerio next argues that the district court erred in rejecting his claims grounded in federal constitutional grounds without conducting an evidentiary hearing. He contends that under the standards applicable to the review of a habeas petition, his claims could not be rejected without an evidentiary hearing. Valerio cites to this court's decisions in Mann v. State¹⁶ and Hargrove v. State,¹⁷ in which this court held that an evidentiary hearing is required when a petitioner asserts claims supported

¹⁵See NRS 34.810(1)(b), (3).

¹⁶118 Nev. 351, 354-55 46 P.3d 1228, 1230 (2002).

¹⁷100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

by specific factual allegations not belied by the record that if true would entitle him to relief.¹⁸ However, Mann and Hargrove involved consideration of a timely initial post-conviction petition or motion; procedural default rules were not at issue. Valerio was first compelled to overcome applicable procedural bars before the district court was required to determine the necessity of an evidentiary hearing.¹⁹

Valerio also cites this court's decision in Crump v. Warden²⁰ for the proposition that "[w]hen resolution of a question of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing on the issue." However, Valerio fails to explain or provide any factual support for why he should be excused from procedural default rules other than to complain that this court inconsistently applies these rules and the delay was not his fault because he was represented by counsel. We conclude, therefore, that he has not demonstrated that an evidentiary hearing was necessary to resolve any question of procedural default.

Valerio also claims that consideration of his claims is not subject to procedural default rules for a myriad of reasons. To the extent that Valerio argues that his petition must be considered on its merits because this court has inconsistently applied procedural default rules, the

¹⁸Valerio also improperly cites other cases in the civil law arena for the incorrect proposition that his allegations had to be accepted as true. See Doleman v. Meiji Mutual Life Ins., Co., 727 F.2d 1480, 1482 (9th Cir. 1984); Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

¹⁹See NRS 34.726(1); NRS 34.810(1), (3).

²⁰113 Nev. 293, 934 P.2d 247 (1997).

law of the case bars this claim.²¹ In a previous habeas petition, Valerio asserted a similar claim.²² Valerio's current argument is merely a "more detailed and precisely focused argument," which does not avoid the doctrine of the law of the case.²³

Valerio further argues that his petition is not barred because any delay in filing was not his fault. Specifically, he asserts that the meaning of the phrase "fault of the petitioner" in NRS 34.726(1)(a) requires that the petitioner himself must act or fail to act to cause the delay. Valerio contends that counsel has continuously represented him and thus any delay in filing is attributable to his counsel's actions and not to him. However, he has alleged no specific wrongdoing by counsel in this regard that might support this argument.

Finally, Valerio contends that "any delay in filing this petition is a consequence of an 'impediment external to the defense.'" Specifically, he argues that this court's "erroneous failure to vacate the penalty judgment in the appeal from the denial of post-conviction relief in 1992" constituted an external impediment under Crump.²⁴ He also claims that "same principle holds true with respect to this court's erroneous failure to entertain the merits of [his] second habeas petition," filed in 1996. However, even assuming this circumstance qualified as an external impediment, Valerio was aware of this court's decision in 1992. He fails to

²¹Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

²²See Valerio, 112 Nev. at 389-90, 915 P.2d at 878.


²³See Hall, 91 Nev. at 316, 535 P.2d at 799.

²⁴113 Nev. 293, 934 P.2d 247.

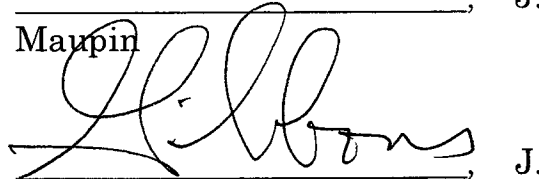
explain the lengthy gaps between this court's 1992 decision and the filing of his subsequent habeas petitions in 1996 and 2004 (the instant petition). We conclude that Valerio fails to substantiate any external impediment that prevented him from filing a timely habeas petition.

Having considered Valerio's argument and concluded that the district court did not err in denying his habeas petition as procedurally barred, we


ORDER the judgment of the district court AFFIRMED.



Maupin



Gibbons



Hardesty

cc: Honorable Jackie Glass, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk