

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY DENNIS COOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44764

FILED

MAR 02 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

In January 1984, appellant Rickey Dennis Cooper was convicted, pursuant to a jury trial, of first-degree murder with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. Cooper claims that a witness to the murder has recanted his trial testimony and that the State withheld evidence that the witness was pressured and received money to testify. We conclude that the district court did not err in denying the petition.

Procedural history

The trial was conducted in November 1983. After the jury found Cooper guilty of murder and three other offenses, the State unsuccessfully sought a death sentence. The district court then sentenced Cooper to two terms of life in prison without the possibility of parole for the murder and prison terms totaling 65 years for the other offenses, with

all terms consecutive. This court dismissed Cooper's direct appeal.¹ In 1986, Cooper filed a petition for post-conviction relief. The district court appointed counsel, and counsel filed an amended petition. The district court denied the petition, and this court dismissed Cooper's appeal.² In 1990, Cooper filed a post-conviction petition for a writ of habeas corpus. The district court dismissed that petition, and this court dismissed the subsequent appeal.³ Also, in February 1997, we denied a proper person petition for a writ of habeas corpus that Cooper filed directly with this court.⁴

In August 1997, Cooper filed another post-conviction petition for a writ of habeas corpus in the district court, which remains the basis for this appeal. The State opposed the petition, arguing that it was untimely and successive and pleading laches. The district court (Hon. Don P. Chairez, District Judge) declined to conduct an evidentiary hearing and denied the petition. Cooper appealed. In 2000, this court affirmed the district court's judgment except in regard to Cooper's claim that a witness to the murder, Donnell Wells, had recanted his trial testimony and alleged that he had been pressured and paid to testify.⁵ We concluded that this

¹Cooper v. State, Docket No. 15653 (Order Dismissing Appeal, May 15, 1986).

²Cooper v. State, Docket No. 18679 (Order Dismissing Appeal, September 21, 1988).

³Cooper v. State, Docket No. 22086 (Order Dismissing Appeal, June 27, 1991).

⁴Cooper v. State, Docket No. 29795 (Order Denying Petition for Writ of Habeas Corpus, February 24, 1997).

⁵Cooper v. State, Docket No. 31667 (Order of Remand, July 24, 2000).

claim, if true, might provide cause to excuse procedural defects and entitle Cooper to relief. Our order stated in part:

The record on appeal does not contain any information regarding whether the factual basis for this claim was reasonably available prior to appellant's raising this claim in his 1997 petition. Further, in denying his petition, the district court did not make any specific findings of fact or conclusions of law regarding the credibility of Donnell Wells' recantation or the materiality of Donnell Wells' testimony at trial. Therefore, we conclude that the district court erred in denying appellant's petition without first conducting an evidentiary hearing.⁶

As to the remaining contentions in the petition, we concluded that the district court did not err in determining that Cooper failed to demonstrate cause or prejudice to excuse the procedural defects.⁷

After remand, the district court (Hon. Michael A. Cherry, District Judge) held an evidentiary hearing and denied Cooper's habeas petition.

Substantive facts

We first summarize the evidence presented at the guilt phase of the trial in 1983.⁸ Shortly after 7:00 p.m. on April 13, 1983, Ricky Williams was shot dead and another person was shot in the hand near the

⁶Id. at 3 (citations omitted).

⁷Id. at 3 n.1.

⁸Cooper's appendix includes some but not all of the trial transcripts. Nevertheless, the basic evidence from the trial is not disputed and is apparent from those transcripts and from the facts asserted in the parties' briefs both in this appeal and in Cooper's appeal from the denial of his first post-conviction petition.

intersection of H Street and Lake Mead Boulevard in Las Vegas. Williams died from a gunshot wound to his right lung and heart; the bullet entered his back and exited his chest.

Jimmy Ray Thompson testified that he rode his bicycle to the area of H Street and Lake Mead Boulevard on the evening of April 13, 1983. He encountered and briefly spoke to Williams, who was standing in front of Bruce's Liquor Store. Thompson pedaled away from the liquor store down H Street when he heard three shots. He looked and saw Williams running from a car in the parking lot by Bruce's and Highview Market. He saw four people in the car but could not tell their gender. He saw a gun barrel drawn back into the front passenger window of the car. Williams was clutching his chest as he ran. The car then drove off.

Larry Collier testified that he drove to the area of H Street and Lake Mead Boulevard on April 13, 1983, to buy some "sherm" (a joint of marijuana laced with PCP). He was accompanied by Debra Manor and two other women. He parked by Bruce's, got out of the car, and said hello to Williams, who was in front of Bruce's. He then bought some sherm from an unidentified person. Another car pulled up and parked by Highview Market. The front passenger of the car called him over. He walked to the car and recognized Cooper sitting in the front passenger seat. There was also a driver in the front and two people in the back seat. Cooper asked what he was holding, and Collier showed him the sherm. Cooper told Collier to "give it up." When Collier refused, Cooper raised a rifle and pointed it toward Collier. Collier hit it with his hand, the rifle fired, and Collier retreated to the rear of the car and ran. Williams, who had been just behind him, also ran. Cooper got up on his knees on the seat and fired two or three more times. As Collier ran to his car, Williams ran in another direction out of sight. The car Cooper was in drove away.

Debra Manor testified that she was in Collier's car when the shooting occurred. She saw Collier walk to the passenger side of another car. She recognized Shawnette (Ragland) as the driver of the car and Cooper as the front passenger. She saw one male in the back seat. Manor saw the end of a gun barrel stick from the car's passenger window and heard one shot and then two more shots. Williams was standing near Collier outside the car. Collier ran to the back of the car, and Williams ran in front of the car and around a store and "laid down." She testified that she did not know who fired the shots and the only person she saw with a gun was the man in the back seat of the car. However, the day after the shooting she had told police that Cooper fired the shots. In response to the prosecutor's questions, she admitted that she did not want to testify because she was a little afraid. She had moved from her former residence after receiving threats to her and her two children, including a rock thrown through her window with a message tied to it. Defense counsel introduced Manor's preliminary hearing testimony in which she stated that she lied to police because she was angry at the death of her cousin, Williams.

Sharon Shawnette Ragland testified that she drove to Highview Market on the evening of the shooting. She was driving her mother's car, and Cooper was in the front passenger seat. Two other men were in the back seat. After shopping at the market, she began to drive away when she heard Cooper fire two shots from the car. She testified that she did not see him with a gun. Ragland was asked about a statement she made to police the day after the shooting. Consistently with that statement, she testified that a man selling sherm approached Cooper as he sat in the car. But she denied telling police that Cooper demanded the sherm and pulled a gun, that the man knocked the gun

away, and that it went off. She further denied saying that Cooper shot at the man as he ran toward the rear of the car and that Cooper got out of the car and fired twice at Williams, who was just standing there.

Donnell Wells testified that he and a friend went to play games at an arcade near H Street and Lake Mead Boulevard on the evening of the shooting. Wells was 15 years old. He knew Williams and talked to him in front of Bruce's. Later Wells and his friend left the arcade and began to walk down the street. Wells testified that they saw a car driving down H Street, driven by a girl. He saw Cooper lean across the driver and fire two shots from the car. The car made a U-turn and came back, Cooper fired three more shots, and Williams fell. Wells testified that he had seen Williams and Cooper arguing two or three hours earlier in front of Bruce's and that Cooper had said that he would be back.

The district court questioned Wells at the end of his testimony. Among other things, the court asked him if he had ever sworn to tell the truth before in his life, if he knew that he was swearing to do so in front of God, and whether he was religious and believed in God. Wells answered these questions affirmatively. The court asked him if he was sure that the car was moving when the shots were fired and whether testimony by others that the car was parked would be incorrect. Wells again answered affirmatively.

At an evidentiary hearing in February 2004 the following evidence was presented. In July 1997 an investigator from the Federal Public Defender's office obtained a declaration signed by Donnell Wells. Wells was incarcerated at Pioche Camp at the time. The declaration stated that detectives pressured him to testify to facts that they told him; that they promised him money to testify; that contrary to his trial testimony, he did not see Cooper shoot the victims; and that after his

testimony, the detectives gave him a paper that he redeemed for roughly \$100.00.⁹

Cooper called Wells to testify. Wells was 36 years old and incarcerated for a conviction of attempted burglary. He testified that he became a trial witness after "detective" (actually investigator) Eddie Shields and another man came to his school—he was in ninth grade—and asked him to answer some questions. They took him from school to the courthouse "once or twice." Wells spoke with them and a third man, but he could not remember whether the third man was prosecutor Mel Harmon.¹⁰ The following direct examination occurred.

Q. Did you tell them at the time that you saw Mr. Cooper shooting?

A. I can't remember.

Q. Did you see Mr. Cooper shooting?

A. To be honest with you, I couldn't really see exactly who was shooting.

Q. So when you testified in court that you saw this gentleman, Rickey Cooper shooting, was that correct?

A. I can't remember.

Q. You can't remember whether you saw him shooting, or you can't remember whether you testified in court that he shot?

A. I can't remember saying that he did the shooting.

Q. If you said he did the shooting, would that have been true?

⁹Evidentiary Hearing Transcript (February 27, 2004) (EHT), at 8-10; Declaration of Donnell Wells (July 30, 1997).

¹⁰EHT at 11-14, 25-26, 34.

A. I can't say. I didn't—I can't—I didn't really see his face. I couldn't see him.

Q. So is it your testimony, sir, that you did not see who shot Ricky Williams?

A. Not really. I couldn't really see.

Q. Were you able to describe—

A. I couldn't see clearly. I couldn't, you know, I just—I thought—I thought it was him.

Q. But you weren't sure?

A. Not—not—now, you know in my, you know, at the age I am right now, I can't really honestly say that that was the man shooting.¹¹

Wells described a kind of practice session in the courtroom on the same day of his trial testimony during which the investigators told him what his testimony should be. His account was rather confused. He initially seemed to say that his trial testimony was interrupted and he was taken outside the courtroom and instructed how to testify. He eventually indicated that the interruption and instruction outside the courtroom occurred during a practice on the same day he testified.¹²

Defense counsel asked Wells if the investigators offered him money, and he said yes. The following exchange occurred.

Q. So he told you if you said that Rickey Cooper was the shooter he would give you money; is that what you're saying?

A. No. He said—he said, well, if—if you testify—if you say it this way right here, then you can get the money, if not we can't use you.

.....

¹¹Id. at 14-15.

¹²Id. at 16, 24-45.

Q. Did you initially tell them that this was too dark and you didn't know exactly who the shooter was?

A. Yeah.

Q. And then did he tell you that he believed that Rickey Cooper was the shooter?

A. Well, he didn't say, if I remember, he didn't say that he believed nothing. He just said that Rickey Cooper was the shooter.

Q. So he told you Rickey Cooper was the shooter?

A. Yes.

Q. And he indicated to you that he could only use you and give you this money if you testified what?

A. In the way he—he wanted me to testify.

Q. Which was what? What did he want you to say?

A. That Rickey Cooper was the shooter.

Q. And you did say that at trial, did you not?

A. Yeah, I think so.

Q. After you testified at trial did you get any money?

A. Yes, ma'am.

Q. How much money did you get?

A. It was—it was—they gave me like two checks.

.....

Q. Was it a significant amount of money?

A. I think one of them was like 60 bucks. One of them was like 40 bucks, something like that.

Q. So you believe you got a hundred dollars?

A. Close to a hundred dollars.

Q. Okay. And that was given to you by whom?

A. The detective.

Q. And what if anything did you do with that money?

A. Well, he took me to the mall, and I bought some jeans and some K-Swiss [sneakers].¹³

The two investigators who worked for the District Attorney on this case have died (as have the trial defense counsel and trial witnesses including Ragland).¹⁴ By stipulation the parties introduced into evidence a voucher showing that Wells was paid \$75.00 in witness fees on the day he testified at trial. The voucher stated "3 Days at \$25.00."¹⁵

On cross-examination of Wells the following exchange occurred:

Q. And how did it happen that Mr. Shields sought you out, if you know?

A. Oh, because I had told Ricky Williams' mom that I was there.

Q. What did you tell Ricky Williams' mom?

A. I told Ricky Williams' mom that I was there when him and Rickey Cooper had a argument, and I was there when the shooting happened.¹⁶

¹³Id. at 16-18.

¹⁴Exhibit 4 (certificates of death) to Petitioner's Index of Stipulated/Proposed Exhibits in Support of Post-Conviction Petition (February 27, 2004) (Petitioner's Index).

¹⁵EHT at 20, 90-92; Exhibit 1 (Wells voucher) to Petitioner's Index.

¹⁶EHT at 23-24.

The State called Melvyn Harmon, the sole prosecutor in Cooper's case, to testify. Harmon denied that he or any of his staff conducted a pretrial practice of Wells's testimony. He or his investigator would have met with Wells at least three times before the trial.¹⁷ Harmon testified that his case notes indicated that Wells was scheduled to come to the courthouse at 8:30 a.m. on November 2, 1983, the morning that Harmon gave the opening statement and the day before Wells testified.¹⁸ Harmon said that his approach was to authorize a fee for each time a witness appeared in the courthouse.¹⁹ Based on the voucher for Wells, Harmon surmised that "Wells was here in the courthouse speaking either with me or with Mr. Shields or perhaps with some other representative of the office of the district attorney at least three times."²⁰

The trial record shows that on the morning the trial began, in response to a request for information by defense counsel, Harmon stated in open court that Wells and another person were alleged to be eyewitnesses to the shooting. He continued, "But there are no formal statements. I've obtained personal service of them. I haven't yet spoken personally to them myself."²¹ And two days later, Wells testified that he had first spoken to Harmon earlier that day and had met with someone else from the District Attorney's office earlier in the week.²²

¹⁷Id. at 47-48; cf. id. at 108-09.

¹⁸Id. at 82-84.

¹⁹Id. at 54, 85-86.

²⁰Id. at 54.

²¹Trial Transcript (November 1, 1983), at 12.

²²Trial Transcript (November 3, 1983), at 296.

At the evidentiary hearing, Harmon could not recall when he learned that Wells was a potential witness, but Wells's name was not in Harmon's initial list of witnesses or in his opening statement to the jury.²³ He moved to endorse Wells's name as a witness on October 10, 1983, three weeks before the trial.²⁴ He surmised that he might not have mentioned Wells in his opening statement because witnesses in the case had been pressured.²⁵

The district court denied Cooper's petition, finding that it was procedurally barred as untimely and successive.

Discussion

Cooper filed his instant petition more than 11 years after remittitur issued from his direct appeal. The petition was therefore untimely.²⁶ It was also successive because Cooper had filed two previous post-conviction petitions.²⁷ Therefore, the petition was procedurally barred absent a demonstration of good cause and prejudice.²⁸ Also, because the State pleaded laches, Cooper was required to overcome a rebuttable presumption of prejudice to the State.²⁹

²³EHT at 60-61, 69, 79.

²⁴Motion and Notice of Motion to Endorse Names on Information (October 10, 1983); EHT at 84, 107.

²⁵EHT at 84.

²⁶See NRS 34.726(1).

²⁷See NRS 34.810(2).

²⁸See NRS 34.726(1); NRS 34.810(3).

²⁹See NRS 34.800(2).

To show good cause, Cooper must demonstrate that an impediment external to the defense prevented him from complying with procedural rules.³⁰ To establish prejudice, he must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."³¹ This court will not overturn a district court's findings in post-conviction proceedings if they are supported by substantial evidence.³²

Cooper's primary assertion of cause and prejudice is based on the State's alleged violation of Brady v. Maryland.³³ Brady and its progeny require the State to disclose evidence that is favorable and material to the defense.³⁴ A Brady violation has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."³⁵ The second and third Brady components parallel the good cause and prejudice necessary to overcome the procedural bars; therefore, proving that the State withheld the evidence

³⁰Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

³¹United States v. Frady, 456 U.S. 152, 170 (1982); see also Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

³²Ford v. State, 105 Nev. 850, 854, 784 P.2d 951, 953 (1989).

³³373 U.S. 83 (1963).

³⁴Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

³⁵Id. at 67, 993 P.2d at 37.

generally establishes cause, and proving that the withheld evidence was material establishes prejudice.³⁶

The prosecutor's reason for withholding evidence is immaterial, and the prosecutor is charged with constructive knowledge of evidence that other state agents withhold.³⁷ If a defendant made no request or only a general request for information, the evidence is material when a reasonable probability exists that the result would have been different had it been disclosed.³⁸ However, if the request was specific, the evidence is material if there is a reasonable possibility of a different result had there been disclosure.³⁹

Here, Cooper contends that he has shown good cause and prejudice because the State allegedly withheld evidence that Wells told investigators that he did not see the shooter and that the investigators nevertheless fed Wells facts and promised him money if his testimony satisfied them. Before trial began, defense counsel requested the prosecutor to provide "any discovery that he has on [Wells]."⁴⁰ Because of this specific request, any withheld evidence on Wells is material if there is a reasonable possibility that its disclosure would have led to a different result.

Cooper also contends that Wells's recantation of his trial testimony provides good cause, and he argues that the credibility of the

³⁶See id. at 66-67, 993 P.2d at 36-37.

³⁷Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996).

³⁸See Mazzan, 116 Nev. at 66-67, 993 P.2d at 36-37.

³⁹See id.

⁴⁰Trial Transcript (November 1, 1983), at 11.

recantation is not relevant to overcoming the procedural bars. This argument is meritless because it focuses only on cause and ignores the requirement of prejudice. If the recantation is not credible or otherwise fails to show that Cooper suffered any actual and substantial disadvantage at trial, then he fails to establish the prejudice necessary to overcome the procedural bars. Although the district court did not expressly find that Wells lacked credibility, it apparently considered his hearing testimony to be largely baseless. Its order denying Cooper's petition specifically states that Harmon refuted Wells's allegation of a pretrial practice session, which the order deems "far-fetched."

Regardless of the sincerity of Wells's hearing testimony, his recantation of his trial testimony was not consistent, clear, or complete, and we conclude that the recantation was not material. At the evidentiary hearing, Wells testified that he could not clearly see who shot Williams, but "I thought it was him"—that is, Cooper—though "at the age I am right now, I can't really honestly say that that was the man shooting."⁴¹ Moreover, at the evidentiary hearing and during an interview at the District Attorney's office in September 2001, Wells has continued to state, as he did in his trial testimony, that he saw an altercation between Cooper and Williams some time before the shooting.⁴² So Wells has not recanted his testimony indicating that Cooper had a motive to shoot Williams.

Wells has, however, alleged that investigators pressured him and promised him money to testify that he saw Cooper shoot Williams even though he told them he did not really see the shooter. His account of

⁴¹EHT at 15.

⁴²Id. at 23-24; Interview with Donell [sic] Williams 9/21/01, at 2.

these matters is not very exact or persuasive, however. In regard to a promise of money, the issue on which the record contains the most evidence to compare with Wells's allegations, it appears that Wells was simply paid witness fees for his trial appearance and pretrial meetings with investigators. Further, the investigators are dead and cannot give their own accounts of their interactions with Wells. This fact is prejudicial to the State and reinforces the statutory presumption of prejudice, which Cooper has the burden to rebut.

Of course, a lack of wrongdoing by the investigators does not change the fact that Wells now asserts he did not see who the shooter was. Even if this assertion is honest, we conclude that even absent Wells's identification of Cooper as the shooter, the jury still would have convicted Cooper. It is likely that jurors gave little weight to Wells's account of the shooting because it was so at odds with the bulk of the evidence that Cooper shot from a parked car. Although Ragland claimed at trial that she had started to drive when she heard Cooper fire from her car, this testimony was contrary to her statement to police the day after the murder that the car was parked. And even her testimony differed sharply from Wells's description of two series of shots from a moving car before and after it made a U-turn. Wells also testified at trial that he saw the second victim get shot in the hand as that victim stood at the door to a fish market, when that victim's own testimony was that he was inside the building about 15 feet from the door when he was shot.⁴³

In fact, the discrepancy between Wells's trial testimony and the other evidence regarding the shooting suggests that the investigators

⁴³Trial Transcript (November 3, 1983), at 276, 284; Trial Transcript (November 4, 1983), at 311.

did not coach that testimony. The questionable nature of Wells's testimony regarding the shooting was obvious. It prompted the district court to ask him if he understood that he had sworn to tell the truth in front of God and if he was sure that the car was moving when the shots were fired.

Cooper contends, however, that the prosecutor and the district court improperly bolstered Wells's testimony, increasing its significance. In making this contention, Cooper completely mischaracterizes the district court's questioning of Wells. Anyway, this court considered and rejected similar claims raised by Cooper in his first post-conviction petition.⁴⁴ Our earlier decision is the law of the case and cannot be avoided by more detailed and precisely focused argument.⁴⁵

To sum up, we conclude that substantial evidence supports finding that the investigators did not act improperly and therefore that the State did not withhold evidence in violation of Brady. Further, even if Wells falsely testified at trial that he clearly saw Cooper shoot Williams, Cooper still fails to overcome the procedural bars to raise this claim. He demonstrates cause for not raising the claim earlier since Wells's recantation revealed an impediment external to the defense and was not available until Wells spoke up. However, he does not demonstrate prejudice since Wells's description of the shooting at trial was not particularly convincing to begin with, while the other evidence of Cooper's

⁴⁴Cooper, Docket No. 18679 (Order Dismissing Appeal), at 3, 5.

⁴⁵See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

guilt was strong.⁴⁶ Moreover, Cooper has not rebutted the presumption that his late claim has prejudiced the State. Consequently, the district court did not err in denying Cooper's petition.

Finally, Cooper also claims that the district court erred in the proceedings below by inadequately inspecting in camera the prosecutor's trial notes on Wells and another person and refusing to allow him to inspect the notes.⁴⁷ He further claims that the district court erred by adopting the order drafted by the State and denying in part his motion to alter, amend, or clarify the order. We conclude that these claims warrant no relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

⁴⁶Cf. Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (stating that recanted false testimony requires relief only if a different trial outcome is probable had the testimony not been admitted).

⁴⁷In response to our order directing transmission of the prosecutor's notes under seal to this court, the State informs us that the notes were destroyed in the process of scanning files in the District Attorney's office and that copies of the notes provided to the district court were lost.

cc: Hon. Michael A. Cherry, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk