

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE LIDDELL WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45796

FILED

JUN 22 2007

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

In October 1995, a jury found appellant Antoine Williams guilty of two counts of first-degree murder of a victim 65 years of age or older; two counts of robbery of a victim 65 years of age or older; and one count each of burglary, possession of a stolen vehicle, and possession of a controlled substance. After the jury was unable to reach a unanimous verdict regarding punishment, a three-judge panel conducted a second penalty hearing and found the following aggravating circumstances: the murders were committed during a robbery and/or burglary; Alice Nail's murder was committed to avoid or prevent a lawful arrest; the murders were committed to receive money or any other thing of monetary value; and Williams had been convicted of more than one murder in the instant proceeding. In March 1996, the panel concluded that the aggravating

factors outweighed the mitigating factors and sentenced Williams to death for each murder.¹

This court affirmed Williams's conviction and sentence on direct appeal.² Williams filed a postconviction petition for a writ of habeas corpus, which the district court denied. This court affirmed the district court on appeal.³ Williams sought relief in federal court. On October 25, 2004, Williams filed a second postconviction petition for a writ of habeas corpus in the Nevada district court, which the district court denied as procedurally barred. This appeal followed.

Williams filed the second petition nearly six years after this court issued the remittitur from his direct appeal; therefore, it was untimely filed.⁴ Moreover, his petition was successive because he had

¹We note that in response to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002), the Legislature has amended NRS 175.556 to provide that penalty hearings may no longer be conducted by a three-judge panel, but must proceed before a jury. See 2003 Nev. Stat., ch. 366, § 3, at 2083; see also Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002).

²Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997), receded from in part by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

³Williams v. State, Docket No. 35559 (Order of Affirmance, October 9, 2000).

⁴See NRS 34.726(1).

previously filed a postconviction habeas petition in the district court.⁵ Williams's petition was therefore procedurally barred absent a demonstration of good cause and prejudice.⁶ He argues that the district court erred in concluding that procedural default rules precluded review of his petition.

Williams first claims that his death sentence is unconstitutional because the State used the same felony charges supporting his conviction on a felony-murder theory to establish two of the aggravating circumstances in violation of McConnell v. State.⁷ In McConnell, this court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."⁸ This court recently held in Bejarano v. State that McConnell has retroactive application.⁹ Thus, Williams can show good cause for failing to raise this claim previously. In this case, the information charged both murders under the theories of premeditation and felony murder based on the perpetration of a robbery and/or burglary. The verdicts are

⁵See NRS 34.810(1)(b) and (2).

⁶See NRS 34.726(1); 34.810(3).

⁷120 Nev. 1043, 102 P.3d 606 (2004).

⁸Id. at 1069, 102 P.3d at 624.

⁹122 Nev. ___, 146 P.3d 265 (2006).

silent as to which theory or theories the jury relied on in finding Williams guilty of each murder. Therefore, pursuant to McConnell, the burglary and robbery aggravating circumstances must be stricken.

Additionally, McConnell applies in this case with equal force to the receiving-money aggravator pursuant to NRS 200.033(6) because it was based on the robbery of the victims.¹⁰ Accordingly, the receiving-money aggravator is also invalid and must be stricken.

Although Williams can demonstrate good cause for failing to raise this claim previously, he must still demonstrate actual prejudice resulting from consideration of the erroneous aggravating circumstances. After striking the burglary, robbery, and receiving-money aggravating circumstances, two remain respecting Alice Nail's murder: the murder was committed to avoid or prevent a lawful arrest, and Williams had been convicted of more than one murder in the immediate proceeding. Respecting William Nail's murder, one remains: Williams had been convicted of more than one murder in the immediate proceeding. The sentencing panel found three mitigating circumstances for each murder—Williams's remorse, his involvement with cocaine, and "any other mitigating circumstances."

We may uphold Williams's death sentence based in part on an invalid aggravator either by reweighing the aggravating and mitigating

¹⁰Id.

evidence or conducting a harmless-error review.¹¹ If we cannot conclude beyond a reasonable doubt that the sentencing panel would have found Williams death eligible and imposed death absent the erroneous aggravating circumstances, we must remand the matter to the district court for a new penalty hearing.¹² On the other hand, if we conclude beyond a reasonable doubt that the sentencing panel would have nonetheless found Williams death eligible and imposed death, then the error was harmless, and Williams's claim is procedurally barred because he has failed to demonstrate actual prejudice.

During the penalty hearing, Williams made a lengthy statement in which he expressed remorse by accepting full responsibility for the murders and apologizing to the Nails' family members. Williams stated that he was unable to sleep, that he felt badly about and regretted his actions, and that he "sees the Nails' faces." Williams also introduced evidence of his cocaine addiction and its impact on his life, including losing his job and girlfriend. However, Williams stated that his cocaine addiction did not excuse murdering the Nails. The sentencing panel evidently considered this evidence credible and persuasive, as it found that Williams's remorse and cocaine addiction, along with "any other

¹¹See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

¹²See Browning v. State, 120 Nev. 347, 364, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 782-83, 59 P.3d 440, 446-47 (2002).

mitigating circumstance," mitigated the double murders. In light of the mitigating evidence presented coupled with the jury's inability to reach a unanimous verdict regarding punishment, we cannot conclude beyond a reasonable doubt that Williams would be found death eligible and sentenced to death absent the multiple erroneous aggravating circumstances. Therefore, we reverse that portion of the district court's order and remand this matter for a new penalty hearing before a jury.

Williams further argues that the district court erred in denying the following claims: the preventing-a-lawful-arrest aggravating circumstance is invalid; the sentencing panel did not find that the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt; the trial court and the three-judge panel were not impartial; the jury was not impartial; the district court's instructions on reasonable doubt, "equal and exact justice," and premeditation were erroneous; Nevada's death penalty scheme is arbitrary and capricious; lethal injection constitutes cruel and unusual punishment under the Eighth Amendment; the State's use of prior convictions in the penalty phase violated double jeopardy principles; his absence during off-the-record meetings and bench conferences rendered his trial unfair; and the trial court's failure to ensure that certain pretrial and trial proceedings were recorded and held in public deprived him of his due process rights. However, these claims could have been raised on direct appeal, and nothing in Williams's submissions demonstrates good cause

for failing to raise them earlier or actual prejudice from the district court's refusal to consider them.¹³

Williams also claims that prosecutorial misconduct mandated reversal of his conviction and sentence. However, this court considered and rejected this claim in his direct appeal.¹⁴ Therefore, further consideration of it is barred by the law of the case.¹⁵

Williams asserts that this court's earlier review of his case was unfair and inadequate for several reasons. Considering his argument and submissions to this court, we conclude that he has not demonstrated that this court's review of his conviction and death sentences was unfair or inadequate.

Williams next argues that his conviction and sentence are invalid because his trial and sentencing and direct appeal were conducted before judicial officers whose tenure in office was not based on good behavior but dependent on popular election. However, he wholly fails to substantiate this claim with any specific factual allegations demonstrating actual prejudice.¹⁶

¹³See NRS 34.810(3).

¹⁴Williams, 113 Nev. at 1023, 945 P.2d at 447.

¹⁵See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹⁶Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Williams also contends that the district court erred in denying several claims of ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Williams must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.¹⁷ He must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the proceeding would have been different.¹⁸

Because we are remanding for a new penalty hearing, we do not address Williams's complaints that his counsel were ineffective in regard to issues involving the penalty hearing. Williams also argues that his trial and appellate counsel were ineffective for failing to raise other claims presented in this appeal. Other than to state that counsel had no tactical basis for not addressing these matters and had counsel done so there was a reasonable probability of a more favorable outcome, Williams neglects to explain how he was prejudiced by counsel's alleged deficiencies. Consequently, we conclude that Williams failed to demonstrate prejudice.

Williams argues finally that his postconviction counsel was ineffective for not securing funds for investigation of issues outside the

¹⁷See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

¹⁸See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

trial record or seeking discovery of information outside the record through litigation. As a death row petitioner Williams had a right to the effective assistance of counsel in his first postconviction proceeding, so he may raise claims of ineffective assistance of postconviction counsel in a second petition.¹⁹ However, he must raise these matters in a reasonable time or risk application of procedural default rules.²⁰ Williams waited four years after this court decided his appeal from the denial of his first habeas petition, when he should have been aware of claims respecting postconviction counsel, to file the instant petition. We conclude that Williams waited an unreasonable time to raise these claims and that he has not demonstrated good cause for his untimely filing. And because Williams fails to explain his claims in any detail, they are nothing more than bare claims unsupported by specific factual allegations.²¹ Consequently, we conclude that he did not demonstrate actual prejudice

¹⁹See McNelton v. State, 115 Nev. 396, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997).

²⁰See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar provided in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

²¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

and that the district court did not err in denying this claim.

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.

Maupin, C.J.

Maupin

Gibbons, J.

Gibbons

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

Douglas, J.

Douglas

Cherry, J.

Cherry

Saitta, J.

Saitta

cc: Hon. Sally L. Loehrer, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk