IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES LEE RANDOLPH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46864

FILED

MAR 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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; Michelle Leavitt, Judge.

Appellant Charles Lee Randolph's judgment of conviction stems from his robbery and murder of Shelly Lokken, a bartender at Doc Holliday's bar, in Las Vegas on May 5, 1998. He was convicted of conspiracy to commit robbery, burglary while in the possession of a firearm, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The jury found three aggravating circumstances beyond a reasonable doubt–that the murder was committed during the course of a burglary and a robbery and that the murder was committed to avoid or prevent a lawful arrest–and one mitigating circumstance–that the murder was committed while Randolph was under the influence of extreme mental or emotional disturbance. The jury further found that the aggravating circumstances outweighed the mitigating circumstance and imposed death. Randolph received two life sentences in prison without the possibility of parole for first-degree kidnapping with the use of a deadly

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weapon and multiple definite terms of imprisonment for the remaining convictions.

This court affirmed Randolph's convictions and death sentence on appeal.[1] Randolph filed a timely post-conviction petition for a writ of habeas corpus, which the district court denied after conducting an evidentiary hearing. This appeal followed.

Randolph argues that the district court erred in denying his claims of ineffective assistance of counsel. He first contends that his counsel were ineffective for failing to adequately challenge the aiding and abetting and vicarious coconspirator liability instructions. According to Randolph, his convictions for the specific intent offenses of first-degree murder, burglary, and first-degree kidnapping must be reversed because the instructions given allowed the jury to convict him of these offenses under the theories of aiding and abetting and vicarious coconspirator liability without proof of the mens rea required in Sharma v. State[2] and Bolden v. State.[3] Sharma was decided after Randolph's judgment of

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[1]Randolph v. State, 117 Nev. 970, 36 P.3d 424 (2001).

[2]118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (holding that "in order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime").

[3]121 Nev. 908, 923, 124 P.3d 191, 200-01 (2005) (concluding that to hold a defendant liable for a specific intent crime under a theory of vicarious coconspirator liability, the prosecution must show that he possessed the requisite statutory intent).

conviction was final.[4] Recently, in Mitchell v. State, this court held that Sharma was a clarification of the law and therefore applied to cases that were final before it was decided.[5] Consequently, the underlying reasoning in Sharma existed at the time of Randolph's trial.[6] Bolden was also decided after Randolph's convictions were final, and we have not yet addressed whether it has retroactive application; however, we need not do so here to resolve Randolph's claim.

Here, counsel exercised a tactical decision, with Randolph's express approval, to concede guilt to felony murder and argue that Randolph's cohort, Tyrone Garner,[7] shot Lokken.[8] Consequently, counsel were not concerned with Randolph's potential liability for first-degree murder under vicarious coconspirator liability or aiding and abetting

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[4]See Ennis v. State, 122 Nev. 694, 699, 137 P.3d 1095, 1099 (2006) ("A conviction is final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari [to the Supreme Court] has elapsed or a timely filed petition has been finally denied.'") (quoting Caspari v. Bohlen, 510 U.S. 383, 390 (1994)).

[5]122 Nev. ___, 149 P.3d 33 (2006).

[6]See Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (stating that if a decision merely construes and clarifies an existing rule rather than announce a new rule, this court's interpretation is merely a restatement of existing law).

[7]Garner was tried separately, convicted, and sentenced to life in prison with the possibility of parole and multiple definite terms of imprisonment. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000), overruled in part by Sharma, 118 Nev. 684, 56 P.3d 368 (2002).

[8]The record indicates that the trial court canvassed Randolph regarding his concession of guilt to felony murder.

theories. Moreover, even assuming counsel should have objected to the challenged instructions for the reasons articulated in Sharma and Bolden, Randolph failed to demonstrate a reasonable probability that the outcome of the trial would have been different in light of his admission of guilt to felony murder.[9]

The same analysis applies to Randolph's claim that his burglary conviction should be reversed due to counsel's failure to object to the aiding and abetting and vicarious coconspirator liability instructions on the principals set forth in Sharma and Bolden. In addition to robbery, burglary was alleged as a predicate felony to the State's felony murder theory. As Randolph conceded his guilt to felony murder, he admitted his guilt to burglary. We conclude that Randolph failed to demonstrate that his counsel were ineffective for failing to object to the challenged instructions on the grounds Randolph now desires.[10] Accordingly, the district court did not err in denying this claim.

Respecting the specific intent offense of kidnapping, although it was not alleged as a predicate felony for felony murder, the evidence of Randolph's guilt as the direct perpetrator of this charge was overwhelming. We are convinced that any error in the aiding and abetting instruction was harmless beyond a reasonable doubt under Sharma. Additionally, respecting Randolph's challenge to the vicarious coconspirator liability instruction, we are convinced that Randolph's first-degree kidnapping conviction satisfies the "absolute certainty" test set

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[9]See Strickland v. Washington, 466 U.S. 668 (1984).

[10]Id.

forth in Bolden. Therefore, even if counsel had objected to the challenged instructions, Randolph failed to demonstrate prejudice.[11] Accordingly, we conclude that the district court properly denied this claim.[12]

Randolph next argues that the district court erred in denying his claim that his trial counsel were ineffective for failing to adequately investigate potential mistakes committed by the Las Vegas Metropolitan Police Department during its investigation. Specifically, he contends that although the police found the clothing and shoes Garner wore on the night of the crimes, these items were never impounded or tested for blood, DNA, or gun residue. According to Randolph, had counsel questioned the police investigators about their decision not to impound or test the clothing or had counsel conducted their own investigation, these items would have shown that he did not shoot Lokken. Testimony elicited during the evidentiary hearing showed that the defense theory at trial was that Garner, not Randolph, shot the victim and thus Garner's clothing would show blood splatter. Counsel had no information that would have led to the discovery of the clothing, and if the clothing been found and tested negative for blood, the defense's theory would have been destroyed. Further, police investigators were cross-examined at trial regarding any

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[11]Id.

[12]To the extent Randolph raises his alleged instructional errors as direct appeal claims, these claims are procedurally barred, and we conclude that he failed to demonstrate good cause and prejudice to overcome the procedural default rules. Therefore, the district court did not err in denying them. See NRS 34.810(1)(b)(2), (3).

deficiencies in the investigation. Moreover, the evidence adduced at trial was inconsistent with Randolph's claim that Garner shot the victim. We conclude that Randolph failed to show that his counsel were deficient in this regard.[13] Accordingly, the district court did not err is denying this claim.

Randolph further contends that the district court erred in denying his claims that his trial counsel were ineffective for: not requesting a competency determination based on medication prescribed to him; failing to file appropriate motions requesting exculpatory evidence; not filing appropriate motions concerning a witness Randolph alleged was induced to testify in exchange for money; improperly conceding his guilt to felony murder; and for being "not well-versed in the law, perhaps forcing any ill-advised and unconstitutional concessions." However, Randolph did not describe these claims in detail or explain any prejudice from alleged deficiencies. Consequently, the district court properly denied them.

Randolph next states that, during the evidentiary hearing on his petition, post-conviction counsel mishandled the questioning of trial and appellate counsel on the issue of Randolph's competency. However, claims respecting the ineffective assistance of post-conviction counsel are inappropriate in the instant proceeding. As this is a death penalty case and Randolph's first post-conviction habeas proceeding, he is entitled to the appointment of counsel and the effective assistance of that counsel both in the proceedings below and in this appeal.[14] Randolph may

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[13]See Strickland, 466 U.S. 668.

[14]See NRS 34.820; Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247,253 (1997).

appropriately raise claims of ineffective assistance in a second habeas petition filed in the district court.[15] Accordingly, we decline to consider these claims at this time.

Finally, our initial review of this case indicated that our decision in McConnell v. State[16] invalidated two of Randolph's three aggravating circumstances found by the jury. Consequently, we directed the parties to file supplemental briefs addressing the matter. Randolph argues that because his first-degree murder conviction is invalid pursuant to Sharma and Bolden, penalty hearing matters are irrelevant. The State contends that although McConnell requires this court to strike two aggravating circumstances, the error is harmless beyond a reasonable doubt, and this court may nonetheless uphold Randolph's death sentence.

The State advanced multiple theories of murder at trial, including that the murder was committed during the commission of a burglary or robbery. As previously noted, Randolph conceded that he was guilty of felony murder. The verdict is silent as to which theory or theories the jury relied on to find Randolph guilty of Lokken's murder. Two of the three aggravating circumstances found were that the murder was committed during the commission of a burglary and a robbery. Under McConnell, these two aggravating circumstances must be stricken. And of course, as we announced in Bejarano v. State,[17] McConnell operates

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[15]McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996).

[16]120 Nev. 1043, 102 P.3d 606 (2004).

[17]122 Nev. ___, 146 P.3d 265 (2006).

retroactively and therefore applies to Randolph's case even though his convictions are final.

We may uphold a death sentence based in part on an invalid aggravator either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review.[18] After striking the robbery and burglary aggravating circumstances, one remains–that the murder was committed to avoid or prevent a lawful arrest.[19] We conclude that the preventing-a-lawful-arrest aggravating circumstance is significant considering Lokken's lack of resistance during the robbery and the fact that she would have recognized Randolph as a recently-fired employee of the bar. And although Randolph's evidence of cocaine addiction was credible, and he expressed remorse for the killing, this evidence is not sufficiently persuasive to outweigh the remaining aggravating circumstance. Therefore, we conclude beyond a reasonable doubt that a jury would have found Randolph death eligible. Further, the manner in which Randolph chose to murder Lokken was remarkably brutal and senseless. He handcuffed Lokken's hands behind her back, forced her into a cooler and to get on her knees, and shot her once in her face and then again after she had fallen to the ground. Additionally, as noted above, Randolph used his position as a former employee to gain entry to the bar through a locked door. Therefore, we also conclude beyond a reasonable doubt that the jury would have imposed death even in the absence of the erroneous aggravating circumstance.

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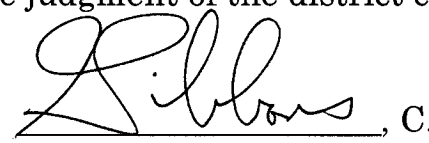
[18]Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

[19]See NRS 200.033(5).

Having reviewed the record and Randolph's claims,[20] we conclude that the district court did not err in denying his post-conviction petition for a writ of habeas corpus, and we

ORDER the judgment of the district court AFFIRMED.[21]



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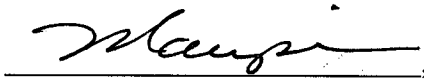
Gibbons



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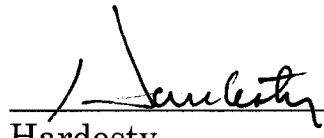
Maupin



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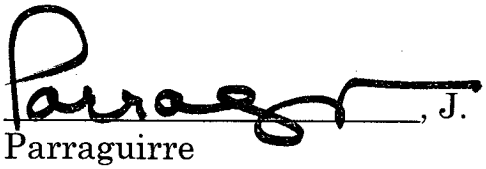

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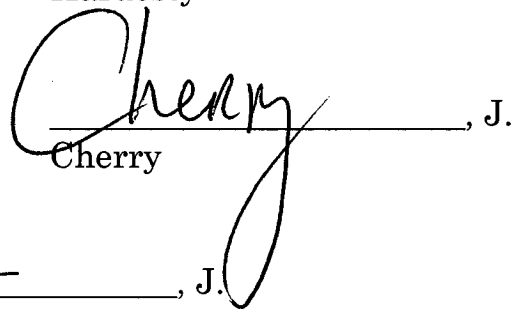

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Federal Public Defender/Las Vegas
James A. Colin
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[20]Randolph's appellate counsel cited to the trial transcript several times in his opening brief but provided no copy of the transcript in the joint appendix. We remind counsel that NRAP 10(b) provides: "For the purposes of appeal, the parties shall submit to the Supreme Court copies of the portions of the trial court record to be used on appeal, including previously prepared transcripts, as appendices to their briefs."

[21]The Honorable Michael L. Douglas, Justice, did not participate in the decision in this matter.