IN THE SUPREME COURT OF THE STATE OF NEVADA

LATISHA MARIE BABB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49929

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On May 7, 1999, the district court convicted appellant Latisha Marie Babb, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The district court sentenced Babb to serve two consecutive terms of life in prison without the possibility of parole and two consecutive prison terms of 72 to 180 months, to be served concurrently with the life sentences. This court affirmed Babb's conviction on direct appeal.[1] The remittitur issued on August 7, 2001.

On December 4, 2001, Babb filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Babb, and counsel filed a supplement to the petition. The State filed a motion for partial dismissal,

[1]Babb v. State, Docket No. 34195 (Order of Affirmance, July 10, 2001).

which the district court granted, dismissing all but one of Babb's claims. After conducting an evidentiary hearing on the remaining claim, the district court denied Babb's petition. This court affirmed that decision on appeal.[2]

On March 27, 2006, Babb filed a second post-conviction petition for a writ of habeas corpus with the assistance of counsel. Babb supplemented the petition on February 9, 2007. The State moved to dismiss the petition as untimely and successive. The district court granted the motion in part but also granted Babb leave to file a second supplement to the petition to address a new claim based on this court's decision in McConnell v. State.[3] Babb then filed a second supplement to the petition, arguing that she was entitled to relief based on McConnell. The district court heard argument and entered an order denying the second supplement. This appeal followed.

On appeal, Babb primarily focuses on the substantive merits of the claims raised in her petition and supplements to the petition.[4] She addresses the procedural bars on which the district court dismissed the petition in rather cursory fashion. To the degree that Babb challenges the district court's conclusion that the petition was procedurally barred, she appears to argue that she demonstrated good cause to excuse her procedural default on three grounds: (1) ineffective assistance of post-

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[2]Babb v. State, No. 42886 (Order of Affirmance, November 4, 2004).

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

[4]Because the petition is procedurally barred, we have not considered and do not address the substantive merits of the claims raised in the petition and argued on appeal.

conviction counsel in connection with the first habeas petition, (2) Babb's inexperience in the law and her youth, and (3) due process. We conclude that these arguments lack merit.

First, Babb was not entitled to effective assistance of post-conviction counsel because appointment of that counsel was not mandated by statute and she therefore cannot rely on ineffective assistance of post-conviction counsel to establish good cause to excuse her procedural defaults.[5] Second, Babb's lack of experience in the law and her youth do not constitute good cause to excuse her procedural defaults as they are not impediments external to the defense.[6] Finally, there is no broad "due process" exception to the procedural bars. To overcome the procedural bars, Babb had to demonstrate good cause and actual prejudice[7] or a fundamental miscarriage of justice.[8] Babb has not made any of the required showings to overcome the procedural bars.

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[5]Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996); NRS 34.750 (providing for discretionary appointment of post-conviction counsel).

[6]See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel . . . .'" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (organic brain damage and limited intelligence not sufficient cause to excuse procedural default).

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

[8]Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

To the extent that Babb demonstrated sufficient cause for the delay in raising her McConnell claim because the legal basis for the claim was not reasonably available to counsel, we conclude that the district court properly denied the claim because it lacks merit. In McConnell, we held that an aggravating circumstance in a capital prosecution cannot be based on the same felony upon which a felony murder is predicated.[9] The remedy for a violation of McConnell is to strike the felony aggravating circumstance and reweigh or conduct harmless error analysis to determine whether there is a reasonable probability that the jury would not have imposed death absent the invalid aggravating circumstance.[10] Here, Babb was not sentenced to death. And we are not convinced that a McConnell violation prejudices a defendant, such as Babb, who does not receive a death sentence.[11] But even if the same reweighing or harmless error

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[9]120 Nev. at 1069, 102 P.3d at 624.

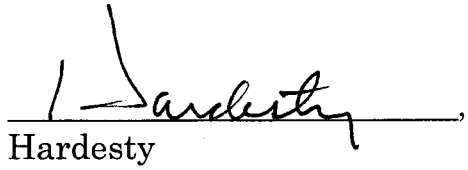
[10]See Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006); Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006).

[11]Cf. Phenix v. State, 114 Nev. 116, 954 P.2d 739 (1998) (holding that defendant not sentenced to death cannot, on appeal, claim he was prejudiced by jury instructions on aggravating circumstances); Schoels v. State, 114 Nev. 981, 990, 966 P.2d 735, 741 (1998) (declining to consider challenges to State's notice of intent to seek death penalty and to allegation of aggravating circumstance where defendant not sentenced to death); see also Lockhart v. McCree, 476 U.S. 162, 166, 173-84 (1986) (assuming death qualified juries are more prone to convict than non-death qualified juries, and holding that death qualification of jury did not violate defendant's rights where prosecution sought death penalty and jury convicted defendant but rejected death penalty); Buchanan v. Kentucky, 483 U.S. 402, 414-20 (1987) (where one codefendant is subject to death penalty and other codefendant is not, the latter cannot assert prejudice based on death qualified jury).

analysis is warranted when the defendant was not sentenced to death, we further are not convinced that in the absence of the single felony aggravating circumstance found by the jury, there is a reasonable probability that the jury would not have sentenced Babb to life in prison without the possibility of parole. Accordingly, Babb's McConnell claim lacks merit.

Having considered Babb's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



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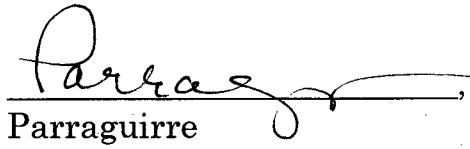
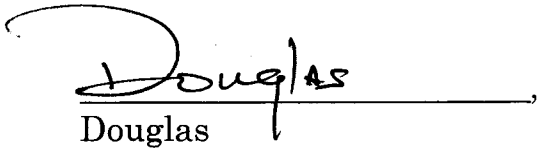


_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Watt, Tieder, Hoffar & Fitzgerald, LLP
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk