

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50447

FILED

OCT 20 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant William Lester Witter's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Witter's convictions are the result of an incident in which he stabbed and then tried to sexually assault Kathryn Cox in a Las Vegas parking garage. When Cox's husband, James, arrived to pick her up and interrupted the attack, Witter stabbed him 16 times, killing him. Witter was convicted by a jury of first-degree murder, attempted sexual assault, attempted murder, and burglary, and was sentenced to death. This court affirmed his convictions and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

On October 27, 1997, Witter filed a post-conviction petition for a writ of habeas corpus. Following an evidentiary hearing, the district court denied the petition. This court affirmed. Witter v. State, Docket No. 36927 (Order of Affirmance, August 10, 2001).

On February 14, 2007, Witter filed a second post-conviction petition for a writ of habeas corpus. The State sought to dismiss the petition as procedurally barred. After hearing argument, the district court found the petition procedurally barred and dismissed all of Witter's claims except his challenge to the validity of two felony aggravators, which was denied on the merits. This appeal followed.

On appeal, Witter claims that the district court erred in upholding his death sentence despite the invalidation of two aggravating circumstances pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and in dismissing his remaining claims. We conclude that the district court did not err in denying Witter's petition.

McConnell claim

Witter argues that the district court erred by denying his claim that the jury's consideration of two invalid felony aggravators resulted in prejudice. In sentencing Witter to death, the jury found four aggravating circumstances, three of which remain:¹ (1) Witter has a previous conviction for a violent felony, (2) the murder was committed while Witter was engaged in the commission of a burglary, and (3) the murder was committed while Witter was engaged in the commission of a sexual assault. In his petition below, Witter claimed that his death sentence should be reversed because the two felony aggravators were invalid pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The district court found that the claim was

¹The aggravator for a murder committed to avoid or prevent a lawful arrest was stricken on direct appeal. Witter, 112 Nev. at 929, 921 P.2d at 900.

procedurally barred pursuant to NRS 34.726, 34.800, and 34.810, but that Witter had good cause for his delay. Accordingly, the district court struck the two felony aggravators. The district court reweighed the remaining aggravating circumstance against the mitigating evidence and concluded that the error was harmless. Witter now argues that the district court erred in upholding the death sentence.

Witter's petition was untimely and successive and the State specifically pleaded laches in a motion to dismiss. See NRS 34.726; NRS 34.810(2); NRS 34.800(2). Moreover, his McConnell claim was barred because it was appropriate for direct appeal. See NRS 34.810(1)(b)(2). Thus, in order for his claim to be considered on its merits, Witter had to demonstrate both good cause for failing to raise the claim earlier and actual prejudice. NRS 34.726; NRS 34.810(1), (3).

There is no dispute that Witter has good cause to raise his McConnell claim in an untimely and successive petition. See Bejarano v. State, 122 Nev. 1066, 1072, 1078, 146 P.3d 265, 270, 274 (2006) (explaining that “[g]ood cause . . . may be established where the factual or legal basis for the claim was not reasonably available,” and holding that McConnell is retroactive). However, to overcome the procedural bars Witter also had to demonstrate actual prejudice. Prejudice is shown if “there is a reasonable doubt that the jury would have returned a sentence of death absent any stricken aggravating circumstances.” Id. at 1073, 146 P.3d at 270-71.

This court must therefore decide whether it is beyond a reasonable doubt both that the jury would have found Witter death eligible and that the jury would have selected the death penalty absent the erroneous aggravating circumstances. If the court cannot make both

determinations, then a new penalty hearing is required. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1081-82, 146 P.3d at 276; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

The remaining aggravator is based on Witter's 1986 conviction for assault with a deadly weapon resulting in great bodily injury. The evidence at the penalty hearing showed that after returning from a night out, Witter's ex-girlfriend, Gina Martin, and David Rumsey were talking when they heard glass breaking in the carport. Witter was outside screaming and breaking the glass out of the car. When Rumsey stated that he did not want to fight, Witter stabbed him in the midsection with a butcher knife. Rumsey ran into the house, and Witter chased him. Rumsey was able to lock himself in the master bedroom until paramedics and police arrived. Witter was arrested and taken to the jail for booking, during which he told police that he "wanted to kill Rumsey and was sorry that he didn't do it." Rumsey spent four weeks in the hospital recovering from numerous cuts to his intestines and bowels. Witter was charged with attempted murder and assault with a deadly weapon and pleaded guilty to the lesser offense.

As mitigating evidence, several members of Witter's family testified that Witter's mother was an alcoholic drug user, his father was a convicted felon with drug and alcohol problems, and he suffered physical abuse as a child. Evidence was presented that Witter began abusing drugs and alcohol at the age of 12. In addition, psychologist Lewis Etcoff testified that (1) Witter had an IQ of 83 (which was "low average"), (2) he had a history of drug abuse and was alcohol and drug dependent, (3) Witter's family was dysfunctional, and (4) on one occasion Witter's uncle

had fondled Witter's genitalia. Dr. Etkoff diagnosed Witter with Anti-social Personality Disorder and, because he had no other evidence to support his conclusions, he only provisionally diagnosed Witter with Attention Deficit Hyperactivity Disorder and Developmental Arithmetic Disorder. Finally, Witter's sister testified that on the night of the murder Witter had just been told by his girlfriend that she had obtained an abortion of the child they were expecting. Dr. Etkoff testified that Witter had told him the same thing.²

We conclude beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances. The remaining aggravator is compelling and involved a violent attack in which Witter stabbed the victim with a seven-inch butcher knife and cut the victim's bowels in ten places, almost killing him. On the other hand, the mitigating circumstances—that Witter: (1) was under the influence of an extreme mental or emotional disturbance, (2) came from a dysfunctional family with alcohol and substance abuse and

²Contrary to Witter's arguments, the reweighing analysis is limited to the trial record. See Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006); Archanian v. State, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (2006); see also Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (stating that this court "elected to explicitly reweigh the aggravating and mitigating circumstances based upon our independent review of the trial record"). In Haberstroh v. State, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003), this court emphasized that its reweighing did not involve factual findings "other than those of the jury at the original penalty hearing." Because the reweighing analysis asks whether it is "clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death," Bejarano, 122 Nev. at 1081, 146 P.3d at 276, the analysis, by its very nature, addresses the evidence considered by the jury.

psychological issues, (3) had below average intelligence, (4) had possible Attention Deficit Hyperactivity Disorder, (5) had possible Antisocial Personality Disorder, and (6) had possible Developmental Arithmetic Disorder—are not particularly compelling.³

We further conclude beyond a reasonable doubt that the jury would have selected the death penalty. Evidence was presented of Witter's numerous misdemeanor convictions for being drunk in public, resisting arrest, vandalism, disturbing the peace, DUI, and hit and run, as well as his arrests for arson, resisting arrest, fighting, drunk driving, burglary, vandalism, and various drug offenses. Evidence was also presented that Witter had been incarcerated as a juvenile for rape. In addition, the State presented evidence that Witter was affiliated with a gang, had committed acts of domestic violence, and that while in jail he had been found with a shank. In conjunction with the victim impact testimony of James Cox's family, including the testimony of his widow who had personally witnessed and survived the attack, we conclude that it is beyond a reasonable doubt that the jury would have selected the death penalty.

Accordingly, the district court did not err in denying Witter relief because he failed to demonstrate actual prejudice and thus his

³Witter argues that because the jury that sentenced him to death did not use a special verdict form, there is no way of knowing which mitigators the jury considered and therefore reweighing is improper because it would involve fact-finding. Witter's claim is without merit. The district court considered every mitigating circumstance for which Witter offered evidence at trial, and we have done the same.

McConnell claim was procedurally barred.⁴ See Bejarano, 122 Nev. at 1073, 146 P.3d at 270-71.

Remaining claims

In addition to the claim addressed above, Witter's petition included claims that (1) the prosecution committed misconduct by withholding evidence and presenting false testimony, (2) trial counsel was ineffective for failing to investigate the mitigating and aggravating evidence, (3) the prosecution exercised its peremptory challenges in a racially discriminatory manner, (4) the trial court erred by limiting voir dire questioning, (5) he was prejudiced by the disclosure of his mental health records, (6) the trial court erroneously instructed the jury on reasonable doubt, mitigating evidence, and aggravating evidence, (7) the State improperly introduced his juvenile records, (8) he was prejudiced by a "death-qualified" jury, (9) the trial court improperly admitted victim impact evidence, (10) the trial court made improper comments about the Bible during voir dire, (11) he was prejudiced by an elected judiciary, (12) the conditions on death row violate the Eighth Amendment, (13) the death penalty is invalid under international law, (14) Nevada's capital punishment system is arbitrary and capricious, (15) the death penalty

⁴In its written order, the district court denied the State's motion to dismiss Witter's McConnell claim as procedurally barred. This ruling was at odds with the district court's later determination that absent the stricken aggravators, the jury would still have imposed a sentence of death. Because there was no reasonable doubt that the jury would have found Witter death eligible and returned a sentence of death absent the stricken aggravating circumstances, Witter failed to show prejudice and his claim was procedurally barred.

violates the Eighth Amendment, (16) he was prejudiced by numerous trial errors and instances of ineffective assistance of counsel, and (17) Nevada's lethal injection protocol is unconstitutional.⁵

Witter's petition was untimely and successive. See NRS 34.726; 34.810(2). Accordingly, in order for Witter's claims to be considered on their merits, he had to demonstrate both good cause for his delay and for failing to raise the claims previously and actual prejudice. NRS 34.726(1); NRS 34.810(1), (3). In addition, many of his claims had already been resolved by this court and were barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Moreover, because Witter's petition was filed more than 5 years after the resolution of his prior petition and the State specifically pleaded laches in a motion to dismiss, Witter had to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Witter claims that he demonstrated good cause to overcome the procedural bars by showing that: (1) his counsel was ineffective, (2) the procedural bars are discretionary and are applied inconsistently, (3) the delay in filing was not his fault because he was represented by counsel, (4) the State withheld evidence, (5) the legal basis for two claims was not previously available, and (6) overcoming the procedural bars to one claim exempts an entire petition from the procedural bars, and Witter also

⁵To the extent that Witter challenges the specific lethal injection protocol used by the Nevada Department of Corrections, Witter's claim is not cognizable in a post-conviction petition for a writ of habeas corpus. McConnell v. State, 125 Nev. ___, ___, 212 P.3d 307, 311 (2009).

claims that the district court erred in applying the doctrine of the law of the case. Witter's claims are without merit.

Ineffective assistance of counsel

Witter claims that the ineffective assistance of trial, appellate, and post-conviction counsel provides him with good cause to overcome the procedural bars. While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), this principle is not unfettered. In Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), this court explained that "to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." See also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that procedurally defaulted claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim).

Other than to argue that trial and appellate counsel committed tactical errors during their representation, Witter fails to explain how any of these alleged deficiencies precluded him from filing his second post-conviction petition until ten years after resolution of his direct appeal. And while his post-conviction counsel claims were not available until this court resolved his first post-conviction appeal in August of 2001, Witter fails to explain the additional delay of five and a half years before filing his second post-conviction petition. Therefore, the district court did not err in denying Witter's claim of good cause based on the ineffective assistance of counsel.

Discretion and inconsistent application of the procedural bars

Witter claims that application of the procedural bars to his petition violates due process because the bars are discretionary and are inconsistently applied.

As to Witter's claim that the procedural bars are discretionary, this court has established that procedural default rules are mandatory. See Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001). In fact, in State v. Dist. Ct. (Riker), this court expressly stated that Riker's claim that this court has asserted discretion to disregard the procedural bars was "a frivolous claim." 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005). Therefore, Witter's claim is without merit.

As to Witter's proposition that the procedural bars cannot be applied to him because this court applies them inconsistently, this court has previously rejected similar claims. See Riker, 121 Nev. at 236, 112 P.3d at 1077.

Witter's argument that Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006), is evidence of this court's inconsistency is without merit. Although the instructional error that we addressed in that opinion was procedurally barred, see NRS 34.810(1)(b)(2), Witter's claim fails because the instructional error addressed sua sponte in that case was related to this court's reweighing process after striking several McConnell aggravators. The issue was not discussed outside of that context. The circumstances in Rippo resulted because the erroneous jury instruction given in that case had direct relevance to this court's reweighing analysis, and those unique circumstances do not support Witter's contention that this court inconsistently applies the procedural bars.

“Fault” under NRS 34.726

Witter claims that the delay in filing was not his “fault” under NRS 34.726 because he was represented by counsel during the proceedings. Witter’s claim is without merit. By the very nature of the attorney-client relationship, counsel operates on behalf and in place of a defendant. Accepting Witter’s interpretation ascribes a meaning to the statute not contemplated by the Legislature. This court has interpreted NRS 34.726(1) as requiring “a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the control of the defense team as a whole, not solely the defendant. Counsel’s actions are routinely imputed to a defendant. Considering the nature and purpose of legal representation, we conclude that Witter’s view that NRS 34.726(1) contemplates only delay personally caused by a petitioner is untenable.

Moreover, even if this court accepted Witter’s interpretation of NRS 34.726(1), he waited more than five years after the district court denied his first habeas petition to file the instant petition, and he offers no explanation for the delay.

Withholding of evidence

Witter claims he has good cause to raise two of his claims now because the prosecution withheld evidence that prevented him from raising them earlier. Specifically, Witter refers to the prosecutor’s handwritten notes taken during trial and alleged evidence that he was not a gang member. Having reviewed the record on appeal and carefully

considered Witter's claims in this regard, we conclude that Witter's claims are wholly without merit.

Legal basis not previously available

Witter claims that he has good cause to raise two claims untimely because the legal basis for those claims was not previously available. Specifically, he refers to the United States Supreme Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002). Those cases, however, do not support the propositions for which Witter cites them, and both opinions were issued more than one year prior to the filing of his petition. Therefore, these two cases do not provide good cause.

Application of procedural bars to the petition as a whole

Witter argues that the district court erred in dismissing his remaining claims because he had good cause and prejudice to overcome the procedural bars to his McConnell claim. Witter claims that the procedural bars apply only to a petition as a whole, and should not be applied to individual claims. Witter's claim is without merit for two reasons.

First, Witter has not overcome the procedural bars to any of his claims, including his McConnell claim. Thus, all of his claims are procedurally barred.

Second, Witter incorrectly interprets Nevada case law in arriving at his conclusion. He cites State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006), for the proposition that procedural bars address a habeas petition as a whole and should not be applied to each individual claim. However, the issue in Powell was whether a supplemental pleading filed two years after the original petition was barred as untimely despite the

fact that the original petition was timely filed. Id. at 755-59, 138 P.3d at 456-58. This court in Powell determined that NRS 34.726 and NRS 34.800 apply to petitions and not to supplemental claims, and concluded that Powell's supplement was not time barred under NRS 34.726. Id. at 757-59, 138 P.3d at 457-58. Nothing in Powell suggests that overcoming a procedural bar to an individual claim excuses the procedural bar for the entire petition.

Witter also cites State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003), and argues that in that case this court held an entire habeas petition exempted from the procedural bars because of one meritorious Brady claim. Witter's claims are belied by the plain language of that opinion. In Bennett this court specifically stated that some of the claims were barred by the doctrine of the law of the case and that others were barred by NRS 34.810 "because Bennett has not demonstrated good cause and prejudice for failing to raise them earlier." 119 Nev. at 605-06, 81 P.3d at 12.

This court has not concluded that where a petition is untimely and barred by laches, a showing of good cause and prejudice sufficient to overcome the procedural bars to a single claim operates to render all of the additional claims timely. Such a conclusion is untenable and Witter's claim in this regard is wholly without merit.

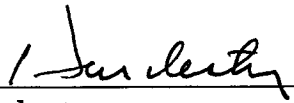
Doctrine of the law of the case


Witter argues that the district court erred in finding several of his claims barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). The district court's order did not specify which claims were denied on that basis. However, the


argument provides Witter no relief because all of his claims are procedurally barred.

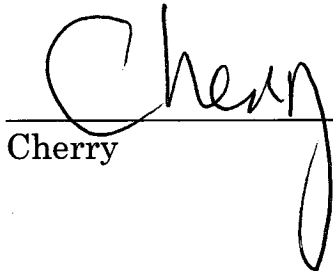
Having considered Witter's claims and concluded that they lack merit, we

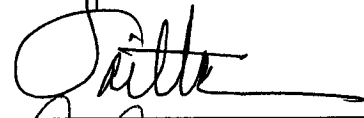
ORDER the judgment of the district court AFFIRMED.

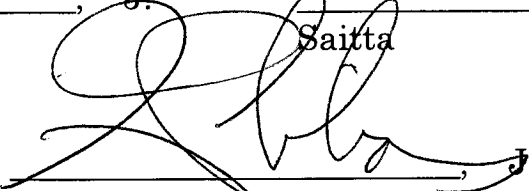

_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta



Gibbons

cc: Hon. Valorie Vega, District Judge
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