IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK LAVELLE PAINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50460

FILED

OCT 20 2009

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant Frederick Paine's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

FACTUAL AND PROCEDURAL HISTORY

On two occasions in January 1990, Paine and his accomplice Marvin Doleman hired taxicabs and robbed the drivers. The first time, Paine shot driver William Walker in the head, but Walker survived. The second time, Paine shot driver Kenneth Marcum in the head, killing him. When Paine and Doleman were arrested, Paine confessed to the crimes.

Paine was charged with first-degree murder, attempted murder with the use of a deadly weapon, and two counts of robbery with the use of a deadly weapon and pleaded guilty to all four counts. At Paine's penalty hearing, a three-judge panel found two aggravating circumstances—the murder was committed during the course of a robbery and was "at random and without apparent motivation"—and one mitigating circumstance—Paine was 19 years old when the murder was

committed—and sentenced Paine to death. However, because it appeared that one member of the panel had fallen asleep during the proceedings, this court vacated Paine's sentence. Paine v. State, 107 Nev. 998, 1001, 823 P.2d 281, 283 (1991), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002).

A second penalty hearing was commenced before a new three-judge panel. At the conclusion of the hearing, the panel found the same two aggravating circumstances but found two additional mitigating circumstances: (1) Paine was raised in a dysfunctional family setting and (2) he had consistently confessed to his crimes. The panel concluded that the mitigators did not outweigh the aggravators and again imposed a sentence of death. This court affirmed. Paine v. State, 110 Nev. 609, 621, 877 P.2d 1025, 1032 (1994), overruled in part by Leslie, 118 Nev. 773, 59 P.3d 440.

On March 1, 1996, Paine filed his first post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition, and this court affirmed. Paine v. State, Docket No. 34459 (Order Dismissing Appeal, July 24, 2000).

On March 22, 2007, Paine filed a second post-conviction petition for a writ of habeas corpus. The State filed a motion to dismiss. Following oral argument, the district court found that the petition was untimely, successive, and barred by laches, and granted the State's motion. This appeal followed.

DISCUSSION

We conclude that the district court did not err in dismissing Paine's petition as procedurally barred with the exception of two claims related to the validity of the aggravating circumstances.

Paine claims that the robbery aggravator is invalid pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and the at-random aggravator is invalid pursuant to Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002), and therefore the district court's refusal to consider his challenges to these two aggravating circumstances resulted in a fundamental miscarriage of justice because he is not eligible for the death penalty.[1] We agree.

Paine's petition is untimely and successive. See NRS 34.726; NRS 34.810(1)(b)(2). Thus, in order for his claims to be considered on their merits, Paine must demonstrate both good cause for failing to raise his claims earlier and actual prejudice. NRS 34.726; NRS 34.810(1), (3). Furthermore, Paine's delay in filing the instant petition was more than five years, and the State specifically pleaded laches in a motion to dismiss. Thus, Paine's petition is subject to dismissal unless he can overcome the presumption of prejudice to the State. See NRS 34.800.

"This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a 'fundamental miscarriage of justice.'" Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)). Likewise, a fundamental miscarriage of justice

---

[1]Paine also contends that the district court erred in dismissing his petition on jurisdictional grounds. Although during the hearing the district court referred to the State's motion as a motion to dismiss on "jurisdictional" grounds, the district court's written order and comments during the hearing considered in context reveal that it did not decline to exercise its jurisdiction but determined that Paine's petition was procedurally barred.

overcomes the presumption of prejudice to the State based on laches. See NRS 34.800(1)(b); Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). In this context, the fundamental miscarriage of justice standard is met if Paine "makes a colorable showing he is . . . ineligible for the death penalty." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Because we conclude below that both remaining aggravators are invalid, application of the procedural bars to Paine's challenges to those aggravators would result in a fundamental miscarriage of justice as there are no valid aggravators to support his eligibility for the death penalty, and we therefore need not determine whether Paine demonstrated good cause to excuse his procedural default.[2] Accordingly, the district court erred in dismissing Paine's challenges to the robbery and at-random aggravating circumstances.

Robbery aggravator

In McConnell, this court held that a felony cannot be used both to establish first-degree murder and to aggravate the same murder to capital status. 120 Nev. at 1069, 102 P.23d at 624. McConnell applies when "the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict." Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d 265, 274 (2006). See also Archanian v. State, 122 Nev. 1019, 1039, 145 P.3d 1008, 1022-23 (2006). Paine pleaded guilty to first-degree murder, but unlike McConnell there is no clear indication in the

---

[2]Based on the nature of Paine's claims, we likewise conclude that he overcame the presumption that the State was prejudiced in responding to his petition. See NRS 34.800(1)(a).

record that he pleaded guilty to willful, deliberate, and premeditated murder. Moreover, because McConnell has retroactive application, see Bejarano, 122 Nev. at 1078, 146 P.3d at 274, the ruling of that case applies to Paine even though his convictions and sentence were final before McConnell was decided. Accordingly, as the State conceded both in the district court and on appeal, the robbery aggravator is invalid.

The "at random and without apparent motive" aggravator

In Leslie, this court concluded that the "at random and without apparent motive" aggravator was intended for "situations where a killer selects his victim without a specific purpose or objective and his reasons for killing are not obvious or easily understood." 118 Nev. at 781, 59 P.3d at 445-46. Further, we found no evidence "that the Legislature intended the aggravator to apply to unnecessary killings in the course of a robbery." Id. at 781, 59 P.3d at 446. Thus, "[i]n order to use this aggravator, the State must show more than the defendant unnecessarily killed another in connection with a robbery." Id. at 781-82, 59 P.3d at 446.

This court's holding in Leslie was confirmed in State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). In Bennett, this court invalidated the "at random and without apparent motive" aggravator where the defendant had chosen his victim for the purpose of robbing her and had killed her in order to "complete the robbery and leave no witnesses." Id. at 598, 81 P.3d at 7. We concluded that the fact that Bennett had unnecessarily killed in connection with an attempted robbery was "insufficient to prove that the murder was committed at random and without apparent motive." Id.

Here, Paine's statements to the police as well as his testimony at the penalty hearing indicate that Paine shot the victim, at least in part,

to eliminate the only witness to the crime. Furthermore, this is not a situation where Paine chose his victim "without a specific purpose or objective." Leslie, 118 Nev. at 781, 59 P.3d at 445-46. The specific purpose was robbery. In light of this court's decisions in Leslie and Bennett, the evidence presented at Paine's second penalty hearing does not support the "at random and without apparent motive" aggravator. Moreover, the panel that sentenced Paine to death specifically relied on Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990), to support its conclusion. We expressly overruled that case in Leslie, 118 Nev. at 781, 59 P.3d at 446.[3] Therefore, the at-random aggravator was not properly applied to Paine and failure to consider the merits of this challenge to the aggravator would result in a fundamental miscarriage of justice. See Bennett, 119 Nev. at 597-98, 81 P.3d at 6-7.

CONCLUSION

Having reviewed the record on appeal and considered the oral and written arguments of the parties, we conclude that both aggravators found by the panel that sentenced Paine to death are invalid. Therefore, Paine is not eligible for the death penalty and his sentence of death must be vacated.[4]

---

[3]We also note that Paine twice challenged the at-random aggravator before Leslie was decided. Both times this court rejected his claims. Paine, 110 Nev. at 615-16, 877 P.2d at 1028-29; Paine, 107 Nev. at 999-1000, 823 P.2d at 282. This court's opinion in Leslie overruled both of those prior opinions.

[4]The appropriate remedy when all remaining aggravators have been stricken is a new penalty hearing. State v. Harte, 124 Nev. ___, ___, 194 P.3d 1263, 1267 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2431 (2009).

For the reasons set forth above, we reverse the district court's dismissal of Paine's challenges to the robbery and at-random aggravating circumstances and affirm in all other respects.[5] Accordingly, we

---

[5]Paine's petition below included 16 additional claims. Specifically, in addition to the two claims addressed above, Paine claimed that: (1) trial counsel was ineffective for failing to investigate and present mitigating evidence; (2) the district court erred in denying Paine's motion to withdraw his guilty plea; (3) he was deprived of mental health experts because he pleaded guilty and his penalty phase mental health expert failed to present supporting documentation; (4) the three-judge panel that sentenced him was unconstitutional because it was not randomly selected, it was biased, and it made findings of fact that should have been made by a jury; (5) one of the judges on the sentencing panel was biased; (6) the district court erroneously ruled that all three members of the panel had to agree on mitigating circumstances; (7) his sentence is invalid because Nevada has a "pervasive history of racial discrimination"; (8) he is ineligible for the death penalty because he suffers from Fetal Alcohol Spectrum Disorder; (9) execution by lethal injection violates the Eighth Amendment; (10) the conditions on Nevada's death row are exceedingly harsh and violate the Eighth Amendment; (11) his death sentence is invalid because the Nevada Supreme Court fails to conduct fair and adequate appellate review; (12) his death sentence is invalid because Nevada's capital punishment scheme operates in an arbitrary and capricious manner; (13) his conviction and sentence are unconstitutional because the proceedings under which he was convicted and sentenced were conducted before elected judges; (14) his appellate counsel was ineffective for failing to raise or "federalize" all available claims; (15) cumulative error rendered his conviction and sentence invalid; and (16) post-conviction counsel was ineffective for failing to raise all available claims in Paine's first petition. In light of our decision today, it is not necessary to consider Paine's claims related to the death penalty. Paine's remaining claims are procedurally barred, and we conclude that the district court did not err in dismissing them because Paine failed to demonstrate good cause and prejudice or a fundamental miscarriage of justice as to these claims. See NRS 34.726; NRS 34.800; NRS 34.810(1), (3); Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003)

continued on next page . . .

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.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. David B. Barker, 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

. . . continued

(holding that "a claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay").