

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WILLIAM SHERMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50653

**FILED**

**MAY 17 2010**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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; Valorie Vega, Judge.

Appellant Donald Sherman beat to death Dr. Lester Bauer, who was the father of Sherman's girlfriend, Dianne Bauer. The couple experienced a tumultuous relationship and by the time they permanently separated in late 1993 or early 1994, Dianne feared Sherman. During the first part of May 1994, she believed that her father's life was in danger from Sherman. On June 1, 1994, Dr. Bauer's body was discovered in his home in Las Vegas. A jury convicted Sherman of first-degree murder and associated burglary and robbery offenses and sentenced him to death. This court affirmed the judgment of conviction and death sentence. Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998).

In this appeal from a district court order denying his second post-conviction petition for a writ of habeas corpus, Sherman argues (1) the district court erred by denying his petition as procedurally barred without affording him discovery and conducting an evidentiary hearing and (2) the district court erred by denying his challenge to two felony aggravators pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606

(2004). Because Sherman failed to overcome applicable procedural bars, we conclude that the district court did not err by denying his post-conviction petition.

#### Application of procedural bars

Sherman contends that the district court erred by denying his post-conviction petition as procedurally barred without conducting an evidentiary hearing. Because he filed his petition approximately six years after this court's remittitur issued on his direct appeal, the petition was untimely under NRS 34.726. The petition was also successive and therefore procedurally barred pursuant to NRS 34.810(1)(b)(2). And because the State specifically pleaded laches, the petition was subject to dismissal under NRS 34.800. Sherman was entitled to an evidentiary hearing if he asserted specific allegations not belied by record and that, if true, would have entitled him to relief. See Nika v. State, 124 Nev. \_\_\_, \_\_\_, 198 P.3d 839, 858 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 414 (2009). As cause to overcome the procedural default rules, Sherman asserts two grounds—(1) he established good cause for his delay in filing his post-conviction petition and (2) this court's inconsistent application of procedural default rules precluded application of those rules to his petition.

#### Good cause

Sherman contends that he established good cause for his delay in filing the instant petition based on post-conviction counsel's ineffectiveness. His good-cause argument encompasses two main aspects: (1) the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), precluding the timely filing of his petition and (2) NRS 34.726 contains no express limitations period during which an otherwise

untimely petition must be filed after the discovery of evidence supporting claims of ineffective assistance of post-conviction counsel.<sup>1</sup>

Brady claim

Respecting Sherman's first good-cause argument, he contends that the district court erred by denying his claims of ineffective assistance of post-conviction counsel because the State's withholding of evidence in violation of Brady prevented him from discovering post-conviction counsel's ineffectiveness until shortly before he filed the instant petition. To support his contention, Sherman points to three categories of Brady evidence.

First, Sherman identifies as Brady material the following evidence related to Dianne: (1) evidence showing that Dr. Bauer intended to exclude Dianne from his estate and that Dianne was aware of her father's objective, (2) files from a police department in Washington purportedly revealing that Dianne intended to kill her father before he changed his will and that she testified falsely about calling the police department to warn officers that Dr. Bauer was in danger, (3) evidence showing Dianne was culpable in her father's death, and (4) the State did not correct Dianne's trial testimony regarding her involvement in her father's murder. However, we conclude that this evidence was either discoverable with the exercise of reasonable diligence, see Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997), or not material in that its absence did not cause prejudice, see State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

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<sup>1</sup>Although Sherman contends that his good-cause argument excuses the application of NRS 34.800 and NRS 34.810, he focuses his argument on NRS 34.726.

Second, Sherman contends that the State withheld Brady material related to two jailhouse informants and another prosecution witness and presented false testimony regarding these witnesses.

Sherman's claim regarding the jailhouse informants relates to evidence the State introduced in the penalty hearing concerning Sherman's plot to escape detention, which included the killing of two correctional officers, another individual, and one of the informants. In particular, Sherman contends that the State failed to disclose information related to the informants' criminal histories and benefits they received in exchange for their cooperation in the investigation of Sherman's escape plan. Although the State improperly withheld information concerning the informants' criminal histories, the disclosure of that information would not have altered the outcome of the penalty hearing in light of the overwhelming evidence supporting Sherman's involvement in planning his escape. As to the benefits the informants received, nothing in the documents Sherman submitted shows that any favorable treatment in the disposition of any pending criminal case against them was related to their cooperation in the investigation of Sherman's escape plot.

As to the prosecution witness, Sherman argues that the State withheld evidence concerning benefits she received related to the disposition of criminal charges, quashing of bench warrants, and sealing of criminal records. However, trial counsel cross-examined her regarding benefits she received after becoming a prosecution witness, including that the prosecutors assisted her in quashing a warrant and securing her release from jail on her own recognizance on unrelated charges. As to Sherman's claim related to the sealing of records, nothing in his submissions clearly indicates that the witness' criminal records were sealed or, if they were, that it was a result of her assistance in Sherman's prosecution.

Third, Sherman contends that the State withheld Brady material regarding his prior murder conviction in Idaho that would have shown his diminished culpability in that murder relative to his co-defendant, who was older and more criminally sophisticated. Even assuming any improper withholding of evidence in this regard, Sherman failed to demonstrate prejudice considering he was the individual who shot the victim three times during a robbery.

Having considered Sherman's arguments and submissions, we conclude that he failed to demonstrate that his Brady claim excused applicable procedural default rules. Therefore, the district court did not err by summarily denying the petition on this basis.

Application of NRS 34.726(1)

Sherman argues that the district court erred by denying his claims of ineffective assistance of post-conviction counsel as procedurally barred because NRS 34.726 contains no express time period during which an otherwise untimely petition must be filed after the discovery of evidence supporting claims of ineffective assistance of post-conviction counsel, other than the delay must not be the petitioner's fault.<sup>2</sup> He suggests that the statute's silence on this matter means that no such time limit exists. However, this court has explained that good cause may be satisfied by a showing that an impediment external to the defense precluded compliance with procedural default rules—for example, the factual or legal basis for a claim was not reasonably available to counsel. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

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<sup>2</sup>We reject Sherman's contention that "fault of the petitioner" as contemplated by NRS 34.726(1)(a) requires that the petitioner himself must act or fail to act to cause the delay.

Therefore, the good-cause provision of the statute contemplates the concerns Sherman expresses. We decline to impose a tolling provision to the statute absent plain language or legislative intent to do so.

Nevertheless, even accepting Sherman's tolling argument, his contention is unpersuasive under the circumstances presented here. In addition to his Brady claim, Sherman points to a number of documents, including affidavits from trial counsel, witnesses and family members, purportedly not received until shortly before he filed the instant petition. Other than his bare allegation that he exercised due diligence, he fails to explain his lengthy delay in securing this information. Nothing in any of the affidavits explains why the information provided in them could not have been discovered earlier, and the individuals who provided affidavits were known to the defense at the time of trial, with most testifying at trial.

Considering Sherman's contentions, we conclude that the district court did not err by denying his petition as procedurally barred under NRS 34.726.

#### This court's application of procedural default rules

Sherman argues that he should be excused from procedural default rules because this court arbitrarily and inconsistently applies them. In State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005), we expressed a clear mandate that procedural default rules are mandatory and that any prior inconsistent application of those rules is not a basis to ignore them. Nothing in Sherman's argument persuades us to revisit that decision.

#### Application of McConnell v. State

Sherman contends that the district court erred by denying his claim that he was entitled to a new penalty hearing because the burglary

and robbery aggravators found for the murder must be stricken pursuant to McConnell and the jury's consideration of those invalid aggravators was not harmless. We conclude that Sherman can show good cause because McConnell is retroactive, Bejarano v. State, 122 Nev. 1066, 1070, 1076, 146 P.3d 265, 268, 272 (2006). However, he failed to show prejudice.

After invalidating the felony aggravators, two aggravators remain—(1) Sherman had been previously convicted of another murder<sup>3</sup> and (2) he committed the murder while under sentence of imprisonment.

To support the aggravators, the State established that Sherman had been previously convicted of another murder in 1982. In that incident, Sherman, 17 years old at the time, hid in the men's bathroom of a small grocery store, waiting for the owner to close the store. While the owner was locking up, Sherman jumped out of the men's bathroom and fired three shots at the owner, killing him. To support the under-sentence-of-imprisonment aggravator, the State presented evidence that at the time Sherman killed Dr. Bauer, he was on parole for the 1982 murder. See Geary v. State, 110 Nev. 261, 266-67, 871 P.2d 927, 930-31 (1994); Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1182 (1991).

In mitigation, Sherman offered evidence that he was under the influence of alcohol and controlled substances at the time of the murder, had been raised in an extremely dysfunctional family, suffered sexual abuse by his mother and an older brother, experienced extensive

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<sup>3</sup>We reject Sherman's challenge to the prior murder aggravator as violative of the United States Supreme Court's prohibition against the execution of juveniles as announced in Roper v. Simmons, 543 U.S. 551 (2005), because he committed the prior murder while he was a juvenile. We do not read Roper so broadly. Moreover, Sherman's claim is procedurally barred as it was appropriate for direct appeal. See NRS 34.810(1)(b)(2).

drug and alcohol abuse as a youth, and that Dianne had exerted a controlling influence over him. Family members and friends described Sherman as polite, obedient, loving, and a talented classical pianist and expressed their love for him. Additionally, Sherman had developed a program in prison to teach illiterate inmates how to read and an anti-rape program focused on protecting new, young inmates from older, stronger prisoners. Sherman made a statement in allocution, expressing his love for his family and describing his actions as deplorable. He also apologized for the pain he caused to his family as well as the Bauer family.

The compelling evidence supporting the remaining aggravators juxtaposed to the mitigation evidence, albeit credible, persuades us to conclude the jury would have found Sherman death eligible absent the invalid aggravators. Sherman's callous shooting murder of a grocery store owner, although committed when he was 17 years old, shows his penchant for violence, which culminated in yet another brutal murder—the beating death of Dr. Bauer. And although the under-sentence-of-imprisonment aggravator arises from the prior murder, Sherman's actions suggest that he remains a danger to others and unaffected by other forms of punishment.

In addition to the aggravators, the State produced evidence concerning four instances of misconduct while Sherman was incarcerated for the instant offenses. First, a correctional officer explained that during a search of Sherman's cell on October 25, 1995, he discovered a shank hidden inside Sherman's mattress. Second, on October 10, 1996, Sherman threatened a correctional officer with violence. Third, several witnesses described an elaborate plan Sherman hatched to escape from prison, which included the killing of four individuals. Fourth, a correctional officer testified that on October 17, 1996, he overheard Sherman threaten violence against other correctional officers.

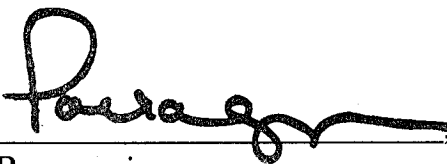


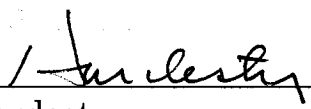
Considering the brutal nature of the murder and Sherman's character and history, particularly his proclivity for violence in and out of prison, we conclude that the jury would have imposed death.

Because Sherman failed to demonstrate prejudice to overcome the procedural default to his McConnell claim, the district court did not err in this regard.<sup>4</sup>

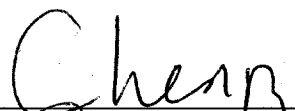
Having considered Sherman's claims and concluded that no relief is warranted, we

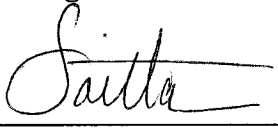
ORDER the judgment of the district court AFFIRMED.

  
Parraguirre C.J.


  
Hardesty J.

  
Douglas J.

  
Cherry J.

  
Saitta J.

  
Gibbons J.

  
Pickering J.

cc: Hon. Valorie Vega, 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

<sup>4</sup>We reject Sherman's claim that the McConnell error was not harmless in light of other constitutional errors this court concluded on direct appeal did not warrant relief.