

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL CU,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52158

FILED

MAY 05 2009

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Michael Cu's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On April 10, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count each of conspiracy to commit kidnapping, first-degree kidnapping with the use of a deadly weapon, first-degree murder with the use of a deadly weapon, conspiracy to commit robbery, and robbery with the use of a deadly weapon. The district court sentenced appellant to serve multiple concurrent and consecutive terms of life with the possibility of parole in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal. Cu v. State, Docket No. 35927 (Order of Affirmance, May 22, 2001). The remittitur issued on June 19, 2001. Appellant unsuccessfully sought post-conviction relief by way of an untimely post-conviction petition for a writ

of habeas corpus filed September 15, 2005. Cu v. State, Docket No. 46568 (Order of Affirmance, June 30, 2006).

On October 29, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing that it was untimely filed. Moreover, the State specifically pleaded laches. The district court appointed post-conviction counsel, who filed a supplement to appellant's petition on May 19, 2008. The State filed a response. On July 25, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant argued that the State had withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). He also argued that the jury did not find the specific intent necessary to convict him of first-degree murder, in violation of this court's holdings in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002) and Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled on other grounds by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008).

Appellant filed his petition more than 6 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus on September 15, 2005. See NRS 34.810(1)(b). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant argued that he was not made aware of potentially exculpatory evidence allegedly withheld by the State until 2007. With respect to his claims regarding specific intent, appellant argued that this court's opinions in Sharma and Bolden were not decided until 2002 and 2005, indicating that he was unable to bring these claims in his previous filings. He further alleged that failure of the district court to consider these claims would result in actual prejudice. For the reasons stated below, we conclude that the district court did not err in denying appellant's petition.

Exculpatory evidence withheld by the State

Appellant first argued that he was entitled to a new trial because the State withheld potentially exculpatory impeachment evidence regarding State witness Thomas Huffman in violation of Brady. He claimed that he did not become aware of this evidence until 2007. To raise a claim of a Brady violation in an untimely or successive post-conviction habeas petition, a defendant bears the burden of demonstrating that (1) the State withheld evidence, which establishes cause, and (2) that the withheld evidence was material, which establishes prejudice. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Evidence is considered material only if there exists reasonable probability that the result of trial would have been different had the evidence been disclosed. Id. at 600, 81 P.3d at 8.

Even if, as appellant argued, the State withheld evidence relating to Huffman, we conclude that appellant failed to demonstrate prejudice resulting from any of the State's alleged actions. Appellant

claimed that the State withheld evidence regarding Huffman's multiple misdemeanor convictions,¹ and evidence that the Mesquite County Sheriff's Office had opened an investigation regarding possible perjury by Huffman. Appellant presented no evidence to suggest that Huffman was ever convicted of perjury. Because most of the convictions allegedly withheld from evidence were general misdemeanor convictions unrelated to Huffman's propensity for honesty, they would have been inadmissible at trial. See NRS 50.085(3) (providing that specific instances of witness misconduct may be inquired into on cross-examination only if relevant to truthfulness); NRS 50.095 (providing that only felony convictions may be used for the purposes of impeaching a witness). While it may have been permissible to cross-examine Huffman regarding his conviction for petit larceny, Huffman admitted during direct examination that he had been engaged in a lifestyle that involved "doing drugs all the time; staying out; get in fights; whatever; stealing." He also admitted to spending time in jail. It does not appear that the result of trial would have been any different had appellant specifically cross-examined Huffman regarding his petit larceny conviction. Accordingly, appellant did not meet his burden of demonstrating prejudice. In addition, appellant did not overcome the

¹The exhibits submitted by appellant to the district court suggest that Huffman was apparently convicted of discharging a firearm within city limits, disturbing the peace, several instances of misdemeanor battery, resisting a police officer in the discharge of his official duties, misdemeanor trespassing, petit larceny, and misdemeanor possession of a controlled substance.

presumption of prejudice to the State caused by having to retry a 10-year old-case. Therefore, the district court did not err in denying this claim as procedurally barred.

Failure to prove specific intent to commit murder

Appellant also claimed that he was entitled to a new trial because the jury did not find the specific intent necessary to convict him of first-degree murder based on this court's holdings in Sharma, 118 Nev. 648, 56 P.3d 868 and Bolden, 121 Nev. 908, 124 P.3d 191. In Sharma, this court concluded that to convict a defendant of murder pursuant to an aiding and abetting theory, the jury must be instructed that the defendant aided and abetted with the intent to kill. 118 Nev. at 656, 56 P.3d at 873. In Bolden, this court similarly concluded that a defendant cannot be found guilty of specific intent crimes on the basis that commission of those offenses was a natural and probable consequence of a conspiracy, but rather it must be proven that the defendant participated in the conspiracy with the intent to commit those crimes. 121 Nev. at 922, 124 P.3d at 200-201. Appellant argued that both of these decisions should be applied retroactively to overturn his conviction, and that the prior unavailability of these claims demonstrated good cause for his failure to raise these claims at trial, on direct appeal, or in his prior post-conviction petition. We disagree.

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. 122 Nev. 1269, 1276, 149 P.3d 37, 38 (2006). Consequently, the legal grounds for appellant's claim were previously

available, and could have been raised at trial or in his direct appeal. In addition, Sharma was decided before appellant filed his first post-conviction petition for a writ of habeas corpus, indicating that appellant also could have raised his Sharma claim in that petition. Accordingly, appellant did not demonstrate good cause for his failure to raise his claim pursuant to Sharma in a timely manner.

Regarding appellant's Bolden claim, we note that while Bolden was not decided until December 15, 2005, three months after appellant filed his first post-conviction habeas petition, appellant waited nearly two years to file the instant petition. Thus, even if this court were to conclude that the Bolden decision provided good cause for a part of appellant's delay in filing, appellant did not demonstrate good cause for the entire length of the delay.

In addition, even if appellant had filed his petition in a more expedient manner, we conclude that the Bolden decision was not sufficient to demonstrate good cause. This court has not yet determined whether Bolden announced a new rule of law, or was merely a clarification of existing law, and applicable to cases that were final before it was decided. In Rippo v. State, this court indicated that good cause may have existed when the legal basis for a claim was previously unavailable. 122 Nev. 1086, 1091, 146 P.3d 279, 283 (2006). However, we have also held that "proper respect for the finality of convictions demands that this ground for good cause be limited to previously unavailable constitutional claims." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Bolden was decided as a matter of state law. 121 Nev. at 920-23, 124 P.3d at 199-201.

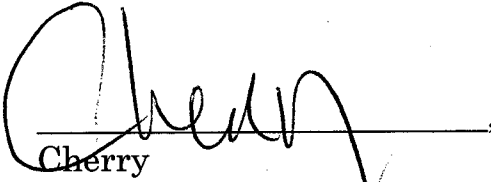
Thus, even if we were to decide that Bolden announced a new rule and introduced legal grounds that were previously unavailable, that case would not provide good cause to overcome the procedural bars because appellant's claim does not implicate federal constitutional concerns. Nika v. State, 124 Nev. ___, ___ 198 P.3d 839, 850 (2008); Clem, 119 Nev. at 621, 81 P.3d at 525-26. Alternatively, if this court were to treat Bolden as a clarification similar to Sharma, the legal grounds for appellant's claim were previously available and his claim should have been raised at trial, on direct appeal, or in his first post-conviction petition in the district court. Appellant has also failed to overcome the presumption of prejudice to the State caused by having to retry a 10-year-old case. Therefore, the district court did not err in denying appellant's claims regarding Sharma and Bolden as procedurally barred.²

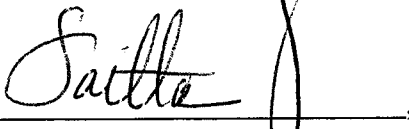
²As a separate and independent ground for denying appellant's claims pursuant to Sharma and Bolden, we note that overwhelming evidence supported the conclusion that appellant specifically intended to kill the victim. Throughout trial, the State's theory was that the appellant shot the victim. Multiple witnesses testified that appellant confessed to them that he shot the victim. Appellant specifically told one witness that he forced the victim onto his knees and shot the victim "execution style." The victim's injuries were consistent with this type of shooting. Given the overwhelming evidence that appellant actually shot the victim, we conclude that any errors in the jury instructions under Sharma or Bolden were harmless beyond a reasonable doubt. Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 323 (2008) (overruling Bolden in part, and concluding that an "erroneous [jury] instruction that makes available invalid alternate theories of liability" is not reversible error if the error is harmless beyond a reasonable doubt).

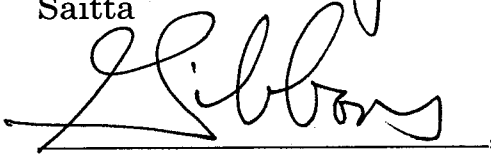
Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Cherry J.


Saitta J.


Gibbons J.

cc: Eighth Judicial District Court Dept. 8, District Judge
Michael Cu
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk