

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN OLIVER SNOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53884

FILED

JUL 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Hansen*
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 in a death penalty case. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

As a hired assassin, appellant John Oliver Snow killed Harry Wham as part of a murder conspiracy involving Wham's wife, Peggy, and several other individuals. An unsuccessful attempt on Wham's life was made on January 26, 1983, approximately three weeks before he was killed on February 13, 1983. Snow was convicted of conspiracy to commit murder and first-degree murder with the use of a deadly weapon. He also was charged with attempted murder stemming from the January 23, 1983, incident but was found not guilty. Following the penalty hearing, the jury returned a verdict finding three aggravating circumstances: (1) the murder was committed by a person previously convicted of a crime involving the use or threat of violence, (2) the murder was committed during the commission or attempted commission of a burglary, and (3) the murder was committed for the purpose of receiving money or other things of monetary value. As other matter evidence, the State introduced evidence that Snow had six felony convictions for drug-related and firearm-possession offenses. The jury found no mitigating circumstances

and sentenced Snow to death for the murder conviction. We upheld the convictions and death sentence on appeal. Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985).

Snow unsuccessfully sought post-conviction relief in state court on three occasions before filing the instant petition on April 25, 2008, which the district court denied without conducting an evidentiary hearing. In this appeal from the denial of his fourth post-conviction petition for a writ of habeas corpus, Snow argues that the district court erred by (1) dismissing his petition as procedurally barred and (2) dismissing his claim that he is actually innocent of the death penalty.

Snow contends that the district court erred by dismissing his post-conviction petition as procedurally barred without conducting an evidentiary hearing. Because he filed his petition approximately 23 years after this court resolved his direct appeal, the petition was untimely under NRS 34.726(1). The petition was also successive and therefore procedurally barred pursuant to NRS 34.810(1)(b)(2). And, as it appears that the State specifically pleaded laches, the petition was subject to dismissal under NRS 34.800. As cause to overcome his procedural default, Snow asserts three grounds—(1) the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and he filed his petition within a reasonable time after the evidence was disclosed, (2) he was deprived of his right to post-conviction counsel and to challenge that counsel's effectiveness, and (3) this court's inconsistent application of procedural default rules precluded application of those rules to his petition. Snow was entitled to an evidentiary hearing on his claims of good cause only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).

Good-cause claims

Brady claims

Snow argues that the district court erred by dismissing his post-conviction petition as procedurally barred because he established good cause and prejudice by showing that the State withheld material evidence in violation of Brady, 373 U.S. 83. Brady obliges a prosecutor to reveal evidence favorable to the defense when that evidence is material to guilt, punishment, or impeachment. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: “the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” Id. at 67, 993 P.2d at 37. We have acknowledged that “a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.” Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997).

When a Brady claim is raised in the context of a procedurally barred post-conviction petition, the petitioner has the burden of demonstrating good cause for his failure to present the claim earlier and actual prejudice. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); Mazzan, 116 Nev. at 67, 993 P.2d at 37. As a general rule, “[g]ood cause and prejudice parallel the second and third Brady components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” Bennett, 119 Nev. at 599, 81 P.3d at 8. But a Brady claim still must be raised within a reasonable time after discovery of the withheld evidence. See Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-

08 (2003); see also Harris v. Warden, 114 Nev. 956, 959 & 959-60 n.4, 964 P.2d 785, 788 & 788-89 n.4 (1998).

Snow points to five categories of evidence that he alleges were withheld by the State and argues that the State's withholding the evidence precluded him from raising the Brady claim earlier and resulted in prejudice: (1) evidence related to Richard Morelli, (2) evidence related to Kathy Faltinowski, (3) evidence related to Jody and Arlen Edwards, (4) evidence related to Malinda Barwick, and (5) evidence related to other suspects. And although Snow obtained much of the alleged Brady material several years before he filed the instant petition, he argues that the State's ongoing failure to comply with post-conviction discovery procedures delayed the filing of his petition, as it took several years and federal court intervention to secure the challenged material from the State.

Having carefully reviewed each of Snow's Brady claims, we conclude that he failed to demonstrate good cause for his delay in raising those claims, as the evidence was discovered or disclosed years before Snow filed the instant petition or could have been discovered through reasonable diligence, was privileged, or its relevance was unclear.¹ However, even if he had demonstrated good cause, we conclude that he failed to show that any of the challenged evidence was material such that

¹We note that some of the evidence, such as the post-trial letters authored by Detective Miller and Deputy District Attorney Harmon, did not exist before or during trial. It is not clear whether the State can be said to have violated Brady by not disclosing that evidence. See Berger v. Stinson, 97 F. Supp. 2d 359, 369 (W.D.N.Y. 2000). Because the parties did not address that concern, we have considered the evidence in the context of the components for a Brady violation.

it affected the outcome of his trial. Therefore, we conclude that the district court did not err by summarily dismissing Snow's Brady claims.

Right to post-conviction counsel

Snow contends that the ineffective assistance of his first post-conviction counsel provided good cause and prejudice to excuse his procedural default. We disagree. This court previously considered and rejected the same good-cause and prejudice argument on appeal from the denial of Snow's third post-conviction petition. At that time, this court acknowledged that Snow was entitled to the effective assistance of first post-conviction counsel because "at that time NRS 177.345(1) required the appointment of counsel for indigent petitioners for post-conviction relief." Snow v. Warden, Docket No. 39354 (Order of Affirmance, December 10, 2002), at 3. Nevertheless, this court concluded that Snow should have raised his post-conviction-counsel claims in his second post-conviction petition and because he failed to do so, he was obligated to demonstrate good cause. Id. Because Snow failed to demonstrate good cause for his delay and his failure to raise the post-conviction-counsel claim previously, we concluded that Snow was not entitled to relief.² Id. at 4.

²Snow complains that this court prevented him from litigating his post-conviction-counsel claims by granting the State's original petition for a writ of mandamus, which challenged the district court's decision to conduct an evidentiary hearing on his third post-conviction petition. He argues that this court's action constituted an impediment external to the defense that provides good cause to consider the instant petition. Snow's contention lacks merit. In granting the State's mandamus petition, this court concluded that the district court erred by granting an evidentiary hearing without considering the procedural default rules and instructed the district court to apply those rules. State v. District Court (Snow), Docket No. 37309 (Order Granting Petition, March 7, 2001). This court's actions did not preclude Snow from litigating his third petition but merely directed the district court to follow applicable law.

Snow now claims that this court's prior decision was erroneous and that he could not have raised his post-conviction-counsel claims in his second petition because it was filed in 1989 and the post-conviction-counsel claims were not available until this court decided McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), and Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997). Therefore, according to Snow, those claims were properly raised in his third post-conviction petition and this court's decision on appeal from the denial of that petition was erroneous. Even accepting Snow's contention that he was unable to raise his post-conviction counsel claims until McKague and Crump were decided, his contention nevertheless fails. Snow filed his third post-conviction petition on April 16, 1997, nearly 14 months after McKague was decided and approximately 6 weeks after Crump was decided. His argument cannot now provide good cause because it was available at the time he filed his third petition. And the only basis for not raising his good-cause claims in his third petition would be ineffective assistance of third post-conviction counsel, which does not exist. Accordingly, the district court did not err by rejecting this allegation of good cause.

Alleged inconsistent application of procedural default rules

Snow argues that he should be excused from procedural default rules because this court arbitrarily and inconsistently applies them. This court has previously rejected this precise claim, concluding, after painstaking analysis, that it does not arbitrarily "ignore[] procedural default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory." State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005). Because Snow fails to advance any persuasive argument justifying a departure from Riker, we conclude that this claim lacks merit and the district court did not err by rejecting it.

Actual innocence

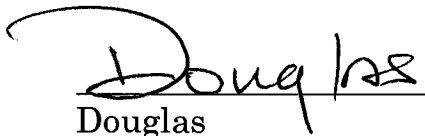
Snow argues that he is actually innocent of the death penalty because the felony aggravator for a murder committed in the commission or attempted commission of a burglary is invalid “as it is based upon an intent to commit murder when entering a building.” Essentially, Snow asserts that because the murder was the sole reason for entering Wham’s garage and lying in wait, the burglary was incidental to the murder and therefore cannot be used to seek the death penalty, as it fails to genuinely narrow the class of death eligible persons.

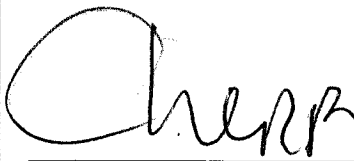
Snow challenged the burglary aggravator in his first state post-conviction petition filed in 1986 on the ground that “the double use of an intent to murder (for both the contract murder and the underlying crime of burglary) violates the Eighth Amendment in that it does not adequately narrow the class of persons eligible for the death penalty.” This court rejected the claim on appeal, noting that Snow was convicted of premeditated murder, not felony murder, and concluding that “since NRS 200.033(4) does not apply to every premeditated murder, it properly serves a narrowing function.” Snow v. State, Docket No. 17874 (Order Dismissing Appeal, August 27, 1987), at 10. Although Snow’s current claim adds a nuance to the challenge raised in his first post-conviction petition, both challenges to the burglary aggravator are based on the same premise and we conclude that the law of the case bars further consideration of this claim. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Even if the law-of-the-case-doctrine was not at issue, Snow’s contention nonetheless lacks merit because the Legislature has deemed that burglary constitutes an activity sufficiently dangerous to human life to warrant elevating first-degree murder to capital murder, where, as here, the murder was committed during the commission of a burglary. See


NRS 200.033(4). Accordingly, the district court did not err by dismissing Snow's claim that he is actually innocent of the death penalty.


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

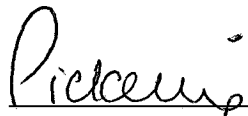
ORDER the judgment of the district court AFFIRMED.

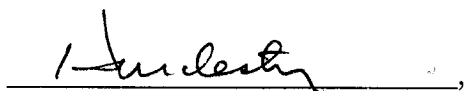
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Douglas

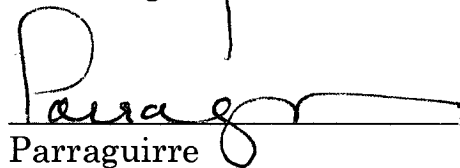
 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

 _____, J.
Pickering

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk