IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JAMES LISLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54787

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the dismissal of a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant Kevin James Lisle shot and killed Justin Lusch, whom Lisle believed intended to divulge to the police illegal gun and narcotics deals in which Lisle was involved. Lisle was convicted of first-degree murder and other attendant offenses. Following the penalty hearing, the jury returned a verdict finding two aggravating circumstances—(1) the murder was committed during the commission of a kidnapping and (2) Lisle had been previously convicted of murdering Kip Logan. As other matter evidence, the State introduced evidence of Lisle's extensive criminal history. Although Lisle presented mitigation evidence, including testimony from relatives that he suffered brain damage and had an abusive childhood and testimony from friends and relatives who described positive aspects of Lisle's character, the jury found no mitigating circumstances and sentenced Lisle to death. This court affirmed the judgment of conviction and death sentence. Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997).

Lisle filed a timely post-conviction petition for a writ of habeas corpus on November 12, 1998, which the district court denied. This court affirmed the judgment, and remittitur issued on August 5, 2002. Lisle v. State, Docket No. 37211 (Order of Affirmance, July 9, 2002). A little more than six years later, Lisle filed a second post-conviction petition on October 3, 2008, followed by a supplemental petition filed on June 19, 2009. The district court dismissed the petition as procedurally barred. This appeal followed.

On appeal, Lisle argues that the district court (1) erroneously dismissed his petition as procedurally barred and (2) erred by denying his claim that he is actually innocent of the death penalty. He also contends that he was entitled to an evidentiary hearing.

Procedural bars

Because Lisle filed his post-conviction petition 11 years after this court resolved his direct appeal, it was untimely under NRS 34.726(1). The petition was also successive and therefore procedurally barred pursuant to NRS 34.810(1)(b)(2). To overcome the procedural defaults, Lisle was obligated to demonstrate good cause for the delay and prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). As good cause to excuse the defaults, Lisle asserts three grounds: (1) his first post-conviction counsel was ineffective, (2) the delay in filing the petition was not his fault, and (3) the procedural bars do not apply because they are discretionary and inconsistently applied. And as the State specifically pleaded laches, the petition was subject to dismissal under NRS 34.800. Additionally, many of Lisle's claims were barred by the doctrine of the law of the case, but he provided no explanation why this court should revisit its previous conclusions respecting those claims.

Lisle 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

Ineffective assistance of first post-conviction counsel

Lisle argues that the district court erred by summarily dismissing his petition as procedurally barred because first post-conviction counsel was ineffective due to inexperience, a lack of communication, a failure to adequately investigate the case, and a conflict of interest. While post-conviction counsel's ineffectiveness may constitute good cause to file claims in a successive petition, those claims are subject to NRS 34.726(1), State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); Pellegrini v. State, 117 Nev. 860, 869-78, 34 P.3d 519, 525-31 (2001), and must be raised within a reasonable time after they become available, Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Here, Lisle's post-conviction counsel claims became available, at the latest, once this court resolved the appeal from the denial of his first post-conviction petition. Yet, he waited six years after the remittitur issued from that appeal to file the instant petition. Therefore, his claims of ineffective assistance of counsel are procedurally barred and cannot serve as good cause for the delay in filing his petition. See Stewart v. LaGrand, 526 U.S. 115, 120 (1999) (concluding that ineffective-assistance-of-counsel claim failed as good cause because ineffective-assistance claim was itself procedurally defaulted); Hathaway, 119 Nev. at 252, 71 P.3d at 506 ("[T]o constitute adequate cause, the ineffective assistance of counsel claim itself

must not be procedurally defaulted."); Riker, 121 Nev. at 235, 112 P.3d at 1077; Pellegrini, 117 Nev. at 869-70, 34 P.3d at 526.

Fault

Lisle argues that the district court erred by summarily dismissing his petition as procedurally barred because NRS 34.726 does not apply to him, as the delay in filing the petition was not his fault but rather counsel's. In this, he contends that the plain language of NRS 34.726(1) evinces the Legislature's intent that petitioner himself must act or fail to act to cause the delay. We reject Lisle's interpretation. We have held that NRS 34.726 requires "a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway, 119 Nev. at 252, 71 P.3d at 506. 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. Accepting Lisle's interpretation ascribes a meaning to this statute not contemplated by the Legislature and would eviscerate NRS 34.726—as long as the defendant is represented by counsel (appointed or retained), the defendant would have good cause to file an untimely petition. Moreover, even if we accepted Lisle's construction of NRS 34.726(1), he waited six years after this court resolved his appeal concerning his first post-conviction petition to file the instant petition, and he does not provide any explanation for that delay.

Challenge to the application of the procedural bars

Lisle argues that the district court erred by summarily dismissing his post-conviction petition because the procedural bars are applied inconsistently and at this court's discretion. He further argues that this court's application of the default rules violates due process and

equal protection because there is inadequate notice of when they will be applied or excused. We have held that this court does not arbitrarily ignore procedural bars 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." Riker, 121 Nev. at 236, 112 P.3d at 1077; see also Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini, 117 Nev. at 886, 34 P.3d at 536. Nor has Lisle established any sort of due process or equal protection violation in this court's application of the procedural default rules.

Actual innocence

Lisle argues that the aggravating circumstances found by the jury are constitutionally invalid as applied to him and therefore he is actually innocent of the death penalty. In particular, he contends that the felony aggravating circumstance is constitutionally infirm based on this court's reasoning in Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007), and that the aggravating circumstance based on his previous murder conviction cannot stand because that conviction did not precede the Lusch murder. We reject Lisle's arguments.

As with all of Lisle's post-conviction claims, his challenges to the aggravating circumstances are procedurally barred. However, where a post-conviction petitioner can make a "colorable showing" that he is actually innocent of a crime or the death penalty, actual innocence serves as a gateway to consider the merits of procedurally defaulted claims. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. The Supreme Court has opined that the actual innocence exception requires a petitioner to present new evidence demonstrating his innocence. See House v. Bell, 547 U.S. 518, 537 (2006); Schlup v. Delo, 513 U.S. 298, 316 (1995). And, the actual

innocence exception is grounded in factual rather than legal innocence. See Bousley v. United States, 523 U.S. 614, 623-24 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Although neither of Lisle's challenges to aggravating circumstances involves new evidence or factual innocence, in the context of the death penalty, we have allowed a broader approach in challenging the validity of aggravating circumstances effectively extending the actual innocence gateway to include legal innocence. See, e.g., State v. Bennett, 119 Nev. 589, 597-98, 81 P.3d 1, 7 (2003); Leslie v. Warden, 118 Nev. 773, 779-80, 59 P.3d 440, 445 (2002). Based on our current jurisprudence, Lisle's challenges to the aggravating circumstances fall within the scope of the actual innocence exception.

Felony aggravating circumstances

Lisle argues that the felony aggravating circumstance based on kidnapping is invalid because it is premised on the felony-murder rule but the State's theory in this case is inconsistent with the rationale for the felony-murder rule—"'to deter dangerous conduct by punishing as a first degree murder a homicide resulting from dangerous conduct in the perpetration of a felony, even if the defendant did not intend to kill.'" Nay, 123 Nev. at 332, 167 P.3d at 434 (quoting State v. Allen, 875 A.2d 724, 729 (Md. 2005)); Payne v. State, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965); see People v. Washington, 402 P.2d 130, 133 (Cal. 1965). According to Lisle, the State's theory at trial was that he kidnapped Lusch to facilitate the murder and therefore the murder did not occur "in the commission of" a kidnapping; rather, the kidnapping occurred in the commission of the homicide.

Relying primarily on this court's decision in Nay, Lisle suggests that this aggravating circumstance is not applicable when the homicide is the purpose behind committing the felony. In Nay, we held that a felony-murder conviction cannot be based on a felony that was committed as an afterthought to homicide. 123 Nev. at 333, 167 P.3d at 435. We reasoned that basing a felony-murder conviction on an afterthought felony would not be consistent with the two rationales supporting the felony-murder rule—that the rule's purpose is to deter people from committing dangerous felonies and that the intent to commit the felony provides the malice for the murder—because those rationales hinge on the perpetrator having the intent to commit the felony before or during the killing. Id. at 332-33, 167 P.3d at 434-35. Although Nay addresses the felony-murder statute, not the felony aggravating circumstance set forth in NRS 200.033(4), the statutes have similar language: felony murder is a murder "[c]ommitted in the perpetration or attempted perpetration of" certain enumerated felonies, NRS 200.030(1)(b), and the felony aggravating circumstance applies when a murder is committed "in the commission of, or an attempt to commit or flight after committing or attempting to commit" certain enumerated felonies, including kidnapping, NRS 200.033(4). Based on this language, Lisle tries to extend the reasoning in Nay to support his argument.

We reject Lisle's efforts to extend Nay in the manner he suggests for two reasons. First, Nay focuses on the felony-murder rule's purpose, but the purposes for the felony-murder rule and the felony aggravating circumstance are not the same. The felony-murder rule's purpose is "to deter dangerous conduct by punishing as a first degree murder a homicide resulting from dangerous conduct in the perpetration

of a felony," Nay, 123 Nev. at 332, 167 P.3d at 34, (internal quotations omitted), while aggravating circumstances determine which defendants convicted of first-degree murder are eligible for the death penalty, NRS 175.554(3); NRS 200.030(4)(a). Second, Nay is focused on the timing of the intent to commit the felony (before or during the murder as opposed to an afterthought), whereas Lisle's argument is more about the nature of the kidnapping in this case—that the murder provided the specific intent for the kidnapping—rather than the timing of that intent because clearly Lisle intended to commit the murder at the time the kidnapping occurred. For these reasons, the analysis in Nay does not carry over to the felony aggravating circumstance.

At its core, Lisle's argument is that the murder did not occur in the commission of the kidnapping; instead, the kidnapping occurred in the commission of the murder. We disagree. The felony aggravating circumstance applies when the murder "was committed while the person was engaged . . . in the commission of . . . any . . . kidnapping in the first degree." NRS 200.033(4). And the kidnapping statute provides that kidnapping is in the first degree when a person "willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person . . . for the purpose of killing the person." NRS 200.310(1). Here, the first-degree kidnapping is based on evidence that Lisle lured Lusch to the desert with the promise of a drug deal so that he could kill Lusch without witnesses. While the kidnapping clearly facilitated the killing and was part of the premeditated plan to kill Lusch, the kidnapping was a separate offense, see Pascua v. State, 122 Nev. 1001, 1006, 145 P.3d 1031, 1034 (2006), that was ongoing until Lusch was killed.

Therefore the killing occurred "in the commission of" the kidnapping. The kidnapping is not incidental to the murder and the facts clearly established that Lisle was engaged in the commission of kidnapping in the first-degree when he killed Lusch, thereby satisfying the elements for the felony aggravating circumstance. NRS 200.033(4); NRS 200.310; NRS 200.320(1); see also Bridges v. State, 116 Nev. 752, 765, 6 P.3d 1000, 1009 (2000).[1] We therefore conclude that the felony aggravating circumstance is not invalid on the ground Lisle advances.

Prior murder aggravating circumstance

Lisle argues that the murder conviction related to Logan's death does not qualify as an aggravating circumstance under the version of NRS 200.033(2) in place during his trial because the Logan conviction did not precede the Lusch murder.[2] He acknowledges that this argument was rejected in Gallego v. State, 101 Nev. 782, 792-93, 711 P.2d 856, 863-

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[1]Lisle contends that NRS 200.033(4) is unconstitutionally vague and that imposing death based on this statute would violate due process and the constitutional rule of lenity. NRS 200.033(4) clearly provides a person of ordinary intelligence fair notice that if one engages in the commission of a kidnapping in the first-degree when committing a murder, the murder may be aggravated. See Holder v. Humanitarian Law Project, 561 U.S. ___, ___, 130 S. Ct. 2705, 2718 (2010); accord State v. Castaneda, 126 Nev. ___, ___, 245 P.3d 550, 553 (2010). Because NRS 200.033(4) is unambiguous, the rule of lenity has no bearing on the construction of this statute. State v. Lucero, 127 Nev. ___, ___, 249 P.3d 1226, 1230 (2011).

[2]At the time of Lisle's original penalty hearing, NRS 200.033(2) provided that first-degree murder may be aggravated if "[t]he murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another." 1993 Nev. Stat., ch. 44, § 1, at 76.

64 (1985); see also Leonard v. State, 117 Nev. 53, 82, 17 P.3d 397, 415 (2001), but contends that this court failed to provide any statutory construction analysis, "including the application of the rule of lenity, which is constitutionally required." We disagree. In Gallego, this court concluded that NRS 200.033(2)'s plain language only required that the defendant have been convicted of the other murders at the time of the penalty hearing. Gallego, 101 Nev. at 792-93, 711 P.2d at 863-64. Since Gallego, this court has consistently rejected challenges similar to Lisle's, reaffirming its reasoning in Gallego. E.g., Leonard, 117 Nev. at 82, 17 P.3d at 415 (2001); Calambro v. State, 114 Nev. 106, 109-10, 952 P.2d 946, 948 (1998); Emil v. State, 105 Nev. 858, 865, 784 P.2d 956, 960 (1989); Crump v. State, 102 Nev. 158, 162, 716 P.2d 1387, 1389 (1986). As Gallego relied on the plain language of NRS 200.033(2), Lisle's argument that the statute is ambiguous is without merit and the rule of lenity does not factor into interpretation of that statute. Lucero, 127 Nev. at ___, 249 P.3d at 1230; Moore v. State, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006).[3]

[3]Lisle argues that he is actually innocent of Logan's murder because the persons who testified against him did so to secure lighter sentences and that there was insufficient evidence to corroborate their testimony. On this basis, he asserts that he is actually innocent of Logan's murder and therefore the prior-murder aggravating circumstance is invalid. We rejected Lisle's challenge to his conviction for Logan's murder. Lisle v. State, 113 Nev. 540, 555, 937 P.2d 473, 482 (1997), clarified on denial of rehearing, 114 Nev. 221, 954 P.2d 744 (1998). Lisle has presented nothing here to alter that decision, and we therefore conclude that this attempt to invalidate the prior-murder aggravating circumstance fails.

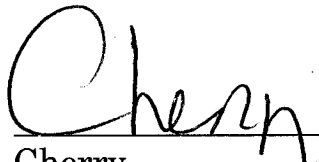
Because the aggravating circumstances remain valid and therefore may be used to support a death sentence, Lisle's actual-innocence claim fails.

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

ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Saitta

_____, J.
Douglas



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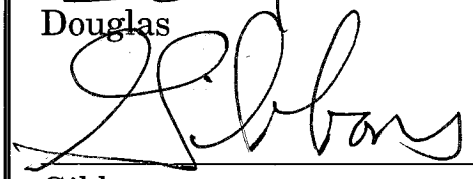
Cherry



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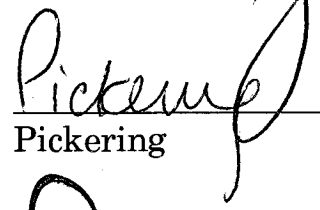

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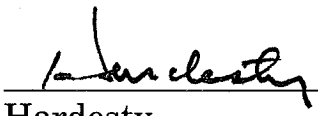

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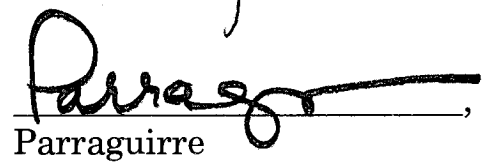
Hardesty



_____, J.
Parraguirre

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[4]Lisle also challenges Nevada's lethal injection protocol. However, in McConnell v. State, 125 Nev. 243, 248, 212 P.3d 307, 310-11 (2009), we concluded that challenges to the lethal injection protocol are not cognizable in state habeas petitions. We reject Lisle's argument that McConnell's holding unconstitutionally suspends the writ of habeas corpus, see Nev. Const. art. 1, § 5, as other avenues are available to challenge the lethal injection protocol, McConnell, 125 Nev. at 249 n.5, 212 P.3d at 311 n.5.

cc: Hon. James M. Bixler, District Judge
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Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk