IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES D. MCNELTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54925

FILED

MAY 23 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Charles D. McNelton's second post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

A jury convicted McNelton of first-degree murder with the use of a deadly weapon for killing 16-year-old Monica Glass. The jury sentenced McNelton to death. This court affirmed the conviction and sentence. McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995). McNelton unsuccessfully sought relief in a prior post-conviction proceeding. McNelton v. State, 115 Nev. 396, 990 P.2d 1263 (1999). McNelton filed the instant petition in the district court on December 12, 2007. The district court denied the petition as procedurally barred, and this appeal followed.

McNelton argues that the district court erred by denying his petition as untimely and successive without conducting an evidentiary hearing. He further contends that even if he cannot demonstrate good cause to overcome the applicable procedural bars, the district court erred

by denying his petition because the failure to consider it on the merits resulted in a fundamental miscarriage of justice.

Procedural bars

Because McNelton filed his petition over twelve years after the remittitur issued in his direct appeal, the petition was untimely under NRS 34.726(1). The petition also was successive pursuant to NRS 34.810(2). The petition was therefore procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default rules, McNelton advances several arguments: (1) the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); (2) his post-conviction counsel was ineffective; (3) the Ninth Circuit decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided him with good cause to challenge the premeditation and deliberation instruction; (4) the inconsistent and discretionary application of procedural bars prohibited the use of procedural bars to deny him relief; (5) any delay was not his fault; and (6) the procedural bars should be subject to equitable tolling.

Failure to disclose evidence

As cause to overcome the procedural default rules, McNelton argues that the State failed to disclose evidence in violation of Brady. 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. However, this court has 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).

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. "Good 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.

To support his claim of good cause, McNelton points to evidence that the State withheld regarding Andre Lee, Leroy Wilson, Brian Jackson, Retor Jones, and Dr. Nina Hollander. He asserts that the State withheld (1) evidence of Lee's prior convictions, including that Lee was serving a five-year sentence at the time of McNelton's trial; (2) evidence concerning Wilson's prior convictions and open cases involving Wilson at the time of trial in which he had challenged his competency to stand trial; (3) evidence related to Jackson's prior convictions; (4) evidence that Jones received a benefit for his testimony; and (5) evidence that the medical examiner, Dr. Hollander, had been dismissed based on performance issues.

Having carefully reviewed each of McNelton's Brady claims, we conclude that he failed to demonstrate good cause for his delay in raising the claims related the criminal histories of Lee, Wilson, and Jackson, as the evidence was not exclusively in the State's possession and

he failed to allege an impediment external to the defense that prevented him from discovering the evidence sooner. Further, the record indicates that McNelton came into possession of many of the documents related to the criminal records several years before he filed the instant petition. Similarly, much of the evidence concerning Dr. Hollander came from newspaper articles that were widely available prior to McNelton's trial. While Lee did not sign his affidavit alleging that the State obscured his custody status at the time of McNelton's trial until April 2006, McNelton did not allege what impediment external to the defense prevented him from contacting Lee sooner.

With regard to all of the evidence, we conclude that, in light of the evidence adduced at trial, McNelton failed to show that any of the challenged evidence was material such that it affected the outcome of his trial. See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (providing that when there is a specific request for evidence, materiality is satisfied if there is a reasonable possibility that the omitted evidence would have affected the outcome). Notably, several witnesses besides Jones testified that McNelton had been living near the scene of the murder in the months before, thus any evidence tending to assail Jones' testimony was of negligible value. As Lee and Wilson acknowledged that they had dealt drugs, McNelton failed to show that further impeachment with their criminal records would have been of significant value. Moreover, their testimony about the shooting was corroborated by Lee's wife, Linda, who did not have a prior criminal record. As to Jackson, McNelton did not demonstrate that the impeachment evidence was material as Jackson, who was related to McNelton, was a rival drug dealer to the victim, and testified that he did not remember much about his or

McNelton's activities around the time of the shooting; Jackson was not a credible witness even in the absence of any efforts to impeach him. As to Dr. Hollander's testimony, McNelton failed to demonstrate that the proffered evidence was material as her expert testimony was not critical to establishing that the gunshot wound to the victim's forehead was the cause of her death. Further, McNelton failed to demonstrate that evidence concerning Dr. Hollander's job performance would have been sufficiently effective at impeaching Detective Leavitt's testimony concerning his observations at the autopsy to such an extent as to alter the outcome of the penalty hearing. Therefore, we conclude that the district court did not err by denying McNelton's Brady claims.

Ineffective assistance of post-conviction counsel

McNelton argues that the district court erred in rejecting his claim of ineffective assistance of post-conviction counsel as good cause to overcome the procedural default rules. We disagree. While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also McKague v. Warden, 112 Nev. 159, 164-65 & n.5, 912 P.2d 255, 258 & n.5 (1996), those claims are still subject to other procedural bars, including timeliness under NRS 34.726, State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (explaining that "to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted"); Edward v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim). In other words, a petitioner must demonstrate cause for raising the ineffective-

assistance-of-counsel claims in an untimely fashion. McNelton failed to explain how post-conviction counsel's failure to litigate claims of trial error and ineffective assistance of counsel in a meaningful manner precluded him from filing his second post-conviction petition until over twelve years after the resolution of his direct appeal and nearly eight years after the order affirming the district court's denial of his first post-conviction petition. And even assuming that his ineffective-assistance-of-post-conviction-counsel claims were not available until this court resolved his first post-conviction appeal in December 1999, he was represented by his current counsel, the Federal Public Defender, as early as October 16, 2006, and McNelton failed to explain the additional delay of over eight years from the denial of his first post-conviction petition. Therefore, the district court did not err in rejecting McNelton's claims of good cause based on the ineffective assistance of post-conviction counsel.

Premeditation and deliberation instruction

McNelton argues that the district court erred in denying his claim regarding the Kazalyn instruction[1] and that the Ninth Circuit Court of Appeals' decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided good cause for his failure to raise the claim in a prior petition. We disagree. In Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000), this court disapproved of the Kazalyn instruction and provided the district courts with instructions to use in the future. However, we concluded in Nika v. State, 124 Nev. 1272, 1276, 1289, 198 P.3d 839, 842, 851 (2008), that Byford does not apply to cases that were final when it was

[1]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), prospectively modified by Byford, 116 Nev. at 236-37, 994 P.2d at 714-15.

decided. McNelton's conviction was final over four years before Byford was decided and therefore Byford does not apply. Accordingly, the district court did not err in concluding that McNelton failed to demonstrate good cause and prejudice to overcome the applicable procedural bars with respect to this claim.

Alleged inconsistent application of procedural bars

McNelton also argues that the district court erred by dismissing his post-conviction petition as procedurally barred because the default rules are discretionary and this court inconsistently applies them. We disagree. Procedural default rules are mandatory, see 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, and we do not have the discretion to ignore them, State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 239, 112 P.3d 1070, 1077, 1079 (2005). Even assuming any inconsistent application, that inconsistency cannot excuse procedural default in other cases. Id. at 236, 112 P.3d at 1077.

Fault

McNelton claims that NRS 34.726 does not apply to him because the delay in filing the instant petition was not his fault but was the fault of counsel. He contends that the plain language of NRS 34.726(1) evinces the Legislature's intent that the petitioner himself must act or fail to act to cause the delay and that any failure to raise claims in a timely manner was the fault of counsel. We disagree. This court has interpreted NRS 34.726(1) as requiring "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. Considering the nature and purpose of legal representation, we conclude that McNelton's view that NRS 34.726(1) contemplates only delay personally caused by a petitioner is untenable. Moreover, even if we accepted McNelton's interpretation of NRS 34.726(1), he waited almost eight years after this court resolved his appeal concerning the denial of his first habeas petition to file the instant petition, and the only apparent explanation for the delay is that he was seeking relief in federal court. The election to go to federal court prior to pursuing state remedies does not provide good cause to excuse the procedural bars. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, the district court did not err in rejecting this claim of good cause without conducting an evidentiary hearing.

Equitable tolling

McNelton argues that the district court erred by denying his claims of ineffective assistance of post-conviction counsel as procedurally barred because NRS 34.726 should incorporate a "discovery rule" that permits the equitable tolling of the statute. We disagree. NRS 34.726(1) provides that a petitioner must demonstrate good cause for a delay in filing a post-conviction petition and that good cause may exist if he demonstrates that the delay was not his fault and prejudice will result. NRS 34.726(1)(a), (b). We have explained that to demonstrate good cause, a petitioner must show that "an impediment external to the defense prevented him from raising his claims earlier." Pellegrini, 117 Nev. at 886, 34 P.3d at 537; see Hathaway, 119 Nev. at 252, 71 P.3d at 506. "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to

counsel, or that some interference by officials, made compliance impracticable.'" See Hathaway, 119 Nev. at 252, 71 P.3d at 506 (internal quotations marks omitted) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Therefore, imposing any tolling provision is unnecessary as the plain language of the statute contemplates the concerns McNelton expresses.

Fundamental miscarriage of justice

McNelton argues that even if he cannot demonstrate good cause to overcome the procedural bars, the district court's failure to consider his post-conviction petition resulted in a fundamental miscarriage of justice. We conclude that this claim is not properly before us on appeal. McNelton did not argue in his pleadings below that the failure to consider any claims on the merits would result in a fundamental miscarriage of justice, rendering him actually innocent of first-degree murder or the death penalty.[2] As this argument is raised for the first time on appeal, we decline to address it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (noting that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

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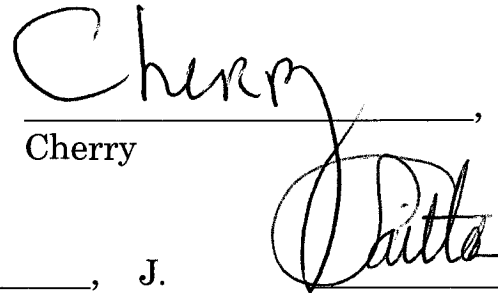
[2]McNelton failed to include a fundamental-miscarriage-of-justice claim in his second amended petition for a writ of habeas corpus. The record does not demonstrate that any such claim was raised in McNelton's original petition filed on December 12, 2007, as that petition has not been included in the record. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) (noting appellant's responsibility to provide court with parts of record necessary for this court's review).

Having considered McNelton's contentions and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



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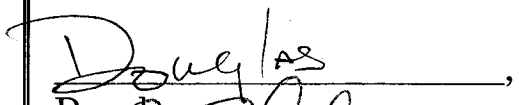

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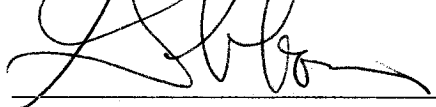

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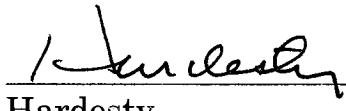

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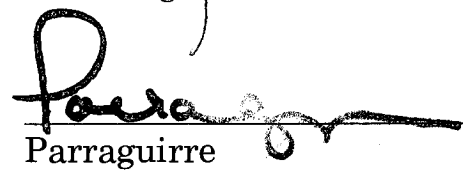

_____, J.
Parraguirre

cc: Chief Judge, Eighth Judicial District Court
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk