

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN MICHAEL HOMICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54955

FILED

OCT 18 2011

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; Elissa F. Cadish, Judge.

On December 11, 1985, appellant Steven Michael Homick shot and killed Bobbie Jean Tipton and Marie Bullock during a robbery of Tipton's home. James Meyers happened upon the scene, and Homick shot and killed him as well. A jury convicted Homick of three counts of first-degree murder with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and burglary, and sentenced him to death for each murder.

In this appeal from the denial of Homick's third post-conviction petition for a writ of habeas corpus, he argues that the district court erred when it (1) denied his claims that the State withheld material impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and (2) dismissed the remainder of his claims as procedurally barred. We agree with the district court that while most of the Brady claims are procedurally barred, Homick demonstrated good cause for not previously raising a claim that a key witness was offered immunity in exchange for testifying at Homick's trial but failed to show prejudice. We

further conclude that the district court correctly applied the procedural default rules to Homick's petition and that he failed to demonstrate good cause and prejudice to overcome any of the applicable procedural bars on his other claims. Accordingly, the district court did not err by denying Homick's petition.

Application of procedural bars

Homick claims that the district court erred in dismissing the majority of his claims as procedurally barred. Because Homick filed his petition 15 years after this court resolved his direct appeal, the petition was untimely. NRS 34.726(1). Additionally, the petition was successive and therefore procedurally barred pursuant to NRS 34.810(1)(b)(2). Accordingly, in order for Homick's claims to be considered on their merits, he had to demonstrate both good cause for failing to raise the claims earlier and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). Finally, because the State specifically pleaded laches, the petition was also subject to dismissal pursuant to NRS 34.800.

Brady violations

Homick argues that the State withheld material impeachment evidence in violation of Brady. To establish good cause and prejudice to excuse his failure to raise these claims previously, Homick must show that the State withheld the challenged evidence and that it was material for Brady purposes. Strickler v. Greene, 527 U.S. 263, 282 (1999); State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). For the most part, the evidence that Homick asserts that the State withheld concerns his

whereabouts on several dates in January 1986.¹ Homick claims that this evidence, if it had been available to him at trial, could have definitively shown that Timothy Catt's testimony about Homick's confession was a fabrication, as Homick was actually out of town on the dates that Catt testified Homick was confessing to him. The district court rejected these claims related to Homick's travels in January 1986, stating that "Homick was in a position to know of his own travels during that period without receiving a disclosure from the State regarding same."² Having carefully

¹Homick argues that he has shown good cause to raise these procedurally-barred Brady claims because evidence of his whereabouts in January 1986 was suppressed by the State. Specifically, Homick argues that the FBI and Las Vegas police conducted a joint investigation into Homick's criminal activities, which resulted in this triple murder prosecution and a federal indictment on racketeering, murder-for-hire, and related charges. This court has concluded that "the record does not indicate that this was a joint investigation." Homick v. State, 112 Nev. 304, 314, 913 P.2d 1280, 1287 (1996), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). Therefore, the district court did not err in concluding that this argument is barred by the law of the case doctrine. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975). However, even if we did attribute this "suppressed evidence" to the State, his Brady claims nevertheless fail because, as discussed below, the evidence is not material.

²Homick asserts four grounds for cause to excuse his failure to know his whereabouts in January 1986, and thus why he could not provide that information to his counsel in the 23 years since he was indicted: (1) he was mentally incapable of assisting in his defense and therefore could not tell counsel that he was out of town, despite the two pretrial evaluations that found him competent; (2) the State's open file policy meant that he was not required to conduct any investigation into his own whereabouts; (3) the State interfered with his right to counsel by not appointing Nevada counsel for 9 months while he was in California pretrial detention on another homicide charge; and (4) trial and post-conviction counsel's failure

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reviewed the allegedly withheld evidence, we agree with the district court. Even if we accepted Homick's contention that he did not know where he was in January 1986, this evidence has been available to him for many years through other channels and he offers no convincing explanation for the long delay in raising these claims. Moreover, even if Homick could explain the delay, this evidence is not material. Catt never specified a calendar date in his testimony and repeatedly stated that the date ranges he recalled were "best estimates only." Additionally, Homick thoroughly impeached Catt on his inability to recall exact dates. We therefore conclude that the district court did not err in dismissing these Brady claims related to Homick's whereabouts.³

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to investigate Homick's whereabouts was ineffective assistance of counsel. These claims could have been raised on direct appeal or in any of his previous post-conviction petitions and are procedurally barred, NRS 34.810; procedurally-defaulted claims cannot provide cause to overcome the procedural bars in this case, State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005).

³Homick also argues that material evidence was suppressed regarding an FBI interview with an informant. He asserts that the information from this interview would have "significantly narrowed the timeline" on the day of the murder—suggesting that Homick would not have had enough time and opportunity to shoot the victims. Homick made this same argument in his first post-conviction petition in 1996 and this court held that it was not material. Homick, 112 Nev. at 315, 913 P.2d at 1288. Homick is precluded from rearguing this claim. NRS 34.810(1)(b), (2). We likewise reject his related claim that new evidence shows that an FBI agent who testified in support of the State's timeline lied when he stated that he observed the manner in which Homick drove as this evidence is deployed in support of his barred "timeline" claim.

The district court did, however, find good cause to excuse Homick's failure to previously raise a claim that the State violated Brady when it failed to disclose an offer of immunity that was extended to Catt. At an evidentiary hearing in the district court, Homick abandoned his claim that the evidence showed an immunity deal and instead argued that the evidence was material because it showed Catt's bias. The district court disagreed that the evidence was material and denied this aspect of the Brady claim. Because Homick discovered this evidence in 2007, the district court was correct in determining that Homick had raised this Brady claim within a reasonable time of discovery. Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003). Homick cannot, however, establish that the evidence is material and therefore cannot make the required showing of prejudice to overcome the procedural bars. See Bennett, 119 Nev. at 599, 81 P.3d at 8. If there were indeed evidence of an immunity deal, then it would be arguably material—but Homick conceded to the court below that nothing in the recently discovered transcript indicated that the State offered Catt immunity in Homick's case. Homick instead argued that it showed Catt's bias to testify for the State. However, the bias argument also fails because it was extensively explored at trial. Accordingly, Homick cannot demonstrate prejudice to overcome the procedural bars and we affirm the district court's judgment on this claim.

Other procedurally barred claims⁴

McConnell claim

Homick contends that the district court erred by denying his claim that his death sentence must be reversed because two of the four aggravating circumstances that the jury found are invalid pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). The district court summarily dismissed this claim as procedurally barred. Homick's third post-conviction petition was filed approximately three years after McConnell and he articulated no reason for the delay. Instead, Homick claimed that he demonstrated good cause to raise his McConnell claim in an untimely and successive petition because he raised this claim exactly one year after Bejarano, which held that McConnell announced a new rule that is substantive and retroactive. Bejarano, 122 Nev. at 1076, 146 P.3d at 272.

⁴Homick raised the following claims in his petition that he did not raise on direct appeal or in a timely post-conviction petition: (1) multiple instances of prosecutorial misconduct during the State's closing penalty phase argument; (2) ineffective assistance of trial counsel for failing to competently challenge the State's use of the murders Homick committed in California during the penalty phase; (3) ineffective assistance of counsel for failing to present a comprehensive picture of Homick's purported mental deficiencies; (4) the "great risk of death to more than one person" aggravator is invalid and unconstitutionally vague; (5) the "avoiding lawful arrest" aggravator was erroneously applied to Homick's crimes because no arrest was imminent; and (6) the death sentence is invalid because the elected judges of this state cannot constitutionally preside over capital cases. The district court did not err in dismissing these claims as they are procedurally barred and Homick failed to demonstrate either good cause or prejudice to excuse the default. See NRS 34.810(b)(2); NRS 34.726(1).

However, McConnell provides the basis for Homick's challenge to the felony aggravators, not Bejarano. Nevertheless, even if he could establish good cause to raise this argument, he still must establish prejudice, NRS 34.726(1)(b); NRS 34.810(3), and failed to do so. Accordingly, the district court did not err in dismissing this claim.

Kazalyn instruction

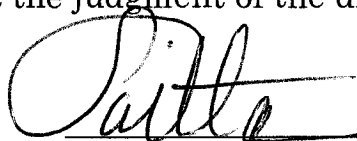
Homick argues that the district court erred by denying his claim that he received a flawed jury instruction on the elements of first-degree murder because the trial court gave the Kazalyn instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000). This claim is also procedurally barred because it is untimely and could have been raised previously. NRS 34.726(1); NRS 34.810(1)(b), (2). As good cause to excuse the procedural default, Homick claims that this court's holding in Byford should apply retroactively to his case based on the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In Polk, the Ninth Circuit held that Byford applied retroactively to Polk because giving the Kazalyn instruction constituted constitutional error in Polk's case. Polk, 503 F.3d at 911.

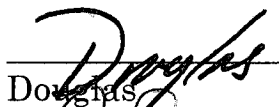
In Nika v. State, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008), this court held that Byford constituted a change in state law that had no retroactive application to convictions that were final when Byford was decided. Because Homick's conviction was final long before Byford was decided, that case does not apply to him. Homick acknowledges Nika but argues that its reasoning is flawed because the opinion ignores the constitutional vagueness concerns attendant to the Kazalyn instruction and fails to determine whether Byford should apply retroactively as a

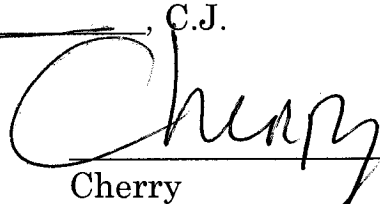
substantive rule of criminal law. Neither argument warrants relief. Until Byford, this court consistently upheld the Kazalyn instruction and rejected constitutional challenges similar to Homick's. Byford did not alter the law in effect when Homick's conviction became final; rather, the law changed prospectively. And because that change concerned a matter of state law, the Byford decision did not implicate federal constitutional concerns. Homick therefore cannot establish good cause to overcome the procedural bars and the district court did not err by summarily denying it on that basis.

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


ORDER the judgment of the district court AFFIRMED.

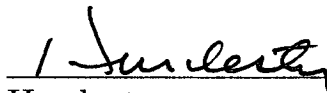

Saitta, C.J.

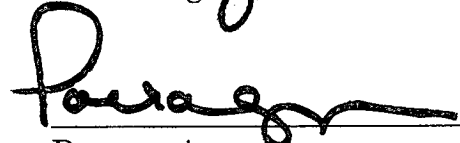

Douglas, J.


Cherry, J.


Gibbons, J.


Pickering, J.


Hardesty, J.


Parraguirre, J.

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