IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE LIDDELL WILLIAMS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35559

FILED

OCT 09 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying a post-conviction petition for a writ of habeas corpus. After a jury trial, appellant Antoine Liddell Williams was convicted of seven felony counts, including two counts of first-degree murder. A three-judge panel sentenced him to death.

Williams contends first that his trial counsel improperly conceded Williams's guilt during closing argument at the guilt phase of the trial. Specifically, lead defense counsel, Philip Kohn, said:

> My client is responsible for those crimes against Mr. and Mrs. Nail. He admitted to the police that he's responsible for those crimes. . . .
>
> Having said that, I don't want any of you to believe that the defense team has abandoned the defendant or that we're throwing him to the wolves or that we don't believe in him. You are not to infer that in any way. I implore you that . . . you remember what the court has told you, that you are not to decide or consider the issue of punishment today. . . . I ask you to not consider penalty in any way, and I will see you in ten days in penalty phase.

(Emphasis added.)

Williams complains that this argument conceded not only his guilt, but his guilt to first-degree murder--a verdict of second-degree murder would not have required a penalty phase. He argues this was ineffective assistance of

counsel under Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994).

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the trial would have been different. Id. at 988, 923 P.2d at 1107.

Kohn testified as follows at the post-conviction evidentiary hearing. After the State rested its case in the guilt phase, Kohn, his second chair, and Williams discussed closing argument strategy. Kohn recounted the immense amount of evidence that the State had presented against Williams: Williams confessed to the murders, fingerprint and DNA evidence linked Williams to the crime scene, the cord used to strangle the victims was traced to Williams's apartment, and videotape showed Williams using the victims' ATM cards. Kohn was concerned if he "called the cops liars and tried to make an ass of the State in the trial phase that [the jurors] would ignore me in the penalty phase, and Mr. Williams said he understood" and "acquiesced" to the decision to concede guilt. No other evidence was presented at the hearing.

In Jones, defense counsel conceded in closing argument that Jones was guilty of second-degree murder; he did so without Jones's consent and after Jones had testified that he did not kill the victim. 110 Nev. at 736, 877 P.2d at 1056. We concluded that this constituted ineffective

assistance of counsel and required reversal. Id. at 737-39, 877 P.2d at 1056-57. However, the authorities cited and the reasoning applied in Jones were all based on a counsel's concession of guilt without the consent of the client. See id. We also stressed that the concession by Jones's counsel rendered Jones's testimony "incredible" and stated that our decision applied to the situation "where counsel undermined his client's testimonial disavowal of guilt." Id. at 738-39, 877 P.2d at 1057.

Here, by contrast, Williams never made a testimonial disavowal of guilt. Thus, trial counsel's concession did not undermine any testimony by Williams. Further, Kohn's unrefuted testimony establishes that Williams consented to the strategy to concede guilt. Williams complains that no record of his consent was ever made at trial. Such a record would have been preferable, but Williams does not offer or point to any evidence suggesting that he did not consent. We conclude that counsel's decision to concede guilt was made with Williams's consent and was reasonable trial strategy.

Williams next contends that the deadly weapon enhancement was improperly imposed. The record shows that Williams "took a knife from the kitchen counter and stabbed Mrs. Nail." Williams v. State, 113 Nev. 1008, 1012, 945 P.2d 438, 440 (1997). He now asserts that a kitchen knife is not a deadly weapon under Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990).[1] Under Zgombic, an instrument is a deadly weapon only if it is "inherently dangerous." Id. at 576, 798 P.2d at 551.

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[1]Williams murdered and robbed the victims on September 2, 1994, before the Legislature superseded Zgombic by providing a broader definition of "deadly weapon" in NRS 193.165(5). See 1995 Nev. Stat., ch. 455, at 1431.

The district court ruled that this issue should have been raised on direct appeal. The issue also could and should have been presented to the trial court. NRS 34.810 provides:

> 1. The court shall dismiss a petition if the court determines that:
> . . .
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence,
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

In his opening brief Williams does not allege cause or prejudice pursuant to NRS 34.810(1). He alleges cause in his reply brief, asserting ineffective assistance of counsel. However, Williams failed to make this assertion with the district court. Moreover, he fails to show that he suffered prejudice.

First, Williams has not established that the kitchen knife he used was not a deadly weapon. Under Zgombic, "at least some knives are inherently dangerous weapons." Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998). In Steese, the murder weapon was "a large kitchen knife," a butcher knife with a five- to seven-inch blade. Id. This court approved instructing the jury that the knife was a deadly weapon as a matter of law. Id. In general, whether a knife is a deadly weapon depends on the specific knife and may or may not be decidable as a matter of law. See Buff v. State, 114 Nev. 1237, 1243-44, 970 P.2d 564, 568 (1998) (whether Swiss army knife was deadly weapon was question of fact for jury to decide); Thomas v. State, 114 Nev. 1127,

1146, 967 P.2d 1111, 1123-24 (1998) (following Steese, "meat-carving knife with a five- to seven-inch blade" was deadly weapon); Geary v. State, 112 Nev. 1434, 1439, 930 P.2d 719, 723 (1996) ("boning knife" qualified as deadly weapon under Zgombic); Collins v. State, 111 Nev. 56, 58 n.1, 888 P.2d 926, 927 n.1 (1995) ("exacto knife" was not deadly weapon under Zgombic).

The record before us does not provide any information on the knife used in this case, other than that it was taken from the kitchen counter. No evidence was heard in the post-conviction proceedings on this issue. It appears that Williams simply asserted below, as on appeal, that a "kitchen knife" could not be a deadly weapon. In light of the case law summarized above, this was not a specific factual allegation that warranted an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (to attain evidentiary hearing, person seeking post-conviction relief must support claim with "specific factual allegations that would, if true," entitle person to relief). Therefore, Williams has failed to show that the knife he used was not a deadly weapon.

Second, the judgment of conviction shows that Williams's sentence for count III, the robbery of Mrs. Nail, was enhanced with a consecutive fifteen-year prison term "for use of a deadly weapon, victim 65 years of age or older." Thus, even assuming the sentence was not properly enhanced for use of a deadly weapon, the undisputed age of the victim was a proper basis for the enhancement. See 193.167(1).

Third, Williams's sentence on count V, the murder of Mrs. Nail with a deadly weapon, was not enhanced. He simply received the death penalty. This was proper because only a term of imprisonment can be enhanced for use of a deadly

weapon. See 193.165(1); Domingues v. State, 112 Nev. 683, 693 n.1, 917 P.2d 1364, 1371 n.1 (1996).

Williams has failed to show that he suffered any prejudice; therefore, this claim is procedurally barred.

Williams next claims that he was improperly convicted of possession of a controlled substance based on cocaine found on a passenger in his car, cocaine which he neither possessed nor controlled. The district court ruled that this claim also should have been raised on direct appeal. Again, it also should have been raised at trial. Williams must therefore show cause and prejudice to overcome procedural default under NRS 34.810(1). Williams alleges cause for the first time in his reply brief, asserting ineffective assistance of counsel. He was required to make this assertion with the district court. He also fails to show that he suffered prejudice.

The record reflects sufficient evidence, apart from the evidence Williams now challenges, to support his conviction for possession of a controlled substance. At trial, the State presented evidence that Williams was driving a stolen car with two female passengers when he was stopped by police. Police found a free-base kit for smoking crack cocaine in the car. After being taken into custody, Williams indicated to police that there might be illegal drugs in the car. An Excedrin bottle was found on the floorboard on the driver's side, and when shown the bottle, Williams acknowledged that it was cocaine. Testing confirmed that the bottle contained .6 grams of cocaine. The prosecutor argued to the jury that this cocaine and the cocaine seized from the female passenger proved that Williams possessed a controlled substance.

We conclude that the evidence that Williams possessed the cocaine in the Excedrin bottle on the driver's side floorboard was sufficient to support the conviction.[2] Therefore, he fails to show prejudice, and this claim also is procedurally barred.

Williams also contends that his trial and appellate counsel were ineffective for failing to object to or challenge on appeal various remarks made by the prosecutors, allegedly asserting their personal beliefs. The remarks came during the closing argument of the penalty phase before the three-judge panel.

The constitutional right to effective assistance of counsel, discussed above, also extends to a direct appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at 1113. To establish prejudice, the claimant must show that an omitted issue would have had a reasonable probability of success on appeal. Id., 923 P.2d at 1114.

As an initial matter, the State points out that on direct appeal Williams alleged a number of instances of prosecutorial misconduct, including expression of personal beliefs. Williams, 113 Nev. at 1018-23, 945 P.2d at 444-47. Therefore, the State argues, the doctrine of the law of the case bars consideration of this issue. We disagree. The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). However, Williams does not raise the same

[2]This court's opinion affirming Williams's conviction notes only the cocaine found in the Excedrin bottle, not the cocaine found on the passenger. See Williams, 113 Nev. at 1013, 945 P.2d at 441.

facts as in his direct appeal. He claims that his counsel were ineffective for failing to object to remarks other than those which this court considered on direct appeal.

This court has "consistently held that prosecutors must not inject their personal beliefs and opinions into their arguments to the jury." Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986). Injection of personal beliefs serves to influence jurors to rely unduly on the prosecutor's expertise and authority, rather than objectively weigh the evidence. Id. We note that it is less likely such remarks would unduly influence a panel of district judges.

The first remark at issue is the following. The prosecutor told the judges:

> [The victims' son] stood up here, sat up here and said, you know if he would have said I got to have the money, my father would have given him anything. There is no doubt I don't think if [Williams] said hey, give me the money or I'm going to beat you up, that the money would have been forthcoming.

Williams says that the second sentence was an impermissible statement of personal belief. The State argues that the prosecutor was not stating a personal belief, but referring to the son's testimony.[3] The first quoted sentence clearly is meant as a paraphrase of the son's testimony. The second

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[3]In making this argument, Brian Rutledge, Chief Deputy District Attorney for Clark County, misquotes the transcript of the closing argument. Rutledge's brief to this court states that the prosecutor said:

> [The victims' son] stood up here, sat up here and said, "There is no doubt I don't think if [Defendant] said hey, give me the money or I'm going to beat you up, that the money would have been forthcoming."

We remind Mr. Rutledge of his duty of candor to this court and admonish him to ensure in future appeals that his recitation of the facts is accurate. See SCR 172(1)(a).

sentence appears to be the prosecutor's own inference from that testimony.

The prosecutor was apparently relying on testimony by Garen Nail, one of two sons who testified. Some of this testimony is impossible to read because of the poor quality of the transcript copy, but Garen appears to say: "[I] think if my dad had known how serious this was about [to] become he would have given him anything and everything. They had no chance to bargain, make a deal, do anything. Which they would have done."

Given this testimony, the prosecutor's statement was reasonable and proper. See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989) (it is permissible for prosecutor to argue evidence before the jurors and suggest reasonable inferences that might be drawn from it). Therefore, counsel were not deficient in failing to challenge the statement at trial or on appeal.

After the defense's closing argument, the prosecutor said: "I've done dozens of murder cases. I've sat through many penalty hearings, and it seems as though when we get into the penalty hearings everything is turned upside down." The State claims that these remarks were invited by defense counsel's argument that Williams should receive a sentence of life in prison. We fail to see how such an argument would invite reference to the prosecutor's experience in dozens of other murder cases. We believe that this remark did improperly aim to invoke the prosecutor's expertise and authority. Nevertheless, we conclude that it did not unduly influence the panel. Therefore, counsel's failure to challenge it did not prejudice Williams.

We have examined the remaining remarks to which Williams objects and conclude that they were permissible

argument and not improper statements of personal belief. We conclude that Williams fails to establish that his counsel were ineffective in failing to challenge them.

Finally, Williams argues that the death penalty is cruel and unusual under the United States and Nevada Constitutions. He also argues that this court has defined statutory aggravating circumstances so broadly that they unconstitutionally fail to narrow the class of murders for which death may be imposed. The district court rejected this claim on its merits but without explanation. However, Williams also failed to raise this issue at trial or on direct appeal. Again he alleges no cause for this failure pursuant to NRS 34.810. Nor are we persuaded that he has shown prejudice, i.e., that Nevada's death penalty is unconstitutional. This claim is also therefore procedurally barred. Accordingly, we affirm the district court's order.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
Christopher R. Oram
Clark County Clerk