

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK R. LAPENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35981

FILED

MAY 22 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus, a motion for a new trial based on newly discovered evidence, and a motion to dismiss the indictment.

In 1982, the district court convicted appellant Frank R. LaPena, pursuant to a jury verdict, of first degree murder and robbery with the use of a deadly weapon. On appeal, this court reversed LaPena's conviction and remanded his case.¹ LaPena was retried in 1989, and the district court again convicted LaPena, pursuant to a jury verdict, of first degree murder and robbery with the use of a deadly weapon. The district court sentenced LaPena to serve a term of life without the possibility of parole for the murder and a concurrent term of thirty years for the robbery with the use of a deadly weapon. This court dismissed LaPena's appeal from his judgment of conviction and sentence.²

¹See LaPena v. State, 98 Nev. 135, 643 P.2d 244 (1982).

²See LaPena v. State, Docket No. 20436 (Order Dismissing Appeal, June 27, 1991).

On June 3, 1992, LaPena filed a petition for post-conviction relief in the district court. The petition was ultimately unsuccessful.³

On March 26, 1999, LaPena filed an untimely second post-conviction petition for a writ of habeas corpus in the district court. The district court conducted evidentiary hearings at which Lynn Brady, many of LaPena's trial counsel, and the prosecutors who tried LaPena's case testified. The district court denied LaPena's petition and motions. This appeal followed.

LaPena filed his petition approximately eight years after this court issued the remittitur from his direct appeal. Thus, LaPena's petition was untimely filed.⁴ Moreover, LaPena's petition was successive because he had previously filed a petition for post-conviction relief.⁵ LaPena's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶

In an attempt to overcome the procedural defaults, LaPena claims that the State violated Brady v. Maryland⁷ in failing to disclose the tape-recorded statement of Lynn Brady. LaPena also claims that he is factually innocent and raises four other claims: (1) ineffective assistance of counsel; (2) inadequate appellate review; (3) prosecutorial misconduct; and (4) district court error in denying LaPena's motion to dismiss the

³See State v. LaPena, 114 Nev. 1159, 968 P.2d 750 (1998).

⁴See NRS 34.726(1).

⁵See NRS 34.810(1)(b), (2).

⁶See NRS 34.726(1); NRS 34.810(1)(b), (3).

⁷373 U.S. 83 (1963).

inadequate indictment. We conclude that LaPena failed to overcome the procedural defaults.

LaPena claims that the State violated Brady in failing to disclose the tape-recorded statement of Lynn Brady, a friend of LaPena. LaPena claims that Brady's statement was favorable to the defense because it supports LaPena's theory at trial that the murder victim's husband, Mr. Krause, not LaPena, was the "mastermind" behind the crime. The statement also connects Mr. Krause and a State witness, Bobby Webb, to a prior criminal scheme where Mr. Krause hired Webb to commit crimes against Lynn Brady and her place of employment. LaPena claims that this part of the statement could have been used as impeachment material.

Brady requires a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.⁸ Evidence must also be disclosed if it provides grounds for the defense to impeach the credibility of a State witness or to bolster the defense case.⁹ "[T]here are three components to a Brady violation: 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."¹⁰ When a Brady claim is raised in an untimely and/or successive post-conviction petition for a writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural

⁸See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

⁹See id. at 67, 993 P.2d at 37.

¹⁰Id.

bars.¹¹ A showing of good cause and prejudice for failing to raise a Brady claim earlier parallels the last two of the three Brady components.¹² Cause can be shown by proving that the State withheld the evidence.¹³ Prejudice can be shown by proving that the withheld evidence was material.¹⁴

In determining whether LaPena demonstrated good cause and prejudice to overcome the procedural defaults, we must first determine if Lynn Brady's statement would have been favorable to the defense. The part of the statement regarding Mr. Krause's plan to have himself robbed and his wife murdered would have corroborated the defense theory that LaPena did not plan the crimes. The alleged robbery by Webb at the instigation of Mr. Krause may have been used as impeachment material. Thus, these parts of Brady's statement were favorable to the defense.

Next, we must determine if Lynn Brady's statement was withheld by the State. The State claims that it did not withhold this evidence because the tape-recorded statement of Brady and other documents listing Brady's name, including a list of witnesses attached to the indictment, were contained in the evidence files that LaPena's counsel and LaPena himself searched through. The record, however, does not support the State's claim. At the evidentiary hearing, LaPena's counsel testified that when they looked through the files they did not discover

¹¹See id.

¹²See id.

¹³See id.

¹⁴See id. at 66-67, 993 P.2d at 36-37.

Brady's statement. Moreover, the State initially claimed that Brady's tape-recorded statement did not exist because the State's attorney could not find it in the files; however, he eventually found it.

The State also claims that LaPena had knowledge of Brady because he was friends with her. Thus, the State asserts that pursuant to Steese v. State¹⁵ it was not required to disclose Brady's statement because the defense could have discovered it with due diligence. We disagree.

Steese states that "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense."¹⁶ It is true that LaPena and his attorneys probably had knowledge of Lynn Brady and could have interviewed her as the State did; however, the defense cannot be expected to uncover a prior recorded statement of Brady that only the State possesses.¹⁷ Access to a witness does not equate to access to her prior recorded statement.¹⁸ Therefore, even diligent investigation by the defense would not necessarily have discovered the prior recorded statement of Lynn Brady.

Because the State failed to disclose favorable evidence to LaPena, we must next determine if this evidence was material.¹⁹ We conclude that it was not. First, Brady's statement was incoherent at

¹⁵114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

¹⁶Id.

¹⁷See Lay v. State, 116 Nev. 1185, 1200 n.3, 14 P.3d 1256, 1266 n.3 (2000).

¹⁸See id.

¹⁹See Mazzan, 116 Nev. at 66, 993 P.2d at 36.

times. Second, she made many negative references to LaPena such as that he was “intrigued with Mafiosi type of things” and that he may have been “ripping off cars” at the car lot he worked at. Third, LaPena’s former counsel stated that they would not have called her as a witness because she was a “loose cannon.” Fourth, the prosecutor in the case testified that he decided not to call her as a witness because she was not credible. Fifth, she never actually stated that LaPena did not plan the Krause murder and robbery; Brady simply speculated that Mr. Krause may have been behind it or that Rosalie Maxwell may have been behind it so she could get Mr. Krause’s money for her and LaPena. This latter theory supports the State’s theory at trial. Sixth, Webb’s alleged robbery of Brady was not material because whether he would have been charged with a crime was too speculative. We conclude that LaPena failed to demonstrate a reasonable probability that Brady’s statement would have changed the result of the trial. Thus, LaPena failed to demonstrate prejudice to overcome the procedural defaults with respect to this Brady claim.

LaPena also attempts to overcome the procedural defaults by making a claim of factual innocence. He claims that because Weakland’s testimony regarding how Weakland killed Mrs. Krause does not coincide with the physical evidence contained in the autopsy report, Weakland could not have been the person who killed Mrs. Krause and therefore LaPena is innocent. We conclude that LaPena has failed to make a credible claim of factual innocence. LaPena essentially raised this claim in his first petition for post-conviction relief and motion to dismiss the

indictment, which we considered and rejected.²⁰ LaPena failed to demonstrate good cause and prejudice for raising this claim again.

Next, LaPena claims that his trial counsel were ineffective for failing to investigate and uncover Lynn Brady or her tape-recorded statement. To establish ineffective assistance of counsel, LaPena must demonstrate that his counsel's actions fell below an objective standard of reasonableness and a reasonable probability that but for counsel's errors the result of the trial would have been different.²¹ Because LaPena's petition is untimely and successive, he must also demonstrate good cause and prejudice for failing to raise this claim earlier.

We conclude that LaPena can demonstrate cause for failing to raise this claim earlier because the existence of Lynn Brady's tape-recorded statement was not discovered until 1998 when she contacted LaPena; however, we conclude that LaPena cannot demonstrate prejudice. As stated previously, there is no reasonable probability that Lynn Brady's statement would have changed the result of the trial. Thus, the district court did not err in denying this claim.

Next, LaPena claims that this court was not able to conduct a fair and adequate review of his previous appeal regarding his first petition for post-conviction relief because this court "misunderstood certain facts in support of LaPena's claims, accepted summaries of testimony by the State's witnesses that did not exist in the record, applied 'old' facts against LaPena that have been repelled by 'new' exculpatory facts." We conclude that the district court did not err in denying this claim. LaPena failed to

²⁰See LaPena, 114 Nev. at 1167, 968 P.2d at 755.

²¹See Strickland v. Washington, 466 U.S. 668 (1984).

demonstrate good cause and prejudice for failing to raise this claim earlier.

Next, LaPena claims that the State committed prosecutorial misconduct in violating Brady by failing to disclose Lynn Brady's statement and police reports, notes, memoranda, and district attorney reports regarding three statements made by Jerry Weakland. As stated previously, the State did not violate Brady by failing to disclose Lynn Brady's statement because the statement was not material. The State also did not violate Brady by failing to disclose evidence relating to statements made by Weakland because LaPena failed to demonstrate that this evidence existed. Moreover, it was known at trial that Weakland changed his testimony regarding who committed the crimes on three occasions. Therefore, the district court did not err in determining that LaPena failed to demonstrate good cause and prejudice to overcome the procedural defaults.

Next, LaPena claims that the district court erred in denying his motion to dismiss the inadequate indictment. LaPena claims that the indictment was inadequate because the State did not prove that Weakland murdered Mrs. Krause. We conclude that the district court did not err in denying this motion. LaPena previously filed a motion to dismiss the indictment in conjunction with his first petition for post-conviction relief. This court concluded that the district court's denial of that motion was proper. Thus, this claim is barred by the doctrine of the law of the case.²²


Lastly, LaPena appeals from the district court's denial of his motion for a new trial based on newly discovered evidence. We conclude


²²See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

that the district court did not err in denying this motion because it was filed more than two years after the verdict.²³

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that LaPena is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Agosti


_____, J.
Shearing


_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Carmine J. Colucci & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²³See NRS 176.515(3).