IN THE SUPREME COURT OF THE STATE OF NEVADA

DONEALE L. FEAZELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37789

FILED
NOV 14 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING IN PART

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.

The district court convicted appellant Doneale Feazell of first-degree murder and attempted robbery, both with the use of a deadly weapon. Feazell received a death sentence for the murder. This court affirmed Feazell's conviction and sentence.[1] Feazell subsequently filed a timely first petition for habeas relief in the district court. The district court appointed counsel to represent Feazell and denied the petition following an evidentiary hearing. This appeal followed.

Feazell claims that his trial and appellate counsel were ineffective for failing to challenge the following adverse rulings by the district court: refusing to provide Feazell with fees in excess of $300.00 for

[1]Feazell v. State, 111 Nev. 1446, 906 P.2d 727 (1995).

an investigator; refusing Feazell's request for an eyewitness identification expert; and limiting objections to the defense attorney conducting the examination. Feazell also claims that his counsel should have challenged the admission of "victim impact" testimony at the guilt phase of the trial and the district court's denial of Feazell's pretrial petition for a writ of habeas corpus in which he complained of the introduction of allegedly improper evidence at his grand jury proceeding.

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[2] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[3] To establish prejudice, the claimant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.[4]

Feazell's claims of ineffective assistance of counsel lack merit. First, Feazell failed to include the relevant transcripts of the district court's adverse rulings making assessment of its exercise of discretion

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[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]Strickland v. Washington, 466 U.S. 668,687 (1984).

[4]Id. at 694.

difficult. Further, Feazell has failed to establish that additional funds for an investigator would have altered the outcome of his trial.[5] He has also failed to demonstrate that he was entitled to an eyewitness identification expert.[6] Also, we perceive no error in the district court's limiting objections to the defense attorney conducting the examination. The "control of the conduct of counsel in trial rests largely in the discretion of the trial judge and will not be disturbed absent an abuse of such discretion."[7] And although Feazell failed to provide this court with the relevant transcript, it appears that the district court limited objections to one defense counsel to avoid "double-teaming" and would have imposed

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[5]See NRS 7.135 (providing that "[c]ompensation to any person furnishing . . . investigative . . . services must not exceed $300.00 . . . unless payment in excess of that limit is . . . [c]ertified by the trial judge . . . as necessary to provide fair compensation for services of an unusual character or duration").

[6]Cf. Echavarria v. State, 108 Nev. 734, 745-47, 839 P.2d 589, 597-98 (1992) (holding that the district court erred in refusing to allow a defendant the services of an eyewitness identification expert where descriptions of the perpetrator were entirely inconsistent and where identifications apparently influenced by exposure to pre-trial publicity and were "cross-cultural" in nature.); see also White v. State, 112 Nev. 1261, 1263, 926 P.2d 291, 292 (1996) (holding that the district court did not err in denying a defendant an expert in eyewitness identification where eyewitness identifications did not suffer from "considerable doubt").

[7]Campus Village v. Brown, 102 Nev. 17, 18, 714 P.2d 566, 567 (1986).

the same restriction on the State if it were represented by two attorneys.[8] Nor are persuaded that the State improperly introduced "victim-impact" evidence at the guilt phase of the trial. The testimony of the victim's mother tended to establish that the victim would not willingly part with his car. Her testimony was therefore relevant to the State's prosecution of Feazell for attempted robbery.[9] With regard to the testimony of the victim's aunt, it appears to be irrelevant but in no wise prejudicial. Finally, at the grand jury proceeding, the prosecutor adequately instructed the grand jurors that evidence of the Vegas World shooting was applicable only against Feazell's original co-defendant Sean White.[10] We

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[8]See Schoels v. State, 114 Nev. 981, 966 P.2d 735 (1998), rehearing granted, 115 Nev. 33, 975 P.2d 1275 (1999) ("A trial judge has authority to assure protection of public interests including assuring fairness to the prosecution.").

[9]See NRS 200.380 (defining robbery in part as "[t]he unlawful taking of personal property from the person of another . . . against his will"); see also NRS 48.015 (providing that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"); NRS 48.025 (providing that relevant evidence is generally admissible).

[10]See State v. Babayan, 106 Nev. 155, 175, 787 P.2d 805, 819 (1990) (indicating that segregation of evidence presented to a grand jury can cure a defect in the presentation of evidence that is admissible only against one defendant); see also Rowland v. State, 118 Nev. ___, 39 P.3d 114, 122 (2002) (reaffirming that the ultimate issue is "'whether the jury can

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therefore conclude that Feazell has failed to demonstrate either that his counsel's performance was objectively unreasonable or that he was prejudiced.

However, our review of the record reveals that Feazell's jury found both the robbery and "receiving money" aggravating circumstances based on the same facts. They were therefore improperly duplicative.[11] Feazell did not raise the issue of duplicative aggravators in his opening brief. Nonetheless, given the particular circumstances of this case, we will reach the merits of this claim.

First, absent a showing of good cause and prejudice, the claim regarding duplicative aggravating circumstances would be procedurally barred: Feazell's conviction was the result of a trial, and the issue could have been raised in the instant habeas petition.[12] However, good cause

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reasonably be expected to compartmentalize the evidence as it relates to separate defendants'") (quoting Jones v. State, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995)).

[11]See Lane v. State (Lane II), 114 Nev. 299, 304, 956 P.2d 88, 91 (1998); NRS 200.033(4), (6).

[12]See NRS 34.810(1)(b)(3) (providing, in pertinent part, that this court shall dismiss a petition where conviction was the result of a trial, and the grounds for the petition could have been presented to the trial court, raised in a direct appeal or raised in any other proceeding that the
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exists to excuse the procedural bar because Feazell has a right to effective counsel in this proceeding,[13] and, as we explain, Feazell's post-conviction counsel was ineffective in failing to raise this issue in the instant petition.[14] Counsel was ineffective and prejudice resulted because this claim has merit; the aggravators are duplicative, rendering the "receiving money" aggravator invalid. No purpose is served by requiring Feazell to submit this claim in a successive petition in which he also demonstrates good cause and prejudice. Similarly, this court has reached the merits of a claim of ineffective assistance on direct appeal, without requiring that it

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petitioner has taken to secure relief from his conviction and sentence absent cause for the failure to present the claim and actual prejudice).

[13]See NRS 34.820(1)(a) (providing that appointment of counsel for a habeas petitioner sentenced to death is mandatory if "the petition is the first one challenging the validity of the petitioner's conviction or sentence"); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) (holding that if a petitioner in a first petition is entitled to and appointed counsel pursuant to the statutory mandate of NRS 34.820(1)(a), then petitioner is also entitled to the effective assistance of that counsel).

[14]See Crump, 113 Nev. at 302-04, 934 P.2d at 252-53 (stating that ineffective assistance of counsel can constitute good cause to defeat procedural default).

be raised in the first instance in the district court, where the record clearly demonstrated that counsel's actions were ineffective as a matter of law.[15]

Second, Feazell argued unsuccessfully on direct appeal that his two aggravators were duplicative.[16] Normally, the doctrine of the law of the case bars reassertion of a claim in habeas,[17] but we have discretion to revisit legal conclusions when warranted.[18] It is warranted in this case because after the disposition of Feazell's appeal, this court held in Lane II that the same aggravators in question here are duplicative.[19] Moreover, Lane II did not announce a new rule of law. On the contrary, it relied upon well-established Nevada law in ruling the aggravators duplicative.[20]

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[15]See Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409, 412-13 (1984); see also Hill v. State, 114 Nev. 169, 178-79, 953 P.2d 1077, 1084 (1998).

[16]Feazell, 111 Nev. 1449, 906 P.2d at 729-30.

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

[18]See Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 535-36 (2001).

[19]114 Nev. at 304, 956 P.2d at 91; cf. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that where a claim had merit, denial of relief by this court constituted an impediment external to the defense that would excuse appellant's default in presenting the same claim in a successive petition).

[20]Lane II, 114 Nev. at 304, 956 P.2d at 91.

Thus, issues of retroactive and prospective application do not arise.[21] Accordingly, we strike the "receiving money" aggravator because there are no facts to support it apart from the robbery of the victim, and it is therefore duplicative.

When an aggravating circumstance is not supported by sufficient evidence or is otherwise invalid, this court may reweigh the valid aggravators against the mitigating evidence, remand for a new penalty hearing or impose a sentence of imprisonment for life without the possibility of parole.[22] We conclude that it is most appropriate here to remand Feazell's case to the district court for a new penalty hearing.

For the reasons discussed above, we AFFIRM the district court's denial of Feazell's claims of ineffective assistance of trial and

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[21]Cf. Gier v. District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990) ("New rules apply prospectively unless they are rules of constitutional law."); see also Murray v. State, 106 Nev. 907, 910, 803 P.2d 225, 226-27 (holding that Supreme Court decision could be applied retroactively where decision did not announce new constitutional rule, but merely explained state statutory law as it existed at time of habeas petitioner's original sentencing).

[22]See Canape v. State, 109 Nev. 864, 877-83, 859 P.2d 1023, 1031-35 (1993) (explaining, pursuant Clemmons v. Mississippi, 494 U.S. 738 (1990), that this court may weigh aggravators and mitigators); NRS 177.055(3).

appellate counsel, VACATE his sentence of death, and REMAND for a new penalty hearing consistent with this order.

It is so ORDERED.

_______________, C.J.
Maupin

_______________, J.
Young

_______________, J.
Shearing

_______________, J.
Agosti

_______________, J.
Rose

_______________, J.
Leavitt

_______________, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Scott L. Bindrup
Clark County Clerk