

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL STEVEN JONES,
Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K.
MCDANIEL AND FRANKIE SUE DEL
PAPA, ATTORNEY GENERAL OF THE
STATE OF NEVADA,
Respondents.

No. 39091

FILED

DEC 19 2002

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's petition for a writ of habeas corpus in a death penalty case.

On September 24, 1990, appellant Daniel Steven Jones pled guilty to first-degree murder, and a three-judge panel sentenced him to death. This court affirmed appellant's conviction and sentence.¹ Remittitur issued on October 25, 1991. On December 27, 1991, appellant, with the assistance of counsel, filed a timely petition for post-conviction relief in the district court pursuant to former NRS 177.315-.385. The

¹Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991).

district court denied appellant relief, and this court dismissed appellant's appeal from the denial.²

On May 1, 2000, appellant filed his current post-conviction petition for a writ of habeas corpus in the district court pursuant to NRS 34.720-.830. The State filed an opposition alleging that appellant's petition was untimely and therefore procedurally barred. Appellant filed a response to the State's opposition. After hearing argument, the district court determined that appellant had not shown good cause for the delay in filing the petition and dismissed it as untimely. The court did, however, reserve a ruling on the issue of whether the State failed to disclose a benefit allegedly received by a State witness for his testimony at appellant's penalty hearing. The court subsequently heard argument on this issue. On December 14, 2001, the district court filed its written findings of fact, conclusions of law, and order denying appellant's petition. This appeal followed.

Procedural default

NRS 34.726(1) provides that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal. Good cause requires the petitioner to demonstrate that the delay

²Jones v. State, Docket No. 24497 (Order Dismissing Appeal, August 28, 1996).

was not his fault and that dismissal of the petition will unduly prejudice him.³

Appellant filed his current habeas petition almost nine years after this court issued its remittitur from his direct appeal. Appellant insists, however, that this court must review his allegations of constitutional error for a number of reasons despite the procedural bar. First, appellant contends that he has established good cause for the delay. In particular, appellant submits that any delay was not his fault because in regard to his first petition the district court (1) provided appointed counsel insufficient time to develop an adequate petition; (2) "denied an evidentiary hearing, refused to bring [appellant] to court, and summarily denied the petition"; and (3) failed to inform appellant and appellant's counsel of the potential consequences of failing to raise all available claims in the initial petition as was required under former NRS 177.380.⁴ Second, appellant complains that he never signed the amended petition or saw it before his first post-conviction counsel filed it. Appellant finally

³NRS 34.726(1).

⁴See 1987 Nev. Stat., ch. 539, § 34(3), at 1228-29 (providing that, in a death penalty case, "[t]he court shall inform the petitioner and his counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding").

ascribes his untimely petition to the allegedly ineffective assistance of his first post-conviction counsel. Appellant further alleges he was prejudiced because the issues raised in his habeas petition have merit.

Appellant has failed to establish good cause for his delay in filing his habeas petition. First, the errors alleged against the district court and the defects identified in the first post-conviction petition do not speak to the issue of appellant's delay in filing his second post-conviction petition and therefore cannot excuse it. Second, appellant filed his first post-conviction petition in December 1991. "At that time, there was no constitutional or statutory right to post-conviction counsel. Where there is no right to counsel there can be no deprivation of effective assistance of counsel and hence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."⁵

Appellant next claims that this court cannot apply NRS 34.726(1) to his current petition because that provision was not in effect when he filed his original post-conviction petition and therefore impermissibly extinguishes his prior right to file a second post-conviction petition unaffected by the one-year filing limitation. He further contends that this court's recent decision in Pellegrini v. State, in which we held

⁵Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 537-38 (internal quotations and citations omitted).

that the procedural bar applies to successive petitions,⁶ constitutes a new default rule that cannot, consistent with constitutional principles of due process and equal protection, be given retroactive effect. Appellant also contends that this court's Pellegrini decision "in itself violates due process and equal protection." We disagree.

In Pellegrini, this court acknowledged that

[p]rior to the effective date of [NRS 34.726], the sole statutory considerations for timely filing under Chapter 34 were laches . . . and that a prior post-conviction petition pursuant to NRS Chapter 177 had to be timely filed. If a petitioner was not barred by laches and had met the prior petition prerequisite, his Chapter 34 petition was not subject to dismissal on grounds of failing to meet a one-year filing rule.⁷

The court then noted that "the legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action."⁸ We concluded that "petitioners whose convictions were final before the effective date of NRS 34.726 and who had

⁶Id. at ___, 34 P.3d at 525-31.

⁷Id. at ___, 34 P.3d at 529.

⁸Id. (quoting Brown v. Angelone, 150 F.3d 370, 373 (4th Cir. 1998) (citing Block v. North Dakota, 461 U.S. 273, 286 n.23 (1983))).

filed a timely first petition under Chapter 177 were entitled to a reasonable period of time after the effective date of the new limitation period in which to file any successive petitions."⁹ We further determined that "it is both reasonable and fair to allow petitioners one year from the effective date of the [statutory] amendment to file any successive habeas petitions."¹⁰ We continue to consider this reasoning sound. Because NRS 34.726(1) became effective on January 1, 1993, and because his current habeas petition was not filed until 2000, appellant does not qualify "for timely filing under this narrow exemption from the requirements of NRS 34.726."¹¹ Moreover, we reject appellant's argument that in Pellegrini we announced a new rule that should only apply prospectively. In Pellegrini, we noted that we "had previously applied the time bar at NRS 34.726 to successive petitions"¹² and that "the plain language of the statute indicates that it applies to all petitions filed after its effective date of January 1, 1993."¹³ A case interpreting the plain language of statutes and

⁹Id.

¹⁰Id.

¹¹Id.

¹²Id. at ___, 34 P.3d at 526.

¹³Id. at ___, 34 P.3d at 529.

existing case law does not announce a new rule and, therefore, may be given retroactive effect.¹⁴

Next, appellant contends that refusing to review his constitutional claims on the basis of either NRS 34.726 or NRS 34.810¹⁵ "would violate the due process and equal protection right to consistent treatment of similarly-situated litigants" because this court allegedly applies these procedural bars so inconsistently that "they do not provide adequate notice of when they will be applied or excused." We reject this contention and conclude that the instant petition is both untimely and successive. As we concluded in Pellegrini: "We have been consistent in requiring good cause and actual prejudice to overcome the procedural bars," and we see no reason to revisit this issue. We particularly reject

¹⁴See Murray v. State, 106 Nev. 907, 910, 803 P.2d 225, 227 (1990).

¹⁵NRS 34.810(2) provides that a second or successive petition must be dismissed if it fails to allege new grounds for relief and the prior determination was on the merits or, if new grounds are alleged, the failure to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(3) requires a petitioner to plead and prove specific facts that demonstrate good cause for failing to present a claim before or presenting a claim again and actual prejudice.

appellant's reliance on unpublished dispositions as cognizable support for his claim of inconsistent application of the procedural bars.¹⁶

Additionally, appellant raises a number of claims that were in substance previously asserted, either on direct appeal or in the first petition for post-conviction relief.¹⁷ 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.¹⁸ Any attempt by appellant to reformulate his direct appeal

¹⁶See SCR 123 (providing that "[a]n unpublished opinion or order of [this court] shall not be regarded as precedent and shall not be cited as legal authority" subject to exceptions that do not apply here).

¹⁷Specifically, appellant reasserts that (1) jurisdiction was improperly exercised by Nevada courts; (2) trial counsel failed to object to the allegedly improper exercise of jurisdiction; (3) trial counsel's failure to object to the exercise of jurisdiction by Nevada courts rendered appellant's guilty plea involuntary; (4) trial counsel failed to have appellant properly evaluated by a neuropsychologist and psychiatrist, which failure allegedly resulted in an involuntary plea; (5) trial counsel "unreasonably failed to investigate and discover exculpatory evidence" on two Florida homicides that were presented by the State at appellant's penalty hearing; (6) trial counsel should have objected to the State's charging appellant with three aggravating circumstances and should have presented additional mitigation evidence; (7) withdrawal of appellant's original trial counsel rendered appellant's guilty plea involuntary; (8) the prosecutor committed misconduct to which defense counsel often failed to object; and (9) appellate counsel rendered ineffective assistance.

¹⁸Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

claims as claims of ineffective assistance is similarly unavailing. To the extent appellant claims that our previous review of his case was inadequate or our prior determinations erroneous, we reject the contention and conclude that the issues reargued in this petition do not warrant further discussion.¹⁹

Appellant also raises numerous claims that are waived because they were not raised in an earlier proceeding.²⁰ Further,

¹⁹Cf. Pellegrini, 117 Nev. at ___, 34 P.3d at 535-36 (acknowledging that "a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted").

²⁰Specifically, appellant argues that (1) he was deprived of an impartial tribunal; (2) his conviction and sentence are invalid due to the (a) inadequacy of the charging document, (b) "systematic exclusion of minorities from the grand jury," (c) failure to "conduct all proceedings in public, and in appellant's presence and to make an adequate record of the proceedings," and (d) alleged unconstitutionality of Nevada's definitions of first-degree murder, implied malice and reasonable doubt; (3) "the death penalty as administered in Nevada does not satisfy constitutional standards"; and (4) trial counsel failed to investigate and present (a) evidence of childhood abuse, neglect and other family-history evidence and (b) evidence to rebut the aggravating circumstances. See 34.810 (2), (3); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding that claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

appellant has not shown that an impediment external to the defense prevented him from complying with procedural default rules.²¹

Nevertheless, if appellant showed that important claims were never presented to the courts, or were inadequately presented, this court could overlook the lack of good cause if the prejudice from failing to consider the claims amounted to a "fundamental miscarriage of justice."²² "We have recognized that this standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty."²³ We conclude that none of appellant's claims implicate this standard.

State's alleged failure to disclose impeachment evidence

Appellant contends that a "key prosecution witness, Robert Bezak, received benefits as a result of his testimony and those benefits were not disclosed to the defense" in violation of Brady v. Maryland and its progeny.²⁴ Bezak testified at appellant's penalty hearing that when he

²¹See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) ("To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated.").

²²See Pellegrini, 117 Nev. at ___, 34 P.3d at 537.

²³Id.

²⁴Brady, 373 U.S. 83 (1963); see also Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972).

and appellant were cell mates, Bezak became aware of appellant's plan to escape from prison and his possession of two "shanks," knife-like instruments apparently fashioned from wire removed from a broom. Appellant alleges that in exchange for this information, six of seven pending charges against Bezak were dropped, that he received a lenient sentence on the remaining charge to which he pled guilty and that the district attorney subsequently sent a letter to the parole board informing it of Bezak's assistance in the instant case. In an attempt to establish good cause for failing to raise this claim in an earlier proceeding, appellant contends that the letter sent by the State to the parole board was not disclosed in federal habeas proceedings "in response to a formal subpoena duces tecum until repeated searches of the prosecution files were conducted." Appellant further alleges that the prosecutor "knowingly presented false testimony to the sentencing panel" when he asked Bezak whether homicide detectives had not made it "perfectly clear" that they could not provide him with any benefit in exchange for his testimony.

Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.²⁵ There are three components to a Brady violation: the evidence at issue is favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, i.e.,

²⁵See Strickler v. Greene, 527 U.S. 263, 280 (1999).

the evidence was material.²⁶ The evidence is material if there exists a reasonable probability that the result of the proceedings would have been different had disclosure occurred.²⁷ Appellant's instant petition for habeas relief is untimely and successive; therefore, to avoid procedural default, he has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to timely present his claim in earlier proceedings and prejudice.²⁸ In Mazzan v. State, this court explained that "[c]ause and prejudice parallel two of the three Brady violation components. If [an appellant] proves that the state withheld evidence, that will constitute cause for not presenting his claim earlier. If he proves that the withheld evidence was material under Brady, that will establish actual prejudice."²⁹

Appellant is not entitled to relief on this claim. First, we are not persuaded that he has established that the State withheld evidence of inducements offered to Bezak in exchange for his testimony at appellant's penalty hearing. The single most compelling evidence in the record of such an agreement is a declaration of appellant's agent, an investigator

²⁶Id. at 281-82.

²⁷Id. at 280.

²⁸See NRS 34.726(1); 34.810(3).

²⁹Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

with the Office of the Federal Public Defender, documenting statements allegedly made to him by Bezak in an interview conducted in August 1998. While this declaration asserts that Bezak acknowledged providing information to the State in exchange for more lenient treatment and lying under oath when he denied receiving any benefit, Bezak subsequently disavowed the declaration in a statement made to an agent of the Nevada Attorney General's Office. Second, even assuming Bezak received a benefit for his testimony, appellant cannot demonstrate that he was prejudiced. Bezak's testimony was unrelated to any of the three aggravating circumstances found by the three-judge panel--that the murder was committed by a person previously convicted of a violent felony; that the murder was committed by a person under sentence of imprisonment; and that the murder was committed in furtherance of a robbery³⁰--and they therefore retain their vitality. Also, evidence was presented at the penalty hearing that appellant was the perpetrator of a double homicide in Florida to which he later pled guilty. Moreover, at the penalty hearing, defense counsel elicited information from Bezak that he had several felony convictions, including robbing a church, and called into question Bezak's motive for testifying and whether he, not appellant, had planned a violent escape and possessed the shanks found in the cell that he shared with appellant. Finally, another witness testified that

³⁰See Jones, 107 Nev. at 635, 817 P.2d at 1181.

appellant possessed a handcuff key that he had carved from the head of a toothbrush, thus corroborating Bezak's testimony that appellant planned to escape from custody. We therefore conclude that appellant has failed to raise a colorable Brady claim that would excuse his procedural default.

Three-judge sentencing panel

Appellant argues that "the three-judge sentencing procedure is unconstitutional." In support, appellant cites, among other grounds, the United States Supreme Court's recent decision in Ring v. Arizona.³¹ Even assuming Ring's recent date provides appellant with good cause for failing to raise it in an earlier proceeding,³² we conclude that appellant suffered no prejudice because appellant's reliance on Ring is inapposite. Ring concerned a defendant who pled not guilty and went to trial. Unlike Ring, appellant pled guilty and waived his right to a jury trial.³³ The Supreme

³¹122 S. Ct. 2428 (2002) (holding that a capital sentencing scheme which places the determination of aggravating circumstances in the hands of a judge following a jury adjudication of a defendant's guilt of first-degree murder violates the Sixth Amendment right to a jury trial).


³²See Lozada, 110 Nev. at 353, 871 P.2d at 946.


³³See Boykin v. Alabama, 395 U.S. 238, 243 (1969) (holding that the valid entry of a guilty plea in a state criminal court involves the waiver of several federal constitutional rights, including the right to trial by jury); see also Abrego v. State, 118 Nev. ___, ___, 38 P.3d 868, 871-72 (2002) (concluding that a defendant affirmatively waived his right to have a jury decide a sentence-enhancing fact).

Court noted that "Ring's claim [was] tightly delineated" and declined to reach issues not explicitly asserted in his appeal.³⁴ We do not read Ring as altering the legitimacy or effect of a defendant's guilty plea. We also conclude that appellant's other grounds for challenging the three-judge sentencing panel are meritless. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³⁵


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender
Clark County Clerk

³⁴Ring, 122 S. Ct. at 2437 n.4.

³⁵Cause appearing, we deny appellant's motion for oral argument.