IN THE SUPREME COURT OF THE STATE OF NEVADA

RAFAEL IBARRA ARREOLA A/K/A RAFAEL IBERRA A/K/A RAFAEL IBARRA-ARREOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39485

FILED

DEC 19 2003

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On June 26, 1992, appellant was convicted, pursuant to a jury verdict, of three counts of sexual assault of a minor under the age of fourteen. Appellant had sexual intercourse with his eleven-year-old biological daughter, who became pregnant and aborted the fetus.

Appellant appealed to this court from his judgment of conviction and argued that: 1) the prosecutor improperly referred to facts not in evidence during his closing summation; 2) the district judge erred by questioning a witness concerning her religious beliefs about abortion; 3) the State's expert testimony, including testimony related to DNA (deoxyribonucleic acid) analysis, was improperly admitted because witnesses did not testify to a reasonable degree of medical probability; and 4) appellant's conviction was not supported by sufficient evidence.

On December 23, 1993, we ordered appellant's appeal dismissed. We concluded that appellant failed to show any error and that the evidence against appellant, which included physical evidence of the victim's rape and pregnancy and the victim's testimony, was

overwhelming.[1] We issued remittitur on June 10, 1994, after the United States Supreme Court denied appellant's petition for certiorari.

On May 3, 1995, appellant filed in the district court a proper person post-conviction petition for a writ of habeas corpus. Appellant raised claims that: 1) his initial detention was unlawful, the State should have been precluded from using evidence, including fingerprints and a blood sample, obtained pursuant to that detention, and his trial counsel was ineffective in failing to challenge the admission of this evidence; 2) the State should have been precluded from using a blood sample from the victim and a sample from the aborted fetus because the samples were illegally obtained, and trial counsel was ineffective in failing to challenge the admission of this evidence; 3) portions of the trial testimony from the State's expert witnesses were improperly admitted, and trial counsel was ineffective in failing to challenge the admission of this testimony; 4) trial counsel was ineffective in failing to obtain the services of a DNA expert, who could have offered statistical evidence, and in failing to obtain the services of a child psychiatrist; and 5) appellate counsel was ineffective.

On November 8, 1995, the district court ordered appellant's petition denied, without appointing post-conviction counsel or conducting an evidentiary hearing. Appellant appealed to this court.

On February 24, 1998, we ordered appellant's appeal dismissed, rejecting his claims on the merits. Particularly relevant here, we concluded, in part, that claim 3 of appellant's petition was partially controlled by the law of the case, which upheld the admission of the challenged expert testimony. Additionally, as to the portion of claim 4 related to counsel's failure to retain a DNA expert, we concluded that even

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[1]Ibarra-Arreola v. State, Docket No. 23420 (Order Dismissing Appeal, December 23, 1993).

if counsel had acted unreasonably, no prejudice resulted, given the overwhelming evidence of guilt including the victim's trial testimony.[2]

Appellant also filed in federal district court a petition for a writ of habeas corpus. In September 2001, the federal district court dismissed this petition without prejudice to allow appellant to exhaust his claims in state court.

On October 3, 2001, appellant filed in the Eighth Judicial District Court a second post-conviction petition for a writ of habeas corpus, raising three grounds for relief: 1) the evidence obtained following his arrest was inadmissible because probable cause was not determined within forty-eight hours of arrest; 2) the evidence based on RFLP (Restriction Fragment Length Polymorphism) analysis showing that appellant's DNA was consistent with his paternity of the aborted fetus was unreliable and insufficient to prove that he sexually assaulted his daughter because no evidence was admitted to show the statistical probability of a "match" occurring; and 3) insufficient evidence was adduced to support appellant's conviction.

The State opposed the petition, asserting state procedural bars at NRS 34.726, NRS 34.800 and NRS 34.810. Appellant, now represented by the Federal Public Defender, responded to the State's opposition, asserting the inadequacy of Nevada's procedural bars as well as claims of good cause and actual prejudice to overcome the bars.

On March 22, 2002, the district court entered its order denying appellant relief. The district court concluded that appellant's petition was barred under NRS 34.726, NRS 34.800 and NRS 34.810. Appellant now appeals.

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[2]Arreola v. State, Docket No. 27755 (Order Dismissing Appeal, February 24, 1998).

First, to the extent that we have already addressed the claims raised in appellant's petition, our previous holdings are the law of the case.[3] We will depart from the law of the case only where we determine that it is so clearly erroneous that continued adherence to it would work a manifest injustice.[4] Because we perceive no error in our previous holdings here, appellant may not avoid them.

Second, appellant failed to bring his claims within a year of the remittitur in his direct appeal, and his instant claims either have been previously determined on the merits or could have been presented in his prior petition. Accordingly, absent a demonstration of good cause for the delay in bringing claims or for bringing the same claims in a successive petition, and a showing of actual prejudice, appellant's claims are barred under NRS 34.726 and NRS 34.810.

Appellant contends that the statutory procedural bars at NRS 34.726 and NRS 34.810 may not be applied to bar his claims because this court has inconsistently applied these bars in other cases. We rejected identical arguments in Pellegrini v. State and concluded that "we have been consistent in requiring good cause and actual prejudice to overcome the statutory procedural bars."[5] Further, appellant fails to cite any authority requiring this court to ignore valid state procedural bars on the

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[3]See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (stating that under the law of the case doctrine, the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same).

[4]See Arizona v. California, 460 U.S. 605, 618 n.8 (1983).

[5]117 Nev. 860, 886, 34 P.3d 519, 536 (2001).

basis that those bars have been inconsistently applied in the past, and we discern no basis to do so here.[6]

Appellant also argues, as to claims 1 and 2 of his petition, that the ineffectiveness of trial and direct appeal counsel constitutes good cause to excuse any delay, default or successiveness. Specifically, appellant argues that trial counsel was ineffective in failing to object to, or offer evidence to rebut, the DNA evidence admitted at trial. Appellant contends that this evidence was improperly obtained; the testimony regarding DNA violated the district court's ruling as to the permissible scope of such testimony; the testimony was given by a molecular biologist whom the district court did not formally accept as an expert; and the DNA evidence was unreliable because no statistical evidence was admitted to show the probability of appellant's parentage of the aborted fetus.[7] We conclude that appellant has failed to demonstrate good cause.

The ineffectiveness of trial counsel or direct appeal counsel cannot constitute good cause for appellant's failure to bring his claims in his prior post-conviction petition or for re-raising claims here. Appellant

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[6]See id. at 879, 34 P.3d at 532.

[7]We note that appellant's trial counsel specifically objected to any reference to statistical probability of paternity on the basis of undue prejudice, and the district court ruled that the State would be precluded from offering such evidence unless defense cross-examination raised the issue. The failure of appellant's current counsel to acknowledge this is troubling in light of his assertions that direct appeal counsel was ineffective in failing to challenge the admission of DNA evidence absent statistical evidence of probability. See U.S. v. Martinez, 3 F.3d 1191, 1199 (8th Cir. 1993) (holding that where defendant specifically requested exclusion of statistical evidence on the probability of a DNA match, and the trial court allowed evidence of the match without statistical reference, defendant could not complain on appeal about exclusion of statistical probability evidence).

brought his first petition in proper person. But he had no right to appointment of counsel to represent him in that proceeding, and thus, he had no right to effective post-conviction counsel.[8] Absent a right to effective counsel in his first post-conviction proceeding, even a claim of ineffective post-conviction counsel could not establish good cause to excuse appellant's delay in bringing the instant claims, his default in failing to raise claims in the 1995 petition, or his successive presentation of the 1995 petition's claims.[9]

Alternatively, appellant argues that good cause as to claim 2 of his petition is shown by the novelty of the legal basis to challenge the DNA evidence. He argues that this court first endorsed in Bolin v. State[10] the theory that evidence of a DNA match or DNA consistency may not be admitted absent admission of supporting statistical probability evidence. Therefore, appellant contends, good cause exists to excuse any default or successiveness of claim 2 because the legal basis to support this claim was not reasonably available earlier.[11] We disagree.

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[8]See NRS 34.750(1) (stating that the "court may appoint counsel to represent the petitioner") (emphasis added); see also Crump v. Warden, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997) (recognizing that where appointment of counsel is discretionary, there is no right to effective assistance of counsel).

[9]See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996); cf. Crump, 113 Nev. at 303 & n.5, 934 P.2d at 253 & n.5.

[10]114 Nev. 503, 960 P.2d 784 (1998).

[11]See Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785, 787 n.4 (1998) (recognizing that good cause to excuse procedural default may be shown where "'the factual or legal basis for a claim was not reasonably available to counsel'" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))).

Appellant misstates the significance of Bolin, where we applied to DNA evidence Nevada's "trustworthiness and reliability" test for determining the admissibility of scientific evidence. We held in Bolin that "DNA statistical probability calculations need not take into account genetic population substructure to be valid and admissible."[12] We did not address in Bolin whether evidence of consistency in DNA profiles may be admitted only if in conjunction with admission of statistical probability evidence.[13] Nevertheless, when appellant filed his first post-conviction petition in May 1995, the legal basis upon which he could have constructed his current claim was reasonably available.[14] The constitutional right to not be convicted upon unduly prejudicial, false or misleading evidence was well established.[15] Additionally, we note that appellant asserted in support of his first petition the claim that trial

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[12]Bolin, 114 Nev. at 528, 960 P.2d at 800.

[13]We note that NRS 56.020(2) states, in part, "[T]he results of [court-ordered tests for genetic markers] may be received in evidence. . . . The opinion of any expert concerning results of genetic tests may be weighted in accordance with evidence, if available, of the statistical probability of the alleged genetic relationship." (Emphasis added.)

[14]Cf. Engle v. Isaac, 456 U.S. 107, 134 (1982) (holding that where basis of constitutional claim was available and had been perceived and litigated by other defense counsel, though the U.S. Supreme Court had not yet ruled on its merits, the claim cannot form basis for good cause to excuse procedural default).

[15]See, e.g., Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."); Hanley v. Sheriff, 85 Nev. 615, 617, 460 P.2d 162, 163 (1969) ("Due process forbids the state from deliberately misrepresenting the truth, and a conviction that rests in part upon such false evidence must be set aside." (citing Miller v. Pate, 386 U.S. 1 (1966))).

counsel should have presented a DNA expert to offer evidence on statistics related to probability of paternity. Moreover, appellant's own briefs in the instant appeal cite the 1991 case of Commonwealth v. Curnin[16] for the proposition that trial counsel was ineffective in failing to challenge the State's DNA evidence by insisting on admission of statistical probability evidence. It is clear that appellant's legal argument is not a novel one.[17] Consequently, he has failed to demonstrate good cause for the failure to assert this basis for his claims in his first post-conviction petition.[18]

Furthermore, appellant has not shown how he was prejudiced by the lack of proof on the statistical probability of paternity. Appellant merely disputes the relevancy of the DNA evidence indicating his DNA is consistent with his being the biological father of the aborted fetus. He offers this bald conjecture: the DNA consistency could have occurred simply because he was the biological grandfather of the fetus. Appellant does not generally challenge the reliability of the method of DNA analysis or the accuracy of that analysis for identifying the DNA of appellant, the victim and the aborted fetus. Moreover, the trial testimony shows that the

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[16]565 N.E.2d 440 (Mass. 1991).

[17]See id. at 442-43 & n.7 (recognizing that test results showing a DNA match are inadmissible without evidence of the likelihood of such a match); State v. Vandebogart, 616 A.2d 483, 494 (N.H. 1992) (holding that evidence of DNA match is inadmissible without supporting statistics); Nelson v. State, 628 A.2d 69, 75-76 (Del. 1993) (similar). But cf. Commonwealth v. Crews, 640 A.2d 395, 402-03 (Pa. 1994) (upholding admission of DNA evidence as relevant and probative without supporting statistics).

[18]See Hathaway v. State, 119 Nev. ___, ___, 71 P.3d 503, 506 (2003) (recognizing that a claim that was reasonably available to petitioner during the statutory time period for bringing a post-conviction petition does not constitute good cause to excuse default).

DNA testing procedure, which used RFLP analysis,[19] differentiated between 1) the DNA bands the fetus shared with the victim, 2) the DNA bands the fetus shared with both the victim and appellant, due to the victim's biological relationship to appellant, and 3) the DNA bands shared exclusively between the fetus and appellant. Thus, the determination that the fetus' DNA was consistent with appellant being the biological father of the fetus was not based on the DNA bands that the fetus inherited from the victim. Finally, on direct appeal, we determined that overwhelming evidence, including physical evidence of the victim's rape and pregnancy and the victim's testimony, supported appellant's conviction. Accordingly, appellant's attempt to show actual prejudice fails.

The State also asserted the laches bar at NRS 34.800. Due to appellant's excessive delay (almost eight years from our decision on direct appeal) in filing the instant petition, a rebuttable presumption of prejudice to the State's ability to retry the case attaches here.[20] Appellant asserts that the prejudice is rebutted because he is informed and believes that the evidence admitted at his trial and the transcripts of his trial are still available. However, appellant's assertion does not rebut the presumption that the State's ability to present the testimony of its numerous witnesses has been prejudiced. Appellant has not demonstrated the fundamental miscarriage of justice necessary to overcome the statutory laches bar.[21] Therefore, we conclude that the district court properly dismissed appellant's petition as barred by NRS 34.800.

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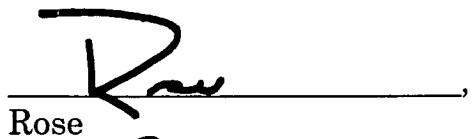
[19]See generally State v. Gross, 760 A.2d 725, 734-36 (Md. Spec. Ct. App. 2000) (discussing reliability of RFLP analysis).

[20]See NRS 34.800(2).

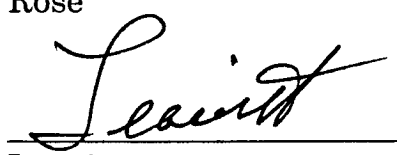
[21]See NRS 34.800(1)(b).

Having concluded that appellant has failed to overcome the applicable state procedural bars, we hereby,

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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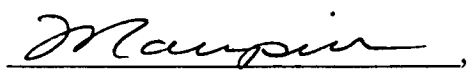

_____, J.
Maupin

cc: Hon. Lee A. Gates, District Judge
Federal Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk