IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
KITRICH POWELL,
Respondent/Cross-Appellant.

No. 39878

FILED

AUG 22 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and a cross-appeal from a district court order granting in part and denying in part Kitrich Powell's post-conviction petition for a writ of habeas corpus in a death penalty case.

In November 1989, Powell subjected four-year-old Melea Allen to repeated beatings that resulted in a variety of injuries, one of which caused her death. A jury convicted Powell of first-degree murder and sentenced him to death. This court affirmed Powell's conviction and sentence.[1]

Powell subsequently filed a timely, first post-conviction petition for a writ of habeas corpus in the district court raising numerous claims, including several claims of ineffective assistance of trial and appellate counsel. The district court heard argument and granted the habeas petition in part. It concluded that Powell had received ineffective

[1]Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992), vacated by 511 U.S. 79 (1994); see also Powell v. State, 113 Nev. 41, 930 P.2d 1123 (1997).

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assistance of trial counsel at the penalty hearing because his attorneys failed to call Powell's father and two brothers to testify in mitigation of punishment. It therefore vacated Powell's death sentence and ordered a new penalty hearing. Otherwise, the district court rejected Powell's claims. The State now appeals, and Powell cross-appeals.

Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.[2] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[3] 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.[4] To establish prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[5] In assessing counsel's performance, the reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from

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[2]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

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

[4]Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[5]Id. at 988, 923 P.2d at 1107.

counsel's perspective at the time.[6] Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[7]

The State contends that the district court erred in vacating Powell's death sentence and ordering a new penalty hearing without conducting an evidentiary hearing. The State argues that this violated the statutory provisions governing post-conviction review and this court's recent ruling in Mann v. State.[8] Powell counters that the State's reliance on Mann is inapposite and that the State, in effect, waived its right to demand an evidentiary hearing by failing to complain after the district court orally announced its decision or by filing a motion for reconsideration.

In the proceeding below, Powell claimed that trial counsel were ineffective for failing to call Powell's father and two brothers to testify at the penalty hearing. Powell claimed that these witnesses would have established that Powell's parents subjected him to severe physical and emotional abuse throughout his childhood and adolescence. Powell submitted letters and affidavits from these witnesses in support of the claim. The State countered that this claim was belied by the testimony of

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[6]See id. at 987-88, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 689).

[7]Strickland, 466 U.S. at 689.

[8]See Mann v. Warden, 118 Nev. ___, 46 P.3d 1228 (2002).

defense investigator Lorne Lomprey. Mr. Lomprey testified at the penalty hearing that he tried to persuade Powell's father to testify for Powell but that the father refused. Mr. Lomprey further testified that he was unable to find witnesses with "anything good to say" about Powell.

We conclude that the district court was required to hold an evidentiary hearing before deciding this issue.[9] Powell's contention regarding waiver is not supported by citation to authority.[10] Moreover, the district court erred in determining conclusively that Powell received ineffective assistance without conducting an evidentiary hearing to resolve the factual dispute created by the affidavits before it.[11] "[B]y observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility."[12] Moreover, a claim "is not 'belied

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[9]See NRS 34.770(1) (providing that a district court "must not" order a change in a petitioner's custodial supervision unless an evidentiary hearing is held).

[10]See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal.").

[11]Cf. Mann, 118 Nev. at ___, 46 P.3d at 1231 (stating that it is improper for the district court to resolve a factual dispute created by affidavits without conducting an evidentiary hearing). We reject the State's contention, however, that the district court improperly admitted the affidavits presented by Powell. NRS 34.370(4) expressly permits this practice.

[12]Id. at ___, 46 P.3d at 1231.

by the record' just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings."[13]

The State also claims that the district court erred in concluding that trial counsel's failure to present the additional witnesses at the penalty hearing constituted ineffective assistance. As discussed above, the existing record does not resolve the factual dispute created by the pleadings and affidavits filed during the post-conviction proceeding. We therefore remand this issue to the district court for an evidentiary hearing regarding the factual underpinnings of Powell's claim and for specific findings of fact regarding this claim of ineffective assistance.

In his appeal, Powell first contends that trial counsel were ineffective for failing to object to an alleged instance of prosecutorial misconduct at the penalty hearing and that appellate counsel was ineffective for failing to allege prosecutorial misconduct on direct appeal. Powell complains that in its closing and rebuttal arguments at the penalty hearing, the State improperly commented on Powell's failure to call witnesses to testify on his behalf, which improperly shifted the burden of proof to the defense. The State counters that the district court properly denied this claim as procedurally barred and, alternatively, that the State merely commented on Mr. Lomprey's testimony.

Our review of the record reveals that the district court improperly denied this claim as procedurally barred. Both in his petition below and his brief to this court, Powell framed this claim in terms of

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[13]Id. at ___, 46 P.3d at 1230.

ineffective assistance.[14] Thus, we remand this issue to the district court for a determination on the merits.

Next, Powell contends that his trial counsel should have presented psychological evidence at both the guilt and penalty phases of trial. Powell supports this claim with a psychological evaluation prepared by William O'Donohue, Ph.D., on September 7, 2001, which indicated that Powell had suffered from mental illness for a lengthy period of time. Powell also relies on Dumas v. State[15] in support of this claim.

This claim does not warrant relief. First, Powell objected to presentation of a psychological defense.[16] Second, defense counsel did obtain a psychological evaluation from psychologist Louis Mortillaro, Ph.D., and had it sealed. Powell has not specified how his trial counsel's decision to seal Dr. Mortillaro's evaluation constituted ineffective assistance. Third, Dr. O'Donohue's evaluation took place almost 12 years after the incident and is therefore of limited value in ascertaining Powell's mental status at the time of the offense. Finally, this case is distinguishable from Dumas. Here, trial counsel obtained a psychological

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[14]See, e.g., Feazell, 111 Nev. at 1449, 906 P.2d at 729.

[15]111 Nev. 1270, 903 P.2d 816 (1995).

[16]Cf. Johnson v. State, 117 Nev. 153, 163, 17 P.3d 1008, 1015 (2001) ("[T]he defendant has the absolute right to prohibit defense counsel from interposing an insanity defense."); see also Kirksey, 112 Nev. at 997, 923 P.2d at 1113 (holding that because Kirksey instructed counsel not to present mitigating evidence, he could not claim ineffective assistance based on counsel's acquiescence or failure to investigate).

evaluation; according to Dr. O'Donohue's evaluation, Powell's mental illness, if any, falls far short of that suffered by Dumas and has no organic basis; and Powell was able to allege in defense that Melea's injuries were accidental in nature or, alternatively, that he was not the perpetrator.[17]

Next, Powell argues that he was denied effective assistance "in the critical pretrial and trial stages of his capital case." In support, Powell purports to quote from a motion to withdraw filed by defense attorney James Lucas, in which Mr. Lucas allegedly expressed concerns regarding the performance of James Mayberry, Powell's lead counsel at trial. Powell also alleges that David Schieck, who replaced Mr. Lucas as co-counsel, did not prepare adequately for Powell's defense. Powell further contends that trial counsel should have requested a continuance so that Mr. Schieck could have prepared for trial. Additionally, Powell complains that the defense presented no testimony to rebut the State's medical evidence.

These claims lack merit. First, although he appears to quote from Mr. Lucas's motion, Powell improperly cites to his habeas petition below in support of these representations.[18] Neither the habeas petition,

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[17]Cf. Dumas, 111 Nev. at 1270-71, 903 P.2d at 816-17 (holding that defense counsel was ineffective for failing to obtain and present psychological testimony where Dumas had an I.Q. of 69, was illiterate, functioned at about the third grade level, and suffered from organic brain damage to his intellectual capabilities and where no other defense existed because when police entered the murder scene, Dumas was "busily stabbing his victim").

[18]See NRAP 28(e) (providing that briefs filed in district courts shall not be incorporated by reference in briefs submitted to this court).

nor any other document in the record before this court includes a copy of Lucas's motion. Further, Powell's conclusory allegations regarding Mr. Schieck's failure to prepare are insufficient to warrant relief.[19] Moreover, Powell has failed to allege that medical testimony was available to rebut that presented by the State. Thus, Powell fails to state a claim warranting relief. Finally, with regard to trial counsel's alleged failure to request a continuance, Powell partially contradicts this allegation by stating in his answering brief that during trial, "defense counsel requested a brief continuance so that they could interview certain witnesses for their case in chief." Further, other than repeating that trial counsel failed to rebut the State's medical testimony, Powell offers no argument as to how he was prejudiced by the failure to request a continuance.[20]

Powell next claims that trial and appellate counsel were ineffective for failing to object to or challenge the jury instructions regarding malice aforethought, equal and exact justice, and the guilt or innocence of any other person. We have rejected similar challenges to those instructions[21] and conclude that Powell cannot demonstrate

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[19]See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) ("A defendant seeking post-conviction relief cannot rely on conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him or her to relief.").

[20]See Mazzan, 116 Nev. at 75, 993 P.2d at 42.

[21]See, e.g., Leonard v. State, 114 Nev. 1196, 1208-09, 969 P.2d 288, 296 (1998) (upholding malice aforethought and equal and exact justice instructions); Guy v. State, 108 Nev. 770, 776-78, 839 P.2d 578, 582-83

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prejudice based on the performance of trial or appellate counsel in this respect.

Powell also complains that the jury was improperly instructed that malice could be presumed, in violation of Collman v. State.[22] Powell did not clearly articulate this claim as alleging ineffective assistance.[23] Moreover, even assuming that Collman, decided after Powell's direct appeal, provides Powell with cause for failing to raise this issue in the earlier proceeding, Powell is not entitled to relief. After a thorough review of the record, we have determined that the defective Collman instruction was not given in this case and that Powell's jury was properly instructed that it had to find malice aforethought in order to convict Powell of first degree murder.

Next, Powell claims that trial counsel provided ineffective assistance by failing to assure that a true and complete record was made of "critical" pretrial proceedings and by failing to file "many meritorious pretrial motions." Powell also argues that his appellate counsel failed to

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(1992) (upholding malice aforethought and guilt or innocence of any other person instructions).

[22]116 Nev. 687, 711, 7 P.3d 426, 441-42 (2000) (holding that instruction providing that child abuse constituted conclusive evidence of malice is erroneous).

[23]See NRS 34.810(1)(b) (limiting a habeas petitioner's ability to raise claims that could have been raised on direct appeal unless the petitioner demonstrates good cause and actual prejudice).

raise the issue of inadequate recording on appeal; "failed and refused to properly communicate" with him; moved to withdraw while his direct appeal was pending on rehearing; and failed to assert "all available constitutional claims," including those raised in the instant petition.

Powell has failed to allege sufficient factual allegations to warrant relief. For example, Powell has failed to identify any instance of a failure to record a pretrial proceeding much less that critical pretrial proceedings were not recorded. And while Powell lists the pretrial motions that trial counsel allegedly should have filed, he does not articulate how any of the suggested motions would have benefited the defense. Powell also does not explain how he was prejudiced by appellate counsel's unsuccessful attempt to withdraw after she filed a petition for rehearing. Finally, this court has held that it will not accept "conclusory, catchall attempts to assert ineffective assistance of counsel."[24]

Next, Powell contends that he was originally charged with "open murder" and that he did not have notice of the State's prosecution on the basis of premeditation and deliberation until a jury instruction issued to that effect, in violation of this court's holding in Alford v. State.[25] Our review of the record reveals that this claim was not properly brought within the ambit of ineffective assistance.[26]

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[24]Evans, 117 Nev. at 647, 28 P.3d at 523.

[25]111 Nev. 1409, 906 P.2d 714 (1995).

[26]Evans, 117 Nev. at 647, 28 P.3d at 523.

Next, citing this court's decision in Byford v. State,[27] Powell complains that it was improper for the jury to receive the Kazalyn[28] instruction on deliberation and premeditation. He invites this court to reconsider its holding in Garner v. State, in which this court held that Byford would not apply retroactively.[29] The State argues that Powell challenged this jury instruction in his direct appeal and that this claim is therefore procedurally barred and, alternatively, that the claim lacks merit. Even assuming that this court's Byford decision, rendered after Powell's direct appeal, provides cause for raising this claim again in the instant petition,[30] we decline to revisit our holding in Garner.

Finally, Powell alleges that cumulative errors deprived Powell of fundamentally fair proceedings and a reliable sentence. This claim lacks merit because, other than the two issues now remanded to the district court, Powell has repeatedly failed to establish that the district court erred in denying his claims. Accordingly, we

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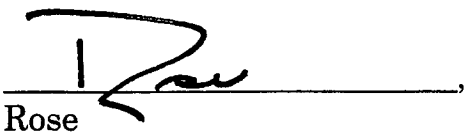
[27]116 Nev. 215, 994 P.2d 700 (2000).

[28]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

[29]See 116 Nev. 770, 787-89, 6 P.3d 1013, 1024-25 (2000), overruled on other grounds by Sharma v. State, 118 Nev. ___, 56 P.3d 868 (2002).

[30]See NRS 34.810(2), (3) (providing that a court must dismiss a successive habeas petition, unless the petitioner proves specific facts that demonstrate good cause for presenting the claims again and actual prejudice).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for an evidentiary hearing on Powell's claim of ineffective assistance at the penalty hearing for failing to call Powell's father and two brothers to testify, and for a determination on the merits of Powell's claim of ineffective assistance for failing to object to the alleged instances of prosecutorial misconduct occurring during the State's closing and rebuttal arguments at the penalty hearing.



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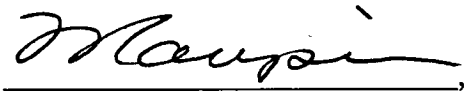
Rose



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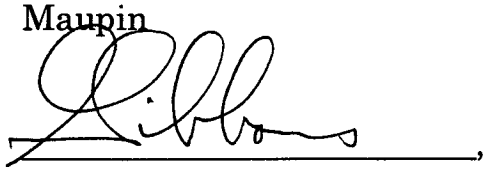

_____, J.
Gibbons

cc: Hon. John S. McGroarty, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Christopher R. Oram
Clark County Clerk