IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS CEASAR POLLARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40105

FILED

JUN 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Appellant Julius Ceasar Pollard was convicted of first-degree murder and received a sentence that requires a minimum of 40 years in prison before he is eligible for parole.

On the night of December 20, 1995, James Hays was at home with family and friends. His son, Terrell Otis (TJ),[1] answered a knock on the door at around 9:00 p.m. Lamar Hearon was at the door and asked for TJ's sister Katie. Besides Lamar, four other teenage boys were outside the house. Hays joined TJ at the door, and both told Lamar that Katie was not at home. Lamar then tried to shake hands with TJ, but TJ turned away because he had been in an altercation with Lamar and Katie's boyfriend several weeks before. Lamar became agitated and began to express annoyance at this, and Julius approached the door, pulled out a handgun, and began waving it around. He pointed the gun at TJ's face and said "Boom," causing TJ to duck away. Hays then told the youths to leave, and Julius raised the gun and shot Hays in the head. Julius and his

[1]Although James Hays and his wife Nancy were actually TJ's grandparents, TJ and his sister Desiree considered them parents and referred to them as such.

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companions fled. Hays was brain dead and died two days later after he was taken off life-support.

After a trial in May 1996, the jury found Julius guilty of first-degree murder with use of a deadly weapon. He was sentenced to two consecutive terms of life in prison, each with the possibility of parole after a minimum of 20 years. After Julius's direct appeal was unsuccessful, he filed the instant post-conviction petition for writ of habeas corpus. The district court held an evidentiary hearing in May 2002 and denied the habeas petition in July 2002.

The first issue before us is one which the parties do not address: whether Julius has shown good cause for the untimely filing of his habeas petition. In pertinent part, NRS 34.726(1) requires a post-conviction habeas petition to be filed within one year after issuance of remittitur on direct appeal, unless the petitioner shows both good cause for the delay and prejudice. To show "good cause," a petitioner must demonstrate that an impediment external to the defense prevented him from raising claims earlier.[2] Among other things, some interference by officials which made compliance with a procedural rule impracticable could provide such an impediment.[3]

After this court dismissed Julius's direct appeal in March 1999, remittitur issued on April 27, 1999. On April 3, 2000, Julius filed in the district court a pro per "Motion for Enlargement of Time and Appointment of Counsel" seeking additional time to prepare and submit a post-conviction petition for habeas relief. According to the district court minutes, on April 10, 2000, the court "noted appeal was dismissed on

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[2]Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001).

[3]Id. at 886-87, 34 P.3d at 537.

February 10th, [sic] therefore, enlargement of time is not necessary." The court also granted the motion for appointment of counsel, but Julius's current attorney was not confirmed as counsel until March 13, 2001. A petition for writ of habeas corpus was filed on July 10, 2001.

Thus, Julius filed his habeas petition more than two years after remittitur issued, outside the one-year deadline of NRS 34.726. But he filed his pro per motion for enlargement of time within that deadline. Although he had less than four weeks to timely file a petition, the district court deemed the motion unnecessary and incorrectly stated that Julius's appeal had been dismissed just two months before. The court should have informed Julius that it had no authority to enlarge the time prescribed by statute for filing a petition and should not have misled him as to the amount of time remaining to him. Given these circumstances, we deem the district court's actions an external impediment providing good cause for the untimely filing.

The question remaining is whether Julius demonstrates prejudice in any of his claims of ineffective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[4] 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.[5] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[6] Judicial review of a lawyer's representation is highly deferential, and a

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

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

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

claimant must overcome the presumption that a challenged action might be considered sound strategy.[7]

We conclude that the cumulative prejudicial effect of several failures by trial and appellate counsel establish a reasonable probability that without those failures the result of the trial would have been different.

Julius first argues that his trial counsel was ineffective in failing to obtain the juvenile records of two state witnesses, Hurvie Fontenot and Mario Kyle. Julius's habeas counsel moved for disclosure of the pair's juvenile records,[8] but after a Chief Deputy District Attorney informed counsel that no such records existed, the district court ruled the motion moot. However, counsel later found notes, made by a Chief Deputy Public Defender before Julius's trial, indicating that Hurvie and Mario were on juvenile probation. The Public Defender's Office decided at that time that it could not represent Julius because Hurvie and Mario were its clients. According to Julius, his trial counsel should have discovered this information and cross-examined Hurvie and Mario on possible bias based on a motivation not to jeopardize their status on probation.

The State fails to respond effectively to Julius's argument. It relies on NRS 50.095(4), which provides that "[e]vidence of juvenile adjudications is inadmissible under this section." The State simply ignores Davis v. Alaska,[9] the relevant United States Supreme Court opinion. Davis held that a state's interest in maintaining the

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

[8]See NRS 62H.030(2) (providing that generally juvenile records "may be opened to inspection only by court order to persons who have a legitimate interest in the records").

[9]415 U.S. 308 (1974).

confidentiality of juvenile records is outweighed by a defendant's constitutional right to confront prosecution witnesses, in that case "to probe into the influence of possible bias in the testimony of a crucial identification witness."[10] Therefore, Julius had a right to question Hurvie and Mario on their juvenile records if those records indicated a possible bias.

The question is whether prejudice resulted from trial counsel's failure to cross-examine on this topic. As an initial matter, Julius has not produced any official records showing that Hurvie and Mario were on juvenile probation. However, for the purposes of this appeal we accept that fact as established since the State has ignored this factual issue in its brief to this court. If Hurvie and Mario were on probation and had been cross-examined accordingly, it conceivably could have made a difference in regard to the jury's finding of deliberate, premeditated first-degree murder rather than second-degree murder.

On direct appeal in confrontation clause cases, "'[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.'"[11] Relevant factors include the overall strength of the prosecution's case, whether the desired testimony is cumulative, the importance of the witness's testimony to the prosecution, and the presence or absence of corroboration of the witness's testimony.[12]

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[10]Id. at 319; see also Stamps v. State, 107 Nev. 372, 376, 812 P.2d 351, 353 (1991).

[11]Stamps, 107 Nev. at 377, 812 P.2d at 354 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

[12]Id.

Hurvie and Mario were the two other teenagers who went with Julius, his cousin, and Lamar to the Hays home the night of the shooting. Their pertinent testimony was strongly corroborated, except in the following respects. Hurvie testified that he heard Julius's cousin say "smoke 'em" before the shooting, and he denied seeing anyone drinking when he was at Lamar's house that day. Mario testified that he spent much of the day with the others but did not recall that they drank any alcohol.

The evidence that Julius and the others drank an excessive amount of wine and even smoked marijuana was so strong that the jury may have given little weight to Hurvie's and Mario's denials on that matter. But cross-examination on their probation status still would have been helpful to the defense to show the two were untrustworthy in this regard and to diffuse any juror doubt that Julius was intoxicated. And intoxication was important to the question of second- versus first-degree murder.

Hurvie's claim that Marshall told Julius to "smoke 'em" also may have contributed to the jury's finding of first-degree murder. In closing argument, the prosecutor told the jury: "If you believe Hurvie's testimony on that point, ... that alone is enough to reach the conclusion that this is a premeditated, intentional killing." If the jurors were swayed by this argument, Hurvie's testimony may have been crucial to their finding of first-degree murder. Cross-examination revealing Hurvie's juvenile probation might have lessened the weight that jurors gave to his testimony.

Therefore, counsel's failure to cross-examine Hurvie and Mario regarding probation had some prejudicial effect.

Julius also contends that his trial and appellate counsel were ineffective because they did not challenge testimony given by three of the

victim's family members. He says that the State improperly presented the testimony simply to evoke sympathy. The first witness called by the State was the victim's wife, Nancy Hays. She was in her bedroom when her husband was shot, and she did not see or hear the shooting. Desiree Otis, the victim's daughter, testified that she was in the back room of the house and heard the gunshot but did not see the shooting. Both testified that they came out to find the victim lying on the floor mortally wounded. Katherine Hays (Katie), the victim's daughter, testified that she came home just after her father was shot. She did not see Julius or any of the youths who had come to the house. After the prosecutor began to ask her about the altercation between her brother TJ and her boyfriend and Lamar, defense counsel objected, and the district court sustained the objection. The transcript indicates that Katie was crying during her testimony. Defense counsel did not cross-examine any of these witnesses.

In Lord v. State this court stated: "It is error to allow the relative of a victim to testify where the testimony is not needed to prove or to strengthen proof of a material fact, giving rise to the inference that the relative's appearance was contrived primarily to arouse the sympathy of the jurors."[13] None of these three witnesses was needed to prove or to strengthen proof of a material fact in this case. It can be inferred that they were called primarily to arouse the sympathy of the jurors. Therefore, counsel performed deficiently in not challenging their testimony. The improper testimony was not overly emotional or graphic, but its prejudicial impact also enters our analysis.

Julius next contends that the jury instruction on premeditation and deliberation was improper and his appellate counsel

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[13]107 Nev. 28, 33, 806 P.2d 548, 551 (1991).

was ineffective in failing to challenge it. Trial counsel unsuccessfully sought a jury instruction that more fully defined willful, deliberate, and premeditated. Instead, the jury received the so-called Kazalyn instruction on premeditation, which the prosecutor stressed in her opening and closing arguments. This court later disapproved the Kazalyn instruction in Byford v. State[14] because it defines only premeditation and blurs the distinction between first- and second-degree murder. However, Byford was published eleven months after this court dismissed Julius's appeal and does not apply retroactively in post-conviction proceedings.[15] Thus, Julius has not shown that his counsel performed deficiently in failing to raise the issue on appeal. Still, the effect of the Kazalyn instruction is relevant to a question we consider below—whether expert psychological evidence might have led to a finding of second-degree rather than first-degree murder.

Julius asserts that his trial counsel was ineffective in failing to retain and present the testimony of two expert witnesses: a firearms expert and a forensic psychologist. He argues first that the evidence presented by his firearms expert at the evidentiary hearing would have bolstered his assertion at trial that the shooting was accidental. The only testimony by the expert which is material to this issue regarded the trigger pull of the murder weapon. At trial, the State's firearms expert testified that the trigger pull was approximately five and a half pounds of pressure, "a fairly deliberate pull." In contrast, Julius's witness gave his opinion that the pull was "[l]ighter than usual, probably around two to three pounds. It would not require a lot of pressure on the trigger to

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[14]116 Nev. 215, 233-36, 994 P.2d 700, 712-14 (2000).

[15]See Evans v. State, 117 Nev. 609, 643, 28 P.3d 498, 521 (2001).

discharge it." This testimony, if correct, would mean the weapon was appreciably easier to shoot than the evidence at trial indicated. However, the strength of the testimony is questionable because Julius's expert gave no basis for his opinion, whereas the State's expert testified that an NRA-certified device with a gauge was used to determine the trigger-pull pressure.

To show that counsel's failure to call a firearms expert prejudiced him, Julius should "demonstrat[e] the type and strength of evidence that might have been presented, and that there exists a reasonable probability that presentation of the evidence would have resulted in a different outcome at trial."[16] This evidence falls somewhat short of this standard.

Julius also contends that because he was under the influence of alcohol and marijuana at the time of the shooting, "[a] forensic psychologist could have testified, as Dr. John Paglini did during the habeas hearing, that [Julius] did not have the ability to form the specific intent necessary to commit first-degree murder." Dr. Paglini's testimony was not as categorical as Julius claims. Dr. Paglini testified that although Julius knew right from wrong and was responsible for the crime, "it was more or less an impulsive move, poor judgment influenced to a certain degree by being high as well as intoxicated." If proof of deliberation and premeditation was strong in this case, this sort of testimony alone would not create a reasonable probability of a different outcome.

However, there was little evidence at trial to establish first-degree murder. The record shows that Julius was only 15, in an

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[16]Riley v. State, 110 Nev. 638, 649, 878 P.2d 272, 279 (1994) (rejecting a claim that counsel was ineffective in failing to call a ballistics expert to testify).

unfamiliar city with new companions (other than his cousin), and under the influence of alcohol and marijuana. His testimony that he was unfamiliar with the murder weapon and had never before used it is uncontradicted. The record also shows that the gun had no safety mechanism or obvious indicators to show when it was either loaded or cocked. Julius did not know and had no motive to harm the victim, other than a sudden, trivial confrontation in which he was not even directly involved. The shooting occurred in the plain view of a half-dozen witnesses. If his cousin indeed said "smoke 'em," this simply added another irrational influence to the situation. Although sufficient for second-degree murder, this evidence only creates an inference of deliberate and premeditated murder. Therefore, because the evidence for first-degree murder was so weak and the Kazalyn instruction deemphasized the intent required for deliberate and premeditated murder, expert testimony like Dr. Paglini's might create a reasonable probability of a different outcome.

We conclude that Julius received ineffective assistance of counsel because without the failures of counsel discussed above, there is a reasonable probability that the jury would have found second-degree murder.[17] Accordingly, we

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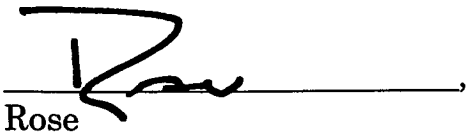
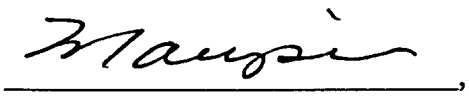
[17]Julius also asserts that his counsel were ineffective in regard to the following claims: the statement he made to a detective the morning after the shooting was involuntary; a jury instruction that "a person with a mind capable of knowing right from wrong must be regarded as capable of entertaining intent and of deliberating and premeditating" was improper; and the jury instructions on reasonable doubt and implied malice were improper. These claims have no merit.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Shearing, C.J.



Rose, J.



Maupin, J.

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