IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40982

FILED

FEB 05 2004

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 a post-conviction petition for a writ of habeas corpus. In 1998, this court affirmed appellant William P. Castillo's conviction of first-degree murder and six other felonies and his sentence of death.[1] The basic facts of the crimes were as follows.[2]

In late November 1995, Castillo helped reroof the house of an 86-year-old woman, Isabelle Berndt. After Castillo found a key to Berndt's house, a coworker dissuaded him from entering, but Castillo indicated he would come back at night. Early in the morning on December 17, 1995, Castillo and an accomplice returned to their apartment with items including a VCR and silverware. Castillo told his girlfriend, who also lived at the apartment, that he had broken into a house, hit the sleeping occupant with a tire iron, stolen some items, and set the house on fire. Early that same morning, firefighters put out a blaze at Berndt's house and found her body inside. An investigator determined that the fire was arson. The coroner determined that Berndt died from an intracranial

[1]Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), corrected by McKenna v. State, 114 Nev. 1044, 1058 n.4, 968 P.2d 739, 748 n.4 (1998).

[2]See id. at 273-77, 956 P.2d at 105-07.

hemorrhage due to blunt force trauma to her face and head consistent with blows from a crowbar or tire iron. Berndt's daughter later searched the house and found that, among other things, her mother's silverware and VCR were missing. On December 19, 1995, one of Castillo's coworkers contacted the police and told them that Castillo had admitted to entering Berndt's house, hitting her numerous times with a tire iron, smothering her with a pillow, and stealing a VCR, money, and silverware. Police executed a search warrant at Castillo's apartment that night. Castillo and his girlfriend consented to the search, and police recovered the silverware, the VCR, and other incriminating evidence. After his arrest, Castillo waived his Miranda[3] rights and eventually confessed to the crimes.

Castillo received a jury trial. The defense did not present evidence at the guilt phase. The jury returned guilty verdicts on all the counts, including first-degree murder with use of a deadly weapon.

At the penalty hearing, the State presented evidence of Castillo's criminal record. His extensive juvenile record included charges of attempted murder and six counts of arson. He also used marijuana, speed, cocaine, and alcohol. During his adolescence, doctors determined that Castillo understood the difference between right and wrong, had no neurological disorder, but suffered from a personality disorder. At seventeen, Castillo escaped from a youth training facility, was arrested for attempted burglary and certified to adult status, and served fourteen months in prison. In 1993, Castillo was convicted of a robbery in which he had a gun. He was sentenced to three years in prison and committed multiple disciplinary infractions while serving just under two years. At

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[3]Miranda v. Arizona, 384 U.S. 436 (1966).

the time of his trial in the instant case, Castillo was charged with battery on his neighbors. The State also introduced victim impact testimony by Berndt's granddaughters and daughter.

A neuropsychologist testified for the defense that Castillo came from a dysfunctional family, had been emotionally, mentally, physically and behaviorally abused, and suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder." A correctional officer and a juvenile facility counselor each testified to several positive episodes regarding Castillo. Castillo's girlfriend testified that he had few social skills, acted like a "big kid," but was trying to improve. Castillo's mother testified that he had a difficult upbringing due to physical and emotional abuse by his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement expressing regret and remorse for his conduct.

The jurors found four aggravating circumstances: (1) Castillo had been previously convicted of a felony involving the use or threat of violence, and he committed the murder (2) during a burglary, (3) during a robbery, and (4) to avoid a lawful arrest. Three mitigating circumstances were found: Castillo's youth, that he committed the murder under the influence of extreme emotional distress or disturbance, and any other mitigating circumstances. The jurors returned a verdict of death.

In April 1999, Castillo filed a post-conviction petition for a writ of habeas corpus, eventually followed by two supplemental briefs. The district court held an evidentiary hearing and in June 2003 denied the petition. Castillo raises a number of issues on appeal, including ineffective assistance of counsel.

A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both good cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.[4] Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus.[5] Such claims present a mixed question of law and fact, subject to independent review.[6] To establish ineffective assistance of counsel, a defendant must show that an attorney's representation fell below an objective standard of reasonableness and that the attorney's deficient performance prejudiced the defense.[7] To establish prejudice, the defendant must show that but for the attorney's mistakes, there is a reasonable probability that the result of the proceeding would have been different.[8]

Castillo claims first that his appellate counsel was ineffective in challenging an improper argument by the prosecutor. On direct appeal, counsel contended that the prosecutor committed misconduct in arguing to the jurors that "you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant."[9] This court considered the

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[4]NRS 34.810.

[5]Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

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

[7]Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[8]Id. at 694.

[9]Castillo, 114 Nev. at 279, 956 P.2d at 109.

argument improper but not reversible error.[10] Castillo now complains that his counsel failed to also challenge a different aspect of the prosecutor's argument, regarding the jury's "duty." The prosecutor began the above remark by telling the jury that "[t]he issue is do you . . . have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and [m]oral duty."[11] In Evans v. State, this court condemned such rhetoric because it is "designed to stir the jury's passion and appeal to partiality."[12]

The district court incorrectly concluded that this issue was subject to the law of the case and deserved no consideration. Castillo's current claim is not simply a refinement of the original direct-appeal issue of prosecutorial misconduct; it is a claim of ineffective assistance of counsel, based, moreover, on a ground not raised on direct appeal. The doctrine of the law the case therefore has no application here.[13] The district court also concluded that because Evans was not decided until 2001, counsel could not be faulted for failing in 1998 to challenge the prosecutor's argument on the ground now raised. This is a relevant but not decisive consideration. It is obviously not necessary in all cases for this court to disapprove specific language before a defense counsel should reasonably object to such language. We conclude that appellate counsel

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[10]Id. at 280-81, 956 P.2d at 109-10.

[11]Trial Transcript (September 24, 1996, Afternoon Session) at 65; cf. Castillo, 114 Nev. at 279, 956 P.2d at 109.

[12]117 Nev. at 633-34, 28 P.3d at 515.

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

acted unreasonably here in not raising this issue but conclude that no prejudice resulted.

In Evans, considering whether the prosecutor's improper remarks on the jury's "duty" deprived Evans of a fair penalty hearing, we stated that "perhaps they did not, but the prosecutor erred further."[14] Based primarily on that further error (the prosecutor urged the jury to prematurely consider character evidence in reaching a verdict of death), we granted Evans a new penalty hearing.[15] We conclude that the improper argument in this case did not deprive Castillo of a fair penalty hearing. The aggravating circumstances and the other evidence presented against Castillo relevant to his sentence were of such force that the result of his appeal would not have changed even if counsel had challenged the improper argument on both grounds.[16]

Castillo also contends that his trial and appellate counsel were ineffective in failing to challenge the jury instructions in regard to the use of character or "other matter" evidence in the penalty hearing. He cites

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[14]117 Nev. at 634, 28 P.3d at 515.

[15]Id. at 634-37, 28 P.3d at 515-17.

[16]Castillo's attorney, Christopher R. Oram, accuses this court of "reverse discrimination" because on direct appeal we did not grant a new penalty hearing for Castillo, based on this improper argument, as we did for Evans. Castillo apparently is white, and Evans apparently is African-American. This accusation is nonsense. First, the race of the parties before this court has no bearing on our decisions. Second, Castillo did not raise this issue on direct appeal, so this court has not had a proper opportunity to address it before. Third, the primary error that occurred in Evans's case—a prosecutor urging the jury to employ improperly the character evidence—did not occur here. We advise Mr. Oram to refrain from making reckless, unfounded accusations in the future.

Evans again but fails to show that it is apposite. Castillo does not provide this court with the instructions given in his case;[17] he simply asserts that they did not properly inform the jury on how to consider the penalty evidence. However, the error in Evans was not incorrect jury instructions but improper argument by the prosecutor, who wrongly directed jurors to employ "other matter" evidence in determining the existence and weight of aggravating circumstances.[18] This court stated that the jury instructions in that case, though accurate, "did not cure the error introduced by the incorrect argument."[19] Evans set forth for future use jury instructions describing the restricted use of "other matter" evidence, but it did not imply, let alone hold, that lack of such instructions in prior cases constituted error.[20] Castillo has shown neither that his attorneys acted deficiently nor that he was prejudiced.

Castillo claims that his trial counsel was ineffective in failing to properly investigate the case and failing to present a psychological defense in the guilt phase. This claim has no merit. Castillo identifies no evidence which his counsel failed to uncover. He argues that psychological evidence presented by the defense in the penalty phase should have been presented in the guilt phase, making it possible for the jury to find second-

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[17]See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); see also Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); NRAP 30(b)(3).

[18]See 117 Nev. at 634-37, 28 P.3d at 515-17.

[19]Id. at 635, 28 P.3d at 516.

[20]Id. at 634-37, 28 P.3d at 515-17.

degree murder. He cites this court's opinion in Dumas v. State, where we concluded that defense counsel was ineffective for failing to investigate and present a defense of mental incapacity or, at least, of a mental state inconsistent with deliberate, premeditated murder.[21] Again, Castillo's authority is not apposite.

Dumas stabbed to death his fiancee; he was mentally deficient and illiterate, had an IQ of 69, and functioned at about a third-grade level.[22] A psychiatrist employed by the State "reported that Dumas probably suffered 'organic damage to [his] intellectual capabilities and was incapable of premeditating'" the killing.[23] The psychiatrist believed rather that "Dumas was acting on impulse and out of emotional desperation."[24] Dumas's counsel failed to investigate or present this evidence. The facts in this case are not comparable. Castillo's counsel did employ a psychologist to investigate Castillo's mental condition. And the record shows that Castillo was average or even above average in intelligence and highly capable of calculation and manipulation; he was delinquent and exhibited a personality disorder but had no neurological damage, mental illness, or learning disability. At the evidentiary hearing, Castillo's trial and appellate counsel, David Schieck, testified that he "didn't see any diminished capacity defense that the jury would accept." He considered the Dumas case different in that Dumas was mentally retarded and

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[21]111 Nev. 1270, 903 P.2d 816 (1995).

[22]Id. at 1271, 903 P.2d at 816-17.

[23]Id.

[24]Id.

committed a crime of passion. Schieck believed that the psychological evidence gathered by his expert was germane only to the penalty phase, and "in fact, a lot of what he would have had to have told the jury about [Castillo's] background probably would have been damaging at the guilt phase of the trial." We conclude that the record shows that defense counsel acted reasonably in investigating Castillo's mental condition and deciding not to offer psychological evidence in the guilt phase.

In his remaining claims, Castillo raises alleged trial or other freestanding errors. He fails to articulate any good cause for failing to raise the claims before, and they are consequently procedurally barred. Although he asserts that his conviction is unconstitutional because of cumulative error, including "the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel," this court does not accept

> conclusory, catchall attempts to assert ineffective assistance of counsel. If first-time applicants for post-conviction habeas relief fail to argue specifically that their trial or appellate counsel were ineffective in regard to an issue or to show good cause for failing to raise the issue before, that issue will not be considered, pursuant to NRS 34.810.[25]

The following claims are therefore procedurally barred: the tire iron or crowbar used in the murder was not a deadly weapon; NRS 193.165(5), which defines "deadly weapon," is unconstitutionally vague and ambiguous; the death penalty is cruel and unusual punishment under the Eighth Amendment of the United States Constitution and violates

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

international law; execution by lethal injection is cruel and unusual punishment and violates international law; Castillo's conviction and sentence are invalid under the International Covenant on Civil and Political Rights; and Nevada's capital punishment system is unconstitutional because it operates in an arbitrary and capricious manner. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Nancy M. Saitta, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk