

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FRANCIS MEEGAN, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40983

FILED

DEC 22 2004

ORDER OF REVERSAL AND REMAND

BY *[Signature]*
JANET M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On November 15, 1996, appellant James Francis Meegan, II, was convicted, pursuant to a jury verdict, of first-degree murder. The district court sentenced Meegan to serve a prison term of life without the possibility of parole. Meegan appealed, and this court affirmed the conviction.¹

On September 17, 1999, Meegan filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Without conducting an evidentiary hearing or appointing counsel, the district court denied the petition. Meegan appealed, and this court reversed the order of the district court, remanding the matter for the

¹Meegan v. State, 114 Nev. 1150, 968 P.2d 292 (1998), clarified by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

appointment of counsel and an evidentiary hearing on Meegan's claim that his counsel were ineffective for failing to challenge the first-degree murder jury instructions requiring the jury to presume malice.²

On remand, the district court appointed counsel to represent Meegan, and counsel supplemented the petition. After conducting an evidentiary hearing, the district court denied the petition, ruling that Meegan was not prejudiced by counsel's failure to object to the erroneous presumed malice jury instructions because the resulting error was harmless beyond a reasonable doubt. The district court also resentenced Meegan, imposing a sentence of life with the possibility of parole, explaining that the original sentence of life without parole was based on a material mistaken assumption of law. Meegan filed the instant appeal.

Meegan contends that the district court erred in rejecting his claim that his trial and appellate counsel were ineffective in failing to challenge the erroneous presumed malice jury instructions. We agree.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.³ To establish prejudice with regard to trial counsel, a petitioner must show a reasonable probability that, but for counsel's errors, the result of the trial

²Meegan v. State, Docket No. 35811 (Order of Reversal and Remand, October 8, 2002).

³Strickland v. Washington, 466 U.S. 668, 687 (1984).

would have been different.⁴ To establish prejudice with regard to appellate counsel, a petitioner "must show that the omitted issue would have a reasonable probability of success on appeal."⁵ A district court's factual findings involving ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

In this case, we first conclude that Meegan's counsel were deficient in failing to challenge the presumed malice jury instructions. Like in Collman v. State, the jury instructions did not comport with then existing law because they directed the jury to presume malice if they found the killing occurred by means of child abuse.⁷ Under the law as it existed in 1996, malice aforethought was an essential element of the offense of first-degree murder perpetrated by means of child abuse; therefore, the jurors should not have been instructed that malice could be presumed.⁸

⁴Id. at 694.

⁵Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁷116 Nev. 687, 7 P.3d 426 (2000). We reject the State's argument that Collman created new law, essentially overruling Graham v. State, 116 Nev. 23, 992 P.2d 255 (2000). The jury in Graham was properly instructed that malice was an element of murder. Id. at 25-26, 992 P.2d at 256. Accordingly, Collman neither conflicted with nor overruled Graham.

⁸See Moser v. State, 91 Nev. 809, 812 & n.3, 544 P.2d 424, 426 & n.3. (1975) (recognizing that malice aforethought is an essential element of
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We also conclude that the district court erred in finding that Meegan was not prejudiced by his counsel's deficient performance.⁹ In determining whether the giving of a presumed malice instruction was harmless beyond a reasonable doubt, this court has stated that: "Where a defendant has contested the omitted element and there is sufficient evidence to support a contrary finding, the error is not harmless."¹⁰ Applying that standard to this case, we cannot say that the erroneous instructions were harmless beyond a reasonable doubt. Meegan contested the omitted malice element and the defense evidence, if believed, was sufficient to support the defense theory that Meegan did not kill the victim with malice aforethought. In particular, like in Wegner v. State, the medical testimony did not eliminate the possibility that the victim died by accidental means.¹¹ Also, Meegan's claims that he loved the victim, and never sold, abused or killed her were also supported by sufficient witness testimony from Meegan's family members and friends.

... continued

first-degree murder charged under NRS 200.030(1)(a)); see also Collman, 116 Nev. at 716-17, 7 P.3d at 445 (discussing the malice aforethought requirement).

⁹See Collman, 116 Nev. at 722-23, 7 P.3d at 449.

¹⁰Wegner v. State, 116 Nev. 1149, 1156, 14 P.3d 25, 30 (2000) (citing Neder v. United States, 527 U.S. 1, 19 (1999)).

¹¹See id.

Moreover, we reject the State's argument that the error alleged in this case is harmless, as it was in Collman. The jury did not find the torture aggravator or return a death verdict, like the jury did in Collman, and notably the State did not even allege that Meegan tortured the victim. In fact, during the penalty phase of Meegan's trial, the prosecutor stated that the death penalty was inappropriate, conceding that there was no evidence that Meegan intended to kill or acted with premeditation. In particular, the prosecutor stated:

In light of what this man did in that he killed his daughter and then mutilated her body, there is no evidence that the State could produce that he in fact intended to kill. There is no evidence that he premeditated the death of the [victim].

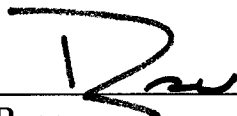
Finally, unlike the prosecutor in Collman, the prosecutor in Meegan's case did not utilize the other jury instructions correctly defining malice in its theory of the case. To the contrary, in closing argument during the guilt phase, the prosecutor emphasized that malice was "conclusively proven" if it established that Meegan abused the victim resulting in her death.

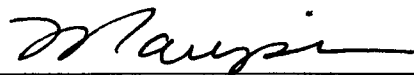
The pivotal issue is whether we can say beyond a reasonable doubt that the jurors would have found that Meegan killed the victim with malice aforethought absent the jury instructions directing them to presume that essential element. We cannot reach such a conclusion in a case, like this one, where the prosecutor emphasized malice was presumed, and conceded that there was no evidence that Meegan either

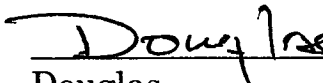
intended to kill or acted with premeditation. Accordingly, we conclude that Meegan was prejudiced by his counsel's deficient conduct.

Because Meegan received ineffective assistance of counsel under the standard set forth in Strickland v. Washington, he is entitled to a new trial.¹² Accordingly, we

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


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²Because we conclude that Meegan is entitled to a new trial, we need not address his remaining contention involving an alleged due process violation.