

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
VERNON ART TIGER,
Respondent.

No. 41470

FILED

JUN 17 2005

JUSTICE M. BLOOM
CLERK OF SUPREME COURT
J. R. BIRCH
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from an order of the district court granting respondent Vernon Art Tiger's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

Procedural history

On August 18, 1983, the district court convicted Tiger, pursuant to a jury verdict, of first-degree murder (count I), burglary with the use of a deadly weapon (count II), robbery with the use of a deadly weapon (count III), and attempted sexual assault with the use of a deadly weapon (count IV). The district court sentenced Tiger to serve a term of life in the Nevada State Prison with the possibility of parole for the murder count, and lesser terms for the remaining counts. On August 31, 1983, Tiger's counsel Joel M. Cooper filed a notice of appeal, but thereafter took no action in prosecuting the appeal.¹ On June 4, 1984, this court

¹Tiger's former trial counsel, Joel Cooper, died on February 6, 1995.

dismissed Tiger's appeal from his judgment of conviction and sentence as abandoned.² The remittitur issued on June 26, 1984.

On May 6, 1993, Tiger filed a proper person post-conviction petition for a writ of habeas corpus in the district court asserting multiple direct appeal and ineffective assistance of counsel claims. On July 14, 1993, the district court appointed counsel for Tiger. Thereafter, during the course of the post-conviction litigation below, three different attorneys served as Tiger's appointed counsel, three different district judges issued rulings in the case, and Tiger and the State filed numerous motions and supplemental documents.

Tiger's current counsel, JoNell Thomas, was appointed in 1999. She thereafter filed a motion in this court, requesting this court to recall the remittitur in the direct appeal. This court denied the motion.³ Thomas then filed a supplemental habeas petition in the district court on September 1, 2000.

On October 31, 2000, the State filed a response to the supplemental petition, renewing contentions--that it had apparently previously abandoned--that the petition was barred as untimely and under the doctrine of laches. Contrary to the State's earlier concession that Tiger was entitled to raise direct appeal issues in his petition pursuant to this court's holding in Lozada v. State, the State's October 2000 response asserted that Tiger was not entitled to the Lozada remedy because he did

²See Tiger v. State, Docket No. 15376 (Order Dismissing Appeal, June 4, 1984).

³Tiger v. State, Docket No. 15376 (Order Denying Motion to Recall Remittitur, March 29, 2000).

not seek relief within a reasonable time after he knew or should have known that his appeal was abandoned.⁴

In response to the State's contentions, Tiger contended that District Judge Gates, District Judge Maupin, and this court had all concluded that the laches argument lacked merit. Tiger also argued that: (1) Judge Gates expressly denied the State's prior motion filed in 1993 to dismiss the petition as procedurally barred; (2) Judge Maupin implicitly denied the motion to dismiss by ordering an evidentiary hearing on the petition; and (3) this court did not mention the laches argument in the order denying the motion to recall the remittitur and therefore implicitly concluded that the petition should not be dismissed under the doctrine of laches.⁵ Tiger's counsel further argued that good cause existed to excuse any procedural default because there was no evidence in the record to show that Tiger had been informed that his appeal was dismissed and that Tiger did not, in fact, know that his appeal had been dismissed. Finally, Tiger's counsel argued that the State had waived the issue of

⁴Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). The State's prior concession was apparently based on an erroneous legal conclusion that Tiger was entitled to a review of direct appeal issues under our holding in Lozada regardless of the fact that he did not assert his appeal deprivation claim until years after this court dismissed his appeal.

⁵We emphatically reject the suggestion that this court implicitly concluded that the petition should not be dismissed under the doctrine of laches. This court's order denying the motion to recall the remittitur simply and quite properly declined to recall the remittitur years after the conviction had become final. The order noted only that Tiger would be entitled to appeal any adverse ruling on his post-conviction petition to this court and expressed no opinion whatsoever on the issue of laches or on whether Tiger's petition was procedurally barred.

laches by conceding in 1995 that Tiger was entitled to raise direct appeal issues within the habeas proceedings pursuant to Lozada.

District Judge Nancy Saitta conducted a hearing on March 7, 2001. She found that the procedural default issue had been raised at least twice previously, and that "the State has had ample opportunity to argue to have their case heard with respect to the procedural bars." Judge Saitta could "see no reason that Judge Maupin would have set this matter on for evidentiary hearing unless he too felt that issue had been previously resolved." Thus, Judge Saitta ordered an evidentiary hearing without specifically finding that Tiger had demonstrated cause and prejudice to overcome the procedural bar. Rather, her ruling was premised upon her finding that the issue had been previously resolved.

The evidentiary hearing was thereafter conducted, and on November 21, 2002, Judge Saitta granted Tiger's petition and ordered a new trial. In the order granting habeas relief, Judge Saitta specifically found: "On October 16, 1995, Supreme Court Justice Maupin, then a District Court Judge assigned to this case, concluded that there was good cause for the late filing of the petition for habeas relief and further that petitioner had received ineffective assistance of counsel in the pursuit of his appeal." This appeal by the State followed. For the reasons stated below, we conclude that Tiger's petition was procedurally barred and should have been denied on that basis.

Procedural default

Initially, we note that Judge Saitta's finding that former District Judge Maupin had "concluded that there was good cause for the late filing of the petition" is not supported by the record. Then District Judge Maupin did not actually find good cause; rather, he ruled that Tiger

could raise direct appeal issues in the habeas proceeding based on the State's concession to that effect. Moreover, as noted above, the State's initial concession was evidently based on an erroneous legal conclusion that Tiger's appeal deprivation claim provided good cause under NRS 34.726 to excuse the untimely filing of the petition. This of course is not and never has been the law in Nevada.⁶ The record before this court does not disclose any specific findings by any of the district court judges who reviewed this untimely post-conviction petition that Tiger had demonstrated good cause to excuse the untimely filing of his petition. Furthermore, neither the law of this state, nor the record before us supports such a determination.

Tiger claims that Judge Gates found good cause to excuse the procedural default. Because the transcript of the hearing before Judge Gates is apparently unavailable, we are unable to verify this claim. Even assuming that Judge Gates found good cause, however, we conclude that such a finding would have been clearly erroneous.

Tiger's explanation for the untimeliness was twofold. First, he argued that he was young, uneducated, and he did not receive adequate assistance from inmate law clerks at the prison. These reasons are not

⁶See Lozada, 110 Nev. at 358, n.5, 871 P.2d at 949 n.5 (Lozada should not be read to excuse the untimely filing of a habeas petition based on an appeal deprivation claim); see also Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) (an allegation that a claimant was deprived of a direct appeal without his or her consent does not constitute good cause to excuse the untimely filing of a petition under NRS 34.726).

sufficient to demonstrate good cause.⁷ Second, Tiger argued he did not know his appeal had been dismissed. A petitioner's reliance upon his counsel to file and pursue a direct appeal is sufficient cause to excuse a procedural default if the petitioner demonstrates: "(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should have known that his counsel was not pursuing his direct appeal."⁸ Although Tiger may have actually and reasonably believed that his attorney was pursuing his direct appeal within the first few years following his conviction, he failed to demonstrate that he filed his petition for post-conviction relief within a reasonable time after he should have known that his direct appeal had been dismissed as abandoned. Moreover, Tiger failed to allege sufficient facts respecting specific measures he took to follow up on the status of his case, apart from arguing that he made "repeated attempts" to contact Cooper.

We further conclude that the State did not effectively concede, stipulate to, or waive any claims that Tiger's petition was procedurally barred as untimely or under the doctrine of laches. As noted, the State did erroneously concede at one point that Tiger could raise direct appeal issues in the habeas proceedings pursuant to Lozada. That concession, however, was legally erroneous and did not specifically address the untimeliness of the petition, or the doctrine of laches, which the State had

⁷See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (organic brain damage and reliance on inmate law clerk for assistance is not good cause to excuse procedural default).

⁸Hathaway, 119 Nev. at 254, 71 P.3d at 507-08 (quoting Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000)).

asserted prior to the concession, then reasserted subsequently below, and continues now to assert on appeal.

Lozada specifically cautioned that an appeal deprivation claim would not automatically excuse an untimely petition for post-conviction habeas relief; an untimely petition asserting such a claim must still demonstrate good cause and prejudice to excuse the procedural default.⁹ It is well settled in this state that the mere fact that a petitioner may have been denied a direct appeal without his consent does not, in and of itself, constitute good cause to excuse the petitioner's failure to assert the appeal deprivation claim in a timely post-conviction habeas petition.¹⁰ Additionally, any stipulation by the State to disregard the procedural default or to otherwise waive the issue was without any valid effect.¹¹

⁹Lozada, 110 Nev. at 358 n.5, 871 P.2d at 949 n.5.

¹⁰Harris, 114 Nev. at 959, 964 P.2d at 787 (a claim that ineffective assistance of counsel deprived the claimant of a direct appeal does not constitute good cause to excuse the untimely filing of a post-conviction habeas petition asserting that claim); see also Hathaway, 119 Nev. at 252, 71 P.3d at 506-07 (good cause and prejudice must be shown to excuse the untimely filing of a claim asserting that ineffective assistance of counsel deprived the petitioner of a direct appeal; an appeal deprivation claim must be asserted within a reasonable time after the petitioner should have known that counsel was not pursuing the direct appeal).

¹¹See State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681-82 (2003) (the application of statutory procedural default rules to post-conviction habeas petitions is mandatory; the parties cannot stipulate to disregard the statutory procedural default rules); see also, Sullivan v. State, 120 Nev. ___, 96 P.3d 761 (2004) (stipulation that as a matter of law entry of amended judgment of conviction extended the time to file a post-conviction petition under NRS 34.726 was invalid); Pellegrini, 117 Nev. at 886 & n.116, 34 P.3d at 536 & n.116. Unlike the situation in Haberstroh, the State's concession in this case was evidently based on an erroneous

continued on next page . . .

In sum, we conclude that Tiger failed to demonstrate good cause to excuse the untimely assertion of the following issues in his petition: (1) the ineffective assistance of trial and appellate counsel; (2) the unconstitutionality of the reasonable doubt instruction; (3) the suggestiveness of the circumstances surrounding the victim's identification of Tiger; (4) the adequacy of the charging document; (5) the propriety of jury instructions given by the district court; (6) prosecutorial misconduct during closing argument; and (7) cumulative error.

Claim of insufficient evidence

In the petition below and in this appeal, Tiger also has argued that there was insufficient evidence adduced to support his conviction for attempted sexual assault. As with the above-noted claims, Tiger has failed to demonstrate good cause to excuse the untimely assertion of this claim. Nonetheless, we have considered the merits of claim to the extent that it might establish a fundamental miscarriage of justice sufficient to excuse the procedural default. We conclude the claim is without merit; the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹²

Specifically, Rochelle Kinnamon testified unequivocally that Tiger fondled her breasts while Thomas Nevius brandished a gun and attempted to remove her clothing. The jury could have reasonably inferred from the evidence presented that Tiger participated in the

... continued

reading of the law and cannot be construed as a stipulation respecting the existence of facts establishing good cause to excuse the procedural bar.

¹²See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

attempted sexual assault. It is for the jury to determine the weight and credibility to give to conflicting testimony; the jury's verdict will not be disturbed where, as here, substantial evidence supports the verdict.¹³ Therefore, Tiger cannot demonstrate a fundamental miscarriage of justice with respect to this issue sufficient to excuse the late assertion of the claim.¹⁴

Validity of Lozada remedy

We further reject Tiger's contention that the only valid and constitutional remedy for the denial of his direct appeal is the reinstatement of his appeal. This court expressly concluded in Lozada that the filing of a timely post-conviction habeas petition was the proper procedure under Nevada law to assert an unconstitutional deprivation of appellate rights.¹⁵ The Lozada remedy allows for the district courts' resolution in the context of a habeas proceeding of factual issues essential to a determination of an appeal deprivation claim. By assuring that appeal deprivation claims are subject to the post-conviction procedural requirements of NRS chapter 34, the remedy also promotes finality and avoids an unreasonable burden on the criminal justice system by assuring that such claims will not be addressed unless they are asserted in a timely manner or good cause has been shown excusing untimely claims. As such,

¹³See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

¹⁴See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

¹⁵Lozada, 110 Nev. at 359, 871 P.2d at 950.

we conclude that the Lozada procedure provides an adequate, effective remedy for the assertion and resolution of appeal deprivation claims.

Brady evidence

The district court granted Tiger relief on his claims that the State violated the disclosure requirements of Brady v. Maryland by withholding the statements of Greg Everett, David Nevius, Sonny Nevius, and James Wood.¹⁶ Tiger also argued that Brady required the State to provide the defense with a copy of a report by a crime scene analyst. We conclude that the alleged Brady evidence was not material, and therefore, the district court erred in finding that the State violated Brady.

Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.¹⁷ A claim that the State committed a Brady violation must show that: the evidence at issue is favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material.¹⁸ When a Brady claim is asserted in an untimely or successive post-conviction habeas petition, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars.¹⁹ Good cause and prejudice parallel the second and third Brady components; in other words, proof that the State withheld the evidence will generally establish

¹⁶373 U.S. 83 (1963).

¹⁷See Strickler v. Greene, 527 U.S. 263, 280 (1999).

¹⁸Id. at 281-82.

¹⁹See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (citing NRS 34.810(3)).

cause, and proof that the withheld evidence was material will establish prejudice.²⁰

If no request or only a general request for information is made, the evidence is material if there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed.²¹ If the request is specific, however, materiality may be established upon the lesser showing that a different result would have been reasonably possible if the evidence had been disclosed.²² The undisclosed evidence is considered collectively and not item by item.²³

In his police statement, Gregory Everett corroborated Tiger's story that the four men had gone out that night "looking for ladies," that they had no prior plan to commit burglary, and that none of them knew that Thomas Nevius was carrying a gun. Everett further corroborated Tiger by stating that he believed Tiger exited the apartment through the sliding glass door. Contrary to Tiger's statements that he remained in one location close to the sliding glass door during the incident and did not intend to participate in any criminal activity, Everett stated that once inside the apartment, "everybody" began ransacking the apartment "to see what they could get," and that Tiger was "in and out" of the bedroom where the attempted sexual assault occurred with Thomas Nevius.

²⁰See Strickler, 527 U.S. at 282.

²¹See id. at 289, 296.

²²See Jimenez v. State, 112 Nev. 610, 619, 418 P.2d 687, 692 (1996).

²³See Kyles v. Whitley, 514 U.S. 419, 436 (1995).

David Nevius' statement to police indicated that after the crimes, Tiger did not respond and "was just laughing," when Thomas Nevius recounted that Tiger had attempted to "jump on the lady." At trial, David testified that he heard Tiger say that he was "horny" and that Tiger had indicated agreement with Thomas Nevius' statements regarding the attempted sexual assault by saying "yes" and "I did too" or utterances to that effect.

Sonny Nevius' statement to the police indicated that Thomas Nevius told Sonny that he intended to get rid of the gun. At trial, Sonny testified that Thomas and Tiger told him that Tiger planned to buy the gun from Thomas.

James Wood's statement reads:

On the [crossed out] day after the apartment was robbed. Greg told me he and a man named Danny did it. Greg said that Danny shot the women's husbon [sic]. Greg said that he wanted the gun, but Danny did the shooting. Greg said they only got a half ounce of pot.

We conclude that these statements are not material even when they are considered collectively and with the other alleged Brady evidence. Although Everett's statement may have been favorable to the defense in that it corroborated some of Tiger's statements, it was not particularly exculpatory; rather, it indicated that Tiger entered the victims' apartment with the other men and participated in the charged crimes. Neither David nor Nevius' statements directly contradicts their own trial testimony. Sonny simply elaborated on Thomas' statements regarding his intention to get rid of the gun by adding that Thomas told him that he intended to sell the gun specifically to Tiger. Wood was not present when the crimes were committed, and his statement merely

reflects what he says he was told by Gregory Everett. Wood's statement does not preclude the possibility that Tiger was also present along with Everett and the other individual identified in the statement as "Danny."

Additionally, the victim Rochelle Kinnamon testified unequivocally at trial that Tiger entered the apartment with Thomas Nevius, ransacked her purse and apartment, and participated in the attempt to sexually assault her as Thomas Nevius brandished a gun. Kinnamon testified that she was certain that it was Tiger because of his "cockeye."²⁴ Given the extensive, overwhelming evidence of Tiger's guilt produced at trial, we conclude that there was neither a reasonable probability or possibility that the result at trial would have been different had these statements been disclosed even when they are considered collectively and with the written report of Officer Ruffino discussed below.

Ruffino's report concerning the sliding glass door to the victims' apartment was also not material, even when it is considered collectively with the other alleged Brady evidence. Tiger testified at trial that he was never in the bedroom while Thomas Nevius was attempting to sexually assault Rochelle Kinnamon. Tiger further testified that he left the apartment at about the time David Kinnamon arrived home and that he exited the apartment by the same sliding glass door through which he had entered. During closing argument the State insisted that Tiger left through the bedroom window and had participated in the attempted sexual assault, emphasizing that the sliding glass door was found closed and locked after the crimes. The undisclosed report by Ruffino, however,

²⁴Tiger has a glass eye that, according to the record, does not track with his other eye.

stated that Ruffino found the sliding glass door ajar when he arrived at the scene.

Ruffino's report contradicted the State's assertion that the door was found closed and locked after the crimes. Further, it could have corroborated Tiger's testimony that he left the crime scene through the sliding glass door and not the bedroom window. Nonetheless, David Nevius and Rochelle Kinnamon both testified that Tiger escaped out the bedroom window. Kinnamon also testified that she left the apartment several times in search of help after the crimes. Further, Ruffino did not arrive at the crime scene until more than an hour after the crime. His report would not have clarified when the door was opened, or who opened it. The fact that he found the door ajar has very little probative value, especially when considered in light of the other evidence of Tiger's guilt presented at trial. We therefore conclude that, even if the report had been disclosed, there is not a reasonable probability or possibility of a different result at trial.

In sum, none of the alleged Brady evidence was material. Therefore, Tiger not only failed to establish a Brady violation, he also failed to demonstrate prejudice sufficient to excuse his procedural default.

Conclusion

We conclude that Tiger has failed to establish good cause and prejudice or a fundamental miscarriage of justice sufficient to excuse the untimely filing of his petition. His petition was procedurally barred. We explicitly conclude that the petition should have been denied on that

basis.²⁵ We further conclude, however, that the district court correctly found that other claims²⁶ presented below lacked merit, and we affirm the district court's ruling as to those claims on that separate, independent ground.²⁷

Accordingly, we

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

Becker, C.J.
Becker

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

²⁵See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).

²⁶Tiger's other claims that were expressly denied by the district court were: (1) Rochelle Kinnamon's identification of Tiger was made under unduly suggestive circumstances, (2) the vague charging document violated Tiger's due process rights, (3) the prosecution presented misleading evidence concerning David Nevius' lack of motive to testify in favor of the State, and (4) the jury was erroneously instructed during Tiger's trial concerning premeditation and deliberation, implied malice, and reasonable doubt.

²⁷Harris v. Reed, 489 U.S. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding.").

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