

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN RICHARD NEFF, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42421

FILED

NOV 04 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On August 14, 1997, appellant John Richard Neff, III, was convicted, pursuant to a jury verdict, of conspiracy to commit robbery (count I), burglary while in the possession of a firearm and/or deadly weapon (count II), attempted robbery with the use of a deadly weapon (counts III-IV), attempted murder with the use of a deadly weapon (count V), and battery with a deadly weapon (count VI). The district court sentenced Neff to serve two consecutive prison terms of 13-60 months for count I, a consecutive prison term of 35-156 months for count II, two consecutive prison terms of 22-96 months each for counts III and IV, two consecutive prison terms of 43-192 months for count V, and a consecutive prison term of 24-96 months for count VI. Neff was also ordered to pay \$193,355.58 in restitution jointly and severally with his codefendants.

Neff's direct appeal from the judgment of conviction and sentence was dismissed by this court.¹ The remittitur issued on January 4, 2000.

On July 29, 2003, Neff, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed Neff's petition and moved to dismiss the petition based on its untimeliness. Neff opposed the State's motion to dismiss. On November 6, 2003, the district court entered an order denying Neff's petition based on the procedural bar. This timely appeal followed.

Neff filed his petition more than three and a half years after this court issued the remittitur from his direct appeal. Thus, Neff's petition was untimely filed.² Neff's petition was procedurally barred absent a demonstration of good cause and prejudice.³ As good cause and prejudice to excuse the untimeliness of his petition, Neff contends that the aiding and abetting instruction given to the jury was based on the "natural and probable consequences doctrine," subsequently disapproved of by Sharma v. State,⁴ and as a result, he was prejudiced by "the large increased sentence that he wrongfully received on counts 5 [attempted murder with the use of a deadly weapon] and 6 [battery with a deadly weapon]." In Sharma, this court held that "in order for a person to be held accountable for the specific intent crime of another under an aiding and

¹Neff v. State, Docket No. 31057 (Order Dismissing Appeal, December 7, 1999).

²See NRS 34.726(1).

³See id.; NRS 34.810(3).

⁴118 Nev. 648, 56 P.3d 868 (2002).

abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.”⁵ Neff argues that Sharma should be applied retroactively to his case. We disagree with Neff’s contention.

We conclude that Neff’s reliance on Sharma is misplaced and that the district court did not err in denying his petition. First, Neff, along with two codefendants, was charged in count V with attempted murder with the use of a deadly weapon for “[codefendant] shooting at and into the body of [victim no. 1] with a shotgun and John Richard Neff, III, stabbing at and into the body of [victim no. 1] and/or all Defendants aiding and abetting each other.” (Emphasis added.) The State presented overwhelming evidence that Neff stabbed the victim repeatedly in the back, and accordingly, he was likely found guilty for his direct and specific actions and not pursuant to a theory of aiding and abetting. Second, although Neff was also charged with attempted murder with the use of a deadly weapon (count VI) for the shooting of a second victim by a codefendant (Neff’s brother, Nicholas) under a theory of aiding and abetting pursuant to a common conspiracy, the jury instead found him guilty of the lesser-included offense of battery with a deadly weapon, a general intent crime.⁶ Therefore, we conclude that: (1) the holding of Sharma, even with retroactive application, does not require reversal of

⁵Id. at 655, 56 P.3d at 872.


⁶See NRS 200.481(1)(a) (“‘Battery’ means any willful and unlawful use of force or violence upon the person of another.”); see also Graves v. State, 82 Nev. 137, 413 P.2d 503 (1966).

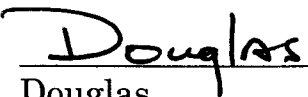
Neff's conviction; and (2) Neff has failed to demonstrate the requisite good cause and prejudice to excuse his petition's procedural defect.

Having considered Neff's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. John S. McGroarty, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷In its fast track response, the State argued that counsel for Neff, Deputy Public Defender Thomas W. Rigsby, "is no longer Neff's counsel," and asked this court for clarification. Pursuant to this court's order of September 17, 2004, Rigsby, both trial and appellate counsel for Neff, informed this court that, although Neff was in fact granted in forma pauperis status by the district court, Rigsby filed the instant habeas petition and appealed its denial because Neff asked him for help.