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***McConnell v. State*, 102 P.3d 606 (Nev. 2004), 120 Nev. Adv. Rep. 105
[McCONNELL I]**

CRIMINAL LAW – SENTENCING

Summary

Appellant Robert McConnell murdered Brian Pierce in August 2002. The State of Nevada charged McConnell with first-degree murder and sought capital sentencing. The State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary.

McConnell represented himself, pleaded guilty to first-degree murder, and presented a case in mitigation at his penalty hearing. The jury returned a sentence of death. Initially, McConnell moved to waive his appeal but eventually reconsidered and authorized counsel to fully brief all issues on appeal.

Specifically, McConnell challenged the propriety of his penalty hearing and death sentence on various grounds. The court found, in all but one instance, his claims had no merit. The one issue which the court addressed in depth was McConnell's argument that because the aggravating circumstance of burglary also served as an element of felony murder, it thereby failed to perform its constitutional function of narrowing death eligibility.

Issue and Disposition

Issue

In a prosecution seeking death for a felony murder, does an aggravator based on the underlying felony constitutionally narrow death eligibility? Specifically, does the felony aggravator set forth in NRS 200.033(4) adequately perform a narrowing function for felony murder?¹

Disposition

No. The court concluded that in a prosecution seeking death for a felony murder, an aggravator based on the underlying felony did not constitutionally narrow death eligibility. However, because McConnell admitted to deliberate, premeditated murder,

¹ NEVADA REVISED STATUTE 200.033(4) (2004) provides that first-degree murder is aggravated if: committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

- (a) Killed or attempted to kill the person murdered; or
- (b) Knew or had reason to know that life would be taken or lethal force used.

the State's alternative theory of felony murder was of no consequence and provides no ground for relief.

Commentary

State of the Law Before *McConnell v. State*

Nevada's Supreme Court, in 1985, addressed the contention that the underlying felony within a felony-murder prosecution cannot be considered as an aggravating circumstance and rejected the argument.² Reasoning that "the U.S. Supreme Court has implicitly approved the use of the underlying felony in felony murder cases as a valid aggravating circumstance to support the imposition of the death sentence," the court in *Petrocelli v. State* established the judicial standard for Nevada on this issue.³ Nevada courts have followed *Petrocelli's* rationale ever since.⁴ In 1988, however, the United States Supreme Court, in *Lowenfield v. Phelps*,⁵ dealt with a challenge to a death sentence on the basis that the sole aggravating circumstance was identical to an element of the capital murder.⁶ The case at issue was the Nevada high court's first attempt to reconcile the *Petrocelli* standard with *Lowenfield*.

In Nevada, the felony aggravator applies only to cases where the defendant "killed or attempted to kill" the victim or "knew or had reason to know that life would be taken or lethal force used."⁷ This adds an element not strictly required for felony murder.

Effect of *McConnell v. State* on Current Law

The Nevada Supreme Court concluded that *Lowenfield* explicitly provides the basic analytical framework to approach this issue. To be constitutional, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁸

As noted in *Lowenfield*, the required narrowing function within any capital punishment scheme may be achieved in one of two ways: 1) The legislature may itself narrow the definition of capital offenses so that a jury finding of guilt is already narrow;

² *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985), holding modified on other grounds by *Sonner v. State*, 955 P.2d 673, 677 (Nev. 1998).

³ *Id.* at 509 (emphasis added) (citing *Proffitt v. Florida*, 428 U.S. 242; *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)).

⁴ See, e.g., *Atkins v. State*, 923 P.2d 1119, 1127 (1996).

⁵ 484 U.S. 231, 241-46 (1988).

⁶ See *Leslie v. Warden, Ely State Prison*, 59 P.3d 440, 448-49 (2002) (Maupin, J., concurring) (discussing *Lowenfield* and this issue).

⁷ *Supra* note 1.

⁸ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

or, the legislature may broadly define capital offenses and narrow, following conviction, through jury findings of aggravating circumstances during the penalty phase.⁹

In Nevada, all felony murder is first-degree murder, and all first-degree murder is potentially capital murder. The Nevada legislature elected to statutorily define felony murder rather broadly. Under NRS 200.030(1)(b), felony murder is defined as a murder during one of any of an enumerated list of felonies, specifically "committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse."

Nevada's statute enumerates two more predicate felonies than Louisiana's capital felony-murder statute in *Lowenfield*, and some of Nevada's predicate felonies are multiple, e.g., either degree of kidnapping.¹⁰ More important though, in Nevada, the intent simply to commit the underlying felony is "transferred to supply the malice necessary to characterize the death a murder." This element of the felony aggravator largely mirrors the constitutional standard and does little to narrow the class of death-eligible defendants.

The end result is that the court, here, overturned *Petrocelli* and established that it is constitutionally impermissible, under the Nevada Constitution, to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

Ultimately, this decision has no effect where the State gains a first-degree murder conviction solely on a theory of deliberate, premeditated murder; it may then use appropriate associated felonies as aggravators.¹¹ Where the State bases a first-degree murder conviction in whole or part on felony murder, the State may not seek capital punishment based on the felony murder's predicate felony as an aggravator.¹²

Other Jurisdictions

A number of other courts have considered this issue since *Lowenfield* was decided. Opinions determining that use of the felony in a felony murder as an aggravator

⁹ 484 U.S. at 246.

¹⁰ Compare *id.* at 246 (enumerating only "aggravated kidnapping" in Louisiana).

¹¹ *McConnell*, 102 P.3d at 624.

¹² *Id.* Further, the court prohibits the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" using one to establish felony murder and another to support an aggravating circumstance. For example, in a case like this one, the burglary could not be used to establish first-degree felony murder while the associated robbery was used as an aggravator to support a death sentence. The burglary and robbery both occurred in an indivisible course of conduct whose primary purpose was the murder of Pierce. *Id.* at 624-25.

was proper include: *Deputy v. Taylor*, 19 F.3d 1485, 1500-02 (3d Cir. 1994); *Perry v. Lockhart*, 871 F.2d 1384, 1392-93 (8th Cir. 1989); and *Ferguson v. State*, 642 A.2d 772, 780-81 (Del. 1994).

Opinions determining that such use was not proper include: *State v. Middlebrooks*, 840 S.W.2d 317, 341-47 (Tenn. 1992), superseded by statute as stated in *State v. Stout*, 46 S.W.3d 689, 705-06 (Tenn. 2001); and *Engberg v. Meyer*, 820 P.2d 70, 86-92 (Wyo. 1991).

Unanswered Questions

It would seem that the “single course of conduct” test, for determining whether or not aggravators may be separately assigned to base a felony murder on one felony and then base an aggravator on an associated felony, may become an issue in future caselaw. Where the conduct is not specifically directed toward the resulting homicide, but occurs within the same flow of events, it is unclear from the court’s examples whether such a felony would be rendered ineligible under the test.

Conclusion

A single felony may not be used both to establish first-degree murder and to aggravate the murder to capital status. Similarly, multiple felonies within a “single course of conduct” may not be separated for purposes of supporting both felony murder and aggravating circumstances in sentencing. The interpretation of Nevada’s death penalty statutes, as noted in this case, provides a more certain framework within which Nevada prosecutors may exercise their discretion, and “enhances certainty and fairness of application within the trial, appellate, and federal court systems.”¹³

¹³ *Id.*