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Summary of Bennett v. Dist. Ct., 121 Nev. Adv. Op. 78

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Bennett v. Dist. Ct., 121 Nev. Adv. Op. 78 (2005)[1]

CRIMINAL LAW AND PROCEDURE—WRIT OF MANDAMUS

Summary:

This was an original petition for a writ of mandamus in a death penalty case regarding the State's filing of an amended notice, alleging additional aggravating circumstances. Petitioner requested that the Court intervene in proceedings regarding the district court's application of a previous holding.

Disposition/Outcome:

Petition granted. The State's amended notice, alleging additional aggravating circumstances is invalid and the additional aggravating circumstances contained therein must be stricken. In addition, two of the previous aggravating circumstances are invalid and must be stricken.

Factual and Procedural History:

On July 7, 1988, the State filed a notice of aggravating circumstances against Bennett. Bennett was subsequently convicted of multiple crimes, including first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and attempted robbery with the use of a deadly weapon.

Although Bennett was sentence to death, his penalty was vacated, and the court ordered a new penalty hearing.[2] At that time, three of the State's original aggravating circumstances remained: (1) the murder created a great risk of death to more than one person, pursuant to NRS 200.033(3); (1) Bennett committed the murder during a burglary, pursuant to NRS 200.033(4); and (3) Bennett committed the murder while attempting a robbery, pursuant to NRS 200.033(4).

On December 29, 2004, before Bennett's second penalty hearing, the Court decided *McConnell v. State*.[3] In *McConnell*, the Court held it was unconstitutional to obtain a death sentence by convicting a defendant under a theory of first-degree felony murder, and then predicating an aggravating circumstance pursuant to NRS 200.033(4) on that underlying felony.

On December 30, 2004, Bennett filed a motion arguing that the second and third aggravating circumstances, based on robbery and burglary, were duplicative and should be eliminated. On January 13, 2005, the State moved the court to file an amended notice, alleging additional aggravating circumstances. Admitting that the *McConnell* opinion "eliminated two of the aggravators originally found by a jury against this defendant (murder in the course of a

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[2] State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003); Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995); Bennett v. State (Bennett I), 106 Nev. 135, 787 P.2d 797 (1990), *overruled in part* by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002).

[3] 102 P.3d 606 (2004), *reh'g* denied, McConnell v. State (McConnell II), 107 P.3d 1287 (2005).

burglary and murder in the course of a robbery)," the State sought to add three *new* aggravating circumstances.

The district court granted Bennett's motion, which argued that the aggravators were duplicative. Yet the district court also held that the *McConnell* opinion provided the State with good cause to file an amended notice alleging additional aggravating circumstances, pursuant to SCR 250(4)(d). However, the district court only partially granted the State's motion, since one of the newly alleged aggravating circumstances was unsupported by evidence. Therefore, the district court struck two of the aggravating circumstances which were pending before *McConnell*, regarding murder during robbery and burglary. However, the district court allowed the State to amend the notice to allege two *new* aggravating circumstances.

Discussion:

Application of *McConnell* to Petitioner's Case

Despite the State's arguments to the contrary, the *McConnell* holding clearly applies to the Bennett case. In its answer, the State asserted: "This Court's opinion denying rehearing in *McConnell* … has since rendered the State's action of removing the two felony-murder aggravators unnecessary since Defendant's conviction has been final since 1990 and *McConnell* does not apply."

The State's argument is insufficient because Bennett's conviction is not yet final. A conviction becomes final when judgment is entered, the availability of appeal has been exhausted, and a petition for certiorari to the U.S. Supreme Court has been denied or the time for such a petition has expired.[4] Because Bennett's death sentence was vacated, and a new penalty hearing was ordered, the finality of the Bennett's case was not absolute. Thus, Bennett's conviction is not yet final, and *McConnell* applies.

The State's second argument is that there was no specific finding that Bennett was found guilty *solely* on a theory of felony-murder. The State claims that because it is unclear whether the conviction was solely based on this theory, it is not clear whether *McConnell* applies.

McConnell does not require the conviction to be based *solely* on the felony-murder theory. If the conviction is based "in whole *or part* on felony murder…the State will have to prove an aggravator other than one based on the felony murder's predicate felony."[5] Thus, as long as the conviction was obtained in part on felony murder, *McConnell* applies. Moreover, contrary to the State's assertions, the original indictment appears to base the first-degree murder solely on the felony-murder theory, and makes no allegations that the murder was premeditated or deliberate.

Because Bennett's judgment is not yet final, and it appears the State based the conviction at least in part on the felony murder theory, *McConnell* applies to the current matter.

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[4] Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); *see* Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

[5] McConnell v. State, 120 Nev. at __, 102 P.3d at 624 (emphasis added).

Consequently, the two previous aggravating circumstances, regarding burglary and robbery, were constitutionally infirm and properly stricken

Good Cause Pursuant to SCR 250(4)(d)

In addition to determining whether *McConnell* applies to Bennett's case, it is necessary for the Court to examine whether the issuance of *McConnell* provided the State with good cause pursuant to SCR 250(4)(d) to file an amended notice alleging additional aggravating circumstances. The Court concludes that it did not, and that the State's new allegations were improper.

SCR 250(4)(d) provides:

> *Upon a showing of good cause*, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances. The State must file the motion *within 15 days after learning of the grounds* for the notice or amended notice. If the court grants the motion, it shall also permit the defense to have a reasonable continuance to prepare to meet the allegations of the notice or amended notice. The court shall not permit the filing of the initial notice of intent to seek the death penalty later than 30 days before trial is set to commence.[6]

SCR250(4)(d) essentially has two prongs. The first prong requires the State to file the motion within 15 days after learning of the need for such an amendment. In this case, the State argued that the issuance of the *McConnell* decision was the basis for its motion to amend. The *McConnell* decision was issued on December 29, 2004, and the State's motion was filed January 13, 2005, exactly15 days after the decision was issued. Thus, the State satisfied the first prong by timely filing a motion to amend.

The second prong requires the State to file the motion with "good cause." The Court concludes that the mere issuance of an opinion by the Court, by itself, is not sufficient "good cause" for the State to file an amended notice, alleging additional aggravating circumstances. Good cause requires something more.

State v. District Court (Marshall)[7] is the only previous case in which the Court addressed the good-cause provision of SCR 250(4)((d). In *Marshall*, although the Court did not set out a definitive explanation of "good cause," it concluded that good cause is not satisfied merely because "a defendant would not suffer any prejudice from the filing of a late notice."[8] In considering whether good cause was shown, the court held that good cause contemplates the discovery of previously unknown evidence regarding aggravating circumstances. However,

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[6] SCR 250(4)(d) (emphasis added); *See also* SCR 250(4)(f) (providing that the State must file a notice summarizing the evidence in aggravation no later than 15 days before trial unless good cause is shown).
[7] 116 Nev. 953, 11 P.3d 1209 (2000).
[8] *Id*. at 964, 967; 11 P.3d at 1215, 1217.

there is not sufficient good cause when it is based on "mere oversight on the part of a prosecutor."[9]

In the current case, the State's evidence for the newly alleged aggravating circumstances was not previously undiscovered. Rather, the State knew of the evidence since Bennett's original prosecution in 1988. This, along with the Court's decision that the issuance of an opinion alone does not constitute good cause, persuades the Court to hold that the State has not shown sufficient "good cause" for filing an amended notice.

Conclusion:

The Court grants Bennett's petition. Because the *McConnell* holding applies to the current matter, two of the original aggravating circumstances, regarding robbery and burglary, are invalid and must be stricken. Furthermore, the *McConnell* holding did not provide the State with "good cause" to file an amended notice, adding additional aggravating circumstances. Therefore, The State's amended notice, alleging additional aggravating circumstances, is invalid, and the additional aggravating circumstances contained therein must be stricken.

[9] *Id.* at 966; 11 P.3d at 1217.