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***McConnell v. State*, 125 Nev. Adv. Op. No. 24 (July 23, 2009¹)²**

CRIMINAL LAW – HABEAS CORPUS – DEATH PENALTY

Summary

Appeal from an order of the district court dismissing appellant’s post-conviction petition for a writ of habeas corpus in a death penalty case.

Disposition/Outcome

Affirmed district court order dismissing appellant’s post-conviction petition notwithstanding the fact the district court did not conduct an evidentiary hearing.

Factual and Procedural History

Appellant Robert Lee McConnell pleaded guilty to first-degree murder with the use of a deadly weapon, sexual assault, and first degree kidnapping.³ At sentencing, the jury found the three aggravators in this case were not outweighed by any mitigating circumstances and returned a death sentence for first-degree murder.

On direct appeal, despite holding that an aggravator cannot be based on the same felony as used to establish felony murder, the Court concluded McConnell was not entitled to relief because he clearly pleaded guilty to willful, deliberate, and premeditated murder rather than felony murder.⁴

The district court dismissed a subsequent post-conviction petition for writ of habeas corpus without conducting an evidentiary hearing on any of McConnell’s several claims for relief. McConnell appealed the order dismissing his claims without an evidentiary hearing.

Discussion

A post-conviction habeas petitioner “is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.”⁵ The Court held the district court did not err by dismissing McConnell’s claims without conducting an evidentiary hearing.

¹ This opinion has been corrected pursuant to an order entered by the court on July 24, 2009 (corrected third full sentence on page 15 of the advance opinion).

² By Ian Houston

³ McConnell admitted shooting and killing his ex-girlfriend’s fiancé, threatening his ex-girlfriend with a knife, handcuffing her, sexually assaulting her and kidnapping her, forcing her to drive to California.

⁴ *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005).

⁵ *Mann v. State*, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); *see Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

A. Claim that Nevada’s lethal injection protocol is unconstitutional

Relying on the recent decision in *Baze v. Rees*,⁶ McConnell argued in his petition that Nevada’s lethal injection protocol does not sufficiently safeguard against a “substantial risk of serious harm” and as such violates the Eighth Amendment to the United States Constitution. The district court concluded that a post-conviction petition for a writ of habeas corpus “by law . . . is used solely to attack a judgment or sentence” and is thus an improper forum to challenge Nevada’s protocol.⁷

The Court agreed holding that under NRS § 34.720, a post-conviction petition for a writ of habeas corpus is limited in scope to (1) “[r]equests [for] relief from a judgment of conviction or sentence in a criminal case” and (2) “[c]hallenges [to] the computation of time that [the petitioner] has served pursuant to a judgment of conviction.” McConnell’s challenge deals only with the former. The Court held that McConnell’s challenge of Nevada’s lethal injection protocol does not call into question the validity of his conviction. Further, because McConnell seeks to invalidate a particular procedure for carrying out the sentence, his challenge does not call into question the validity of the death sentence itself.⁸ As such, McConnell’s constitutional challenge is outside the scope of a post-conviction petition for habeas corpus under NRS Chapter 34 and the district court did not err in rejecting this claim with conducting an evidentiary hearing.

B. Claims that challenged the validity of the guilty plea

McConnell argued the district court erred in dismissing his claims that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid and the defendant bears the burden of establishing the guilty plea was not entered knowingly and intelligently.⁹ The Court will not invalidate a plea where it is evident from the totality of the circumstances that the defendant plead guilty freely, knowingly and voluntarily¹⁰ and understood the nature of the offense and the consequences of the plea.¹¹

The Court held that McConnell did not meet his burden under the totality of the circumstances and the record demonstrates his guilty plea was entered knowingly and voluntarily.

⁶ *Baze v. Rees*, 553 U.S. ___, ___, 128 S. Ct. 1520, 1531 (2008) (*quoting* *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

⁷ The district court was incorrect in further denying McConnell’s claim under the law-of-the-case doctrine because on direct appeal, McConnell did not challenge, and the Court did not address, the constitutionality of Nevada’s specific protocol.

⁸ The manner in which death by lethal injection is carried out in Nevada is left to the Director of the Department of Corrections.

⁹ *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also* *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

¹⁰ *State v. Freese*, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000).

¹¹ *See* *Kidder v. State*, 113 Nev. 341, 344, 924 P.2d 254, 256 (1997), *overruled on other grounds by Freese*, 116 Nev. at 1106, n.7, 13 P.3d at 448 n.7.

C. Claims of ineffective assistance of counsel

To prevail on a claim of ineffective assistance of trial or appellate counsel, the defendant must demonstrate (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense.¹² Failure to prove either prong ends the analysis.¹³

1. *Ineffective assistance of trial counsel*

The Court affirmed the district court's dismissal of McConnell's claim that his standby trial counsel failed to provide effective assistance by permitting him to plead guilty in light of a pending discovery request, by failing to properly investigate and by failing to properly prepare. To establish prejudice, McConnell carried the affirmative burden of demonstrating a reasonable probability that he would not have entered a guilty plea but would have instead insisted on trial.¹⁴ The Court held that McConnell did not meet his burden.

First, McConnell did not have a constitutional right to the effective assistance of standby counsel because he waived his right to counsel and chose to represent himself.¹⁵ Second, pursuant to RPC 1.2, a lawyer in a criminal case shall "abide by the client's decision, after consultation with the lawyer, as to a plea to be entered." McConnell stated during the pleading canvass that he was pleading guilty against the advice of counsel. Third, McConnell did not specify in his petition what discovery was outstanding and how that discovery would have convinced him not to plead guilty. He, therefore, did not meet his affirmative burden of establishing prejudice by showing that but for his attorney's error in allowing him to plead guilty despite a pending discovery request, he would not have plead guilty but instead would have gone to trial.

2. *Ineffective assistance of appellate counsel*

To prove a claim of ineffective assistance of appellate counsel, the defendant carries the burden of demonstrating that counsel's performance fell below an objective standard of reasonableness and that an omitted issue would have had a reasonable probability of success on appeal.¹⁶ However, appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁷

¹² Strickland v. Washington, 466 U.S. 668 (1984).

¹³ *Id.* at 687.

¹⁴ Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

¹⁵ See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that defendant does not have right to advisory counsel); see also Faretta v. California, 422 U.S. 806, 835 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel").

¹⁶ Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

¹⁷ Jones v. Barnes, 463 U.S. 745, 751 (1983).

a. Jury Instruction on weighing aggravating and mitigating factors

McConnell challenged appellate counsel's failure to argue that the district court should have instructed the sentencing jury that in order to impose a death sentence, the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt. The Court held that the district court did not err in dismissing this claim because this argument would not have had a reasonable probability of success on appeal. No Nevada statute or caselaw imposes a requirement that the State prove the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.¹⁸

b. Mandatory review of death sentences

McConnell challenged the district court's dismissal of his claim that appellate counsel failed to argue that the Supreme Court of Nevada has not articulated any standards for its mandatory review of death penalty sentences pursuant to NRS § 177.055(2) thus frustrating any direct appeal with respect to the excessiveness of his sentence. McConnell argued that the Court only considers whether "the crime and defendant before [the Court] on appeal [are] of the class or kind that warrant[] the imposition of death?"¹⁹

The Court clarified that death sentences of "similarly situated defendants may serve as a frame of reference" in an excessive sentence determination.²⁰ Further, the Court considers "the totality of the circumstances surrounding the defendant and the crime."²¹ The Court held that McConnell failed to specify how he would have benefited by more specific standards and that it thoroughly considered on direct appeal whether McConnell's character and the crime warranted death. McConnell failed to demonstrate this claim would have had a reasonable probability of success on appeal and the district court properly dismissed the claim without an evidentiary hearing.

c. Elected Judges

McConnell challenged his appellate counsel's failure to argue that elected judges presiding over his trial and appellate review are beholden to the electorate and are therefore incapable of impartiality.

The Court held that the district court properly dismissed this claim without an evidentiary hearing because McConnell failed to substantiate his claim with any specific factual allegations demonstrating actual judicial bias. The Court concluded this argument would not have had a reasonable probability of success on appeal.

¹⁸ NEV. REV. STAT. § 200.030(4)(a) permits a death sentence "only if . . . any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstances." NEV. REV. STAT. § 175.554(3) states that "[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

¹⁹ *Dennis v. State*, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000).

²⁰ *Id.*

²¹ *Rhyne v. State*, 118 Nev. 1, 16, 38 P.3d 163, 173 (2002).

d. Death-qualified jury

McConnell argued the district court erred in dismissing his claim of ineffective assistance of appellate counsel based on appellate counsel's failure to argue that jury selection was unfairly limited to those jurors who were "death qualified." However, death qualification of a jury is not an unconstitutional practice.²² Further, McConnell's jury was chosen only for sentencing. Therefore, in order to ensure their ability to perform their duty as jurors, each was required to be death certified. As such, the district court did not err in rejecting McConnell's claim that appellate counsel provided ineffective assistance of counsel by failing to raise this issue.

e. Application of the McConnell rule

McConnell challenged the district court's dismissal of his claim that appellate counsel provided ineffective assistance by failing to argue that two of the aggravating circumstances were improperly based upon the predicate felony alleged in support of the felony-murder charge.

The Court held that this claim was belied by the record in that appellate counsel did raise this issue on direct appeal. Because the issue on direct appeal did not involve the validity of his guilty plea but rather the theory upon which the first degree murder conviction was based and McConnell did not cite relevant authority to undermine the Court's analysis on direct appeal, the district court did not err in dismissing the claim without conducting an evidentiary hearing.

D. Direct appeal claims

McConnell argued the district court erred in dismissing eight of his claims without conducting an evidentiary hearing. The Court held that these issues should have been raised on direct appeal and thus are procedurally barred under NRS § 34.810 absent a showing of good cause and prejudice. The district court did not err in dismissing these claims because McConnell failed to make such a showing.

E. Cumulative error

McConnell argued that under the cumulative-error standard the Court applies on direct appeal,²³ the effect of the claims raised in this appeal rendered his conviction and sentence unfair. The Court held that even if the cumulative-error standard used on direct appeal were the correct standard under the instant circumstances, McConnell failed to

²² See, e.g., *Buchanan v. Kentucky*, 483 U.S. 402, 416, 420 (1987); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986); *Aesoph v. State*, 102 Nev. 316, 317-19, 721 P.2d 379, 380-81 (1986); *McKenna v. State*, 101 Nev. 338, 342-44, 705 P.2d 614, 617-18 (1985).

²³ See, e.g., *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually").

assert any meritorious claims. As such there is nothing to cumulate and the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Conclusion

A constitutional challenge of Nevada's lethal injection protocol in a post-conviction petition for a writ of habeas corpus under NRS Chapter 34 is not a cognizable claim because it involves a challenge to the manner in which the death sentence will be carried out rather than the validity of the judgment of conviction or sentence. Accordingly, the judgment of the district court was affirmed.