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Summary of State v. Harte, 124 Nev. Adv. Op. No. 82

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***State v. Harte*, 124 Nev. Adv. Op. No. 82 (Oct. 30, 2008)¹**

**CRIMINAL LAW – HABEAS CORPUS/AGGRAVATING
CIRCUMSTANCE IN SENTENCING**

Summary

Appeal from a district court order partially granting a post-conviction petition for a writ of habeas corpus in a death penalty case.

Disposition/Outcome

Affirmed the district court order vacating Defendant’s death sentence, affirming the guilty verdict and ordering a new penalty hearing.

Factual and Procedural History

In October 1997, Shawn Russell Harte and two codefendants, Latisha Babb and Weston Sirex, murdered a Reno cab driver, John Castro, during the course of a robbery. Harte subsequently admitted to sheriff’s deputies that he shot Castro in the head.

Harte, Babb and Sirex were indicted and the jury found them guilty of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The jury was not, however, asked to return a special verdict form indicating whether they convicted based on the State’s willful, premeditated, and deliberate murder theory or the State’s alternative theory of felony murder.

Harte was sentenced to death.² The jury found only one aggravating circumstance: the murder was committed during the course of a robbery. The jury found this alone outweighed any mitigating factors. Harte unsuccessfully appealed his conviction³ and was denied in his initial request for post-conviction relief.⁴ Harte filed a subsequent post-conviction petition for a writ of habeas corpus. Harte alleged that because the sole aggravating circumstance found by the jury was the same robbery used to support the felony murder theory, the aggravator was invalid pursuant to *McConnell v. State*.⁵ As such, Harte argued he was entitled to a new sentencing hearing.

The State acknowledged *McConnell* and *Bejarano v. State*⁶ may afford Harte relief but argued that the appropriate remedy was a new trial. Harte subsequently abandoned all claims that could result in a new trial and indicated that his focus was

¹ By Ian Houston

² Babb and Sirex were sentenced to life without the possibility of parole.

³ *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

⁴ Order Dismissing Appeal, *Harte v. State*, No. 43877 (April 7, 2005); Order Denying Rehearing, *Harte v. State*, No. 43877 (May 19, 2005); Order Denying En Banc Reconsideration, *Harte v. State*, No. 43877 (Sept. 8, 2005).

⁵ 120 Nev. 1043, 102 P.3d 606 (2004) (holding that it is unconstitutional to base aggravating circumstance in capital prosecution on felony that was used to obtain first-degree murder conviction), *reh’g denied*, 121 Nev. 25, 107 P.3d 1287 (2005); Harte also claimed ineffective assistance of counsel.

⁶ 122 Nev. 1066, 146 P.3d 265 (2006) (holding that *McConnell* applies retroactively).

solely on obtaining a new penalty hearing. The district court invalidated the sole aggravator and agreed with Harte that the appropriate remedy for a *McConnell* error was a new penalty hearing. The district court vacated the death sentence, affirmed the guilty verdict and stayed further proceedings pending this appeal.

Justice Maupin, with Chief Justice Gibbons and Justices Douglas and Cherry concurring (Justices Hardesty, Parraguirre and Saitta concurring in the judgment) affirmed the district court's finding of fact, conclusions of law, and judgment. The court held the district court did not err in invalidating the sole aggravator in this case pursuant to *McConnell* and that the appropriate remedy in a *McConnell* error case where the sole aggravating circumstance is invalidated is a new penalty hearing and not a new trial.

Discussion

McConnell was Properly Decided

The State argued that *McConnell* was wrongly decided and “three major flaws” in the decision called for its reversal:

First, the *McConnell* analysis begins with the definition of first-degree murder instead of a “generic offense of felonious homicide,” the common-law definition of murder, or even the notion of felonious murder. According to the State, this prevented the court from recognizing that the Nevada statutory scheme genuinely narrows the class of individuals that are eligible for the death penalty. The court in this case was not convinced by this argument. The *McConnell* court relied on the analytical framework of *Lowenfield v. Phelps* in determining that the narrowing function may be accomplished by narrowly drawn definitions of capital offenses or through aggravating circumstances found by a jury at the penalty phase.⁷ The *McConnell* court evaluated Nevada's capital sentencing scheme as it applies to felony murder and found capital felony murder to be defined broadly and the felony aggravating circumstances of NRS 200.033(4) insufficient to genuinely narrow the class of felony murderers eligible for the death penalty. The State did not convince the court in this case that the *McConnell* analysis was flawed based on its starting definition.

Second, the *McConnell* analysis is based on the question of whether the statutory aggravating circumstances “sufficiently” exclude an adequate number of murderers from the death penalty. The State argued that the analysis should be an objective test of whether the aggravators “genuinely” narrow the class eligible for a death sentence as put forth in *Lowenfield*. The court, however, points out that the *McConnell* court's analysis began by discussing whether either of the two aggravators in that case “genuinely” narrowed the class.⁸ The analysis showed that while the two aggravators may “theoretically” narrow the class, they did not satisfy constitutional demands because they failed to “genuinely” narrow.⁹ As such, the court concluded that *McConnell* used the proper standard.

⁷ 484 U.S. 231, 244 (1988).

⁸ *McConnell*, 120 Nev. at 1067, 102 P.3d at 623.

⁹ *Id.* at 1069, 102 P.3d at 624.

Third, the *McConnell* analysis discounted the requirement that the felony aggravating circumstance must be accompanied by certain mental states.¹⁰ The State argues this intent element in Nevada's statutory scheme objectively narrows the class eligible for the death penalty. The court, however, was not persuaded that the *McConnell* analysis of the felony aggravating circumstance intent element was inadequate. The *McConnell* court noted that the felony aggravating circumstance intent element (1) was different than the intent required for a felony-murder conviction, (2) largely mirrored the constitutional standard and did little to narrow the class of persons eligible for the death penalty, (3) lacked the specificity of the capital felony-murder definition that met the constitutional narrowing requirement of *Lowenfield*, and (4) could be overlooked and not considered by the jury.¹¹ The court further considered the issue on rehearing and found that while the felony aggravating circumstance intent element is narrower than Nevada's felony murder, it is still quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the class of death eligible felony murderers.¹²

As such the court held that *McConnell* was correctly decided and the district court's order relying on *McConnell* was proper.

A New Penalty Hearing is the Remedy under the Circumstances of this Case

The State argued the *McConnell* error was a charging error and was willing to amend the charging document to remove the felony murder theory making a new trial the appropriate remedy.

The court held that a *McConnell* error is not a charging error because the State is permitted at its discretion to proceed on alternate theories supported by evidence.¹³ Instead, the *McConnell* violation resulted in a sentencing error. The State offered no relevant authority or cogent bases to refute the district court's conclusion that a new penalty hearing is the only remedy when a prejudicial *McConnell* error invalidates the sole aggravator.¹⁴

Concurrence

HARDESTY, J., with whom PARRAGUIRRE and SAITTA, JJ., agree, concurring:

Justice Hardesty concurs that a new penalty hearing is the proper remedy when the only aggravating circumstance found by the jury is invalidated pursuant to *McConnell* but believes this case reveals three fundamental flaws in *McConnell*'s analytical framework:

¹⁰ See NEV. REV. STAT. § 200.033(4).

¹¹ *McConnell*, 120 Nev. at 1067-68, 102 P.3d at 623-24.

¹² *McConnell v. State*, 121 Nev. 25, 28, 107 P.3d 1287, 1289 (2005).

¹³ *Walker v. State*, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000).

¹⁴ The remedy is a new penalty hearing unless it is "clear beyond a reasonable doubt that absent the invalid aggravator[] the jury still would have imposed a sentence of death." *Bejarano*, 122 Nev. at 1081, 146 P.3d at 275-76.

First, the Legislature has adopted a statutory scheme to narrow the class of persons eligible for the death penalty that does not necessitate judicial expansion.¹⁵ Second, the Legislature has narrowly defined felony murder by limiting the felonies that subject a defendant to a first-degree murder conviction.¹⁶ Third, there is no constitutional, legislative, or jurisprudential basis to impose a specific intent to kill requirement for any aggravating circumstance.

Conclusion

The court found that *McConnell* was correctly decided and that a new penalty hearing is the proper remedy where the sole aggravating circumstance is invalidated. The district court did not err in its application of *McConnell* or by invalidating the sole aggravator, that “the murder was committed during the course of a robbery,” because it was improperly based on the felony used to obtain the first-degree murder conviction. The court therefore affirmed the district court’s order vacating Harte’s death sentence, affirming the guilty verdict and ordering a new penalty hearing.

¹⁵ See NEV. REV. STAT. §§ 200.030(1), 200.033.

¹⁶ It is not a broad felony murder definition as it involves crimes that are inherently dangerous but some inherently dangerous felonies are excluded.