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***Browning v. State*, 120 Nev. Adv. Rep. 39, 91 P.3d 39 (2004).**

CRIMINAL LAW – APPEALS

Summary

Appeal from a petition for post-conviction relief dismissed by the Eighth Judicial District Court, State of Nevada, finding that Petitioner “received effective assistance of counsel and that his other claims were procedurally barred.”

Disposition/Outcome

Affirmed in part, vacated in part, and remanded. Although Petitioner raised numerous claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct, the court determined that all of the claims lacked standing, merit or were held to be harmless error, with the exception of one. The court found that Petitioner’s counsel failed to challenge the jury instruction defining the aggravating circumstance of depravity of mind and therefore vacated the “death sentence and remanded for a new penalty hearing.”

Factual and Procedural History

Petitioner Paul Browning was convicted of first-degree murder with use of a deadly weapon, robbery with the use of a deadly weapon, burglary, and escape as a result of an incident in 1985. Browning robbed a jewelry store and during the robbery killed the proprietor with a knife. The Browning was seen standing over the victim’s body and fleeing the seen by the victim’s wife. Other witnesses also testified to seeing Browning as he was fleeing the scene. Browning was later arrested after the police were notified that he was in a hotel room with the stolen jewelry. The police informant also told the police officers the location of the weapons used in commission of the crime.

A jury convicted Browning and sentenced him to death, finding five aggravating circumstances. The aggravating circumstances were: “the murder was committed while Browning was engaged in a burglary; the murder was committed while he was engaged in a robbery; he was previously convicted of a felony involving the use or threat of violence; the murder was committed while he was under a sentence of imprisonment; and the murder involved depravity of the mind.”

Browning filed a timely petition for post conviction relief in May 1989. He then supplemented and revised his petition. In December 2001, the district court dismissed Browning’s petition after conducting an evidentiary hearing. Browning appealed the dismissal to the Nevada Supreme Court resulting in this decision.

Discussion

Petitioner, Browning, raised several issues on appeal, only one had merit. Petitioner asserted that he was denied effective assistance of counsel on direct appeal when “appellant counsel failed to challenge the jury instruction defining the aggravating circumstance of depravity of mind.”

The instruction read: [D]epravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

The instruction did not provide an appropriate definition for “depravity of the mind” nor did it provide proper limiting instructions as identified in *Godfrey v Georgia*. The *Godfrey* Court declared that an appropriate jury instruction “must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death.” The *Godfrey* Court further concluded that defining depravity of mind as “a state of mind outrageously, wantonly vile, horrible or inhuman,” does not prevent a jury from finding that every person found guilty of murder could be characterized as such.

The Nevada Supreme Court found that because the court did not provide an appropriate limiting instruction, the jury’s consideration of the death penalty might have been prejudiced. Therefore, it was reasonably objectionable when appellant’s counsel failed to challenge the instruction. However, this conclusion does not complete the inquiry.

In order to provide the petitioner relief, the court must also determine if it is clear whether the absence of the erroneous aggravator would have resulted in a penalty other than death. In *State v. Haberstroh*, the Nevada Supreme Court confirmed that a similar erroneous instruction provided inadequate guidance to a jury, despite the existence of other aggravators. The court concluded that “the weight of the remaining aggravators was no enough to convince us [the court] beyond a reasonable doubt that the jury would have returned a death sentence without the depravity-of-mind aggravator” as emphasized by the *Haberstroh* prosecutor.

The prosecutor, in this case, applied similar emphasis on the term depravity-of-mind. As such, the court came to a similar conclusion; the jury instruction, as given, without appropriate limiting instructions, failed to provide the protections identified in *Godfrey*. Thus, Petitioner was prejudiced and appellant’s counsel should have challenged the instruction.

Conclusion

The Nevada Supreme Court held that when providing jury instructions addressing depravity-of-mind, an appropriate limiting instruction must be given. Such a jury instruction must channel the sentencer's discretion by clear and objective standards. In addition, the instruction must include a “rationally reviewable the process for imposing a sentence of death.” Since such limiting instructions were not given in this case, the court vacated the Petitioner’s death sentence and remanded the matter for a new penalty hearing.