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***State v. Bennett*, 119 Nev. Adv. Op. No. 63 (Dec. 30, 2003)¹**

CRIMINAL LAW – HABEAS CORPUS

Summary

Appeal and cross-appeal from a district court order granting in part and denying in part Defendant’s post-conviction petition for a writ of habeas corpus in a capital case.

Disposition/Outcome

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

Factual and Procedural History

On February 8, 1988, Edward Bennett, age 18, purchased a handgun in Provo, Utah. The next day, Bennett and his accomplice Joseph Beeson traveled to Las Vegas, Nevada and attempted to rob a clerk at a Stop N’ Go Market there.² Beeson shot, but did not kill, a customer, Derrick Franklin; Bennett shot and killed the store clerk, Michelle Moore.³ Police later linked the gun used in the Las Vegas robbery-murder to Bennett’s purchase in Provo. Bennett’s fingerprints were also found on the Stop N’ Go Market door and cash register counter.

Bennett was arrested and charged with attempted robbery with use of a deadly weapon, murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Bennett was tried by a jury and was convicted of all counts.

At his penalty hearing, Bennett presented many witnesses who aggregately testified that Bennett: suffered from dyslexia; had problems with alcohol and drugs (including marijuana, LSD and cocaine); was influenced by his peers, including Beeson, whom he looked up to; suffered from depression and suicidal tendencies; listened to and wrote lyrics resembling heavy metal music, though he was not a devil worshipper; and had turned his life to God after his arrest and wanted his previous educators to tell his story to other kids to save them from the evils of hell. Bennett’s family further testified that Bennett was a happy and helpful youth; although, he had problems in school because of his dyslexia, dropped out after the tenth grade and had become distant and withdrawn the year prior to his arrest.

The State also presented witnesses at the penalty hearing, including police officers that testified about Bennett’s previous arrest for drug and paraphernalia possession and an

¹ By Shane Jasmine Young

² Unlike the other stores Bennett and Beeson cased, this Stop N’ Go did not have bulletproof glass surrounding the register.

³ Bennett subsequently returned to Utah, and on March 5, 1988, told his friend, Jeffrey Chidester, about the murder. According to Chidester, Bennett bragged about his “killing spree.” Chidester reported this information to the Utah police, who then contacted the Las Vegas Metropolitan Police Department (LVMPD). Chidester received a total of \$32,000 as a reward for providing information to the police.

incident wherein Bennett and Beeson were driving and Bennett shot a pellet gun at two boys as they walked on the street. Several items were also presented, including witchcraft books, handwritten song lyrics discussing death and killing and heavy metal music cassettes. Each of these items was discovered during a warranted search of Bennett's Utah home. Jeffrey Chidester also testified to what Bennett told him about the crimes.⁴

At the conclusion of the penalty hearing, the jury found four aggravating circumstances or "aggravators": (1) in committing the murder, Bennett knowingly created a great risk of death to more than one person; (2) the murder was committed while Bennett was engaged in the commission of a burglary; (3) the murder was committed while Bennett was engaged in attempted robbery; and (4) the murder was committed "at random and without apparent motive." The jury found three mitigating circumstances: (1) Bennett's lack of a criminal history; (2) Bennett's youth; and (3) Bennett's alcohol and drug usage. The jury determined that the aggravating circumstances outweighed the mitigating circumstances and rendered a verdict of death.

On July 7, 1998, after his direct appeal was unsuccessful and his petition for post-conviction relief was dismissed, Bennett filed a second post-conviction petition for a writ of habeas corpus in the district court.⁵ The district court determined that Bennett had demonstrated good cause and prejudice to overcome the procedural bars due to: (1) violations of *Brady v. Maryland*⁶; and (2) the district court's denial of his request for an investigator to assist prior post-conviction counsel. The district court vacated Bennett's death sentence, granted a new penalty hearing, and presumably dismissed the remainder of Bennett's claims.⁷

Chief Justice Agosti, with Justices Rose, Leavitt and Maupin concurring, affirmed the district court's order vacating Bennett's death sentence and ordering a new penalty hearing. The court held that, in light of the erroneous finding of the "at random and without apparent motive" aggravator and the State's *Brady* violations, it was unable to conclude beyond a reasonable doubt that the jury would have returned a verdict of death in the absence of such errors.

Discussion

The Invalid "At Random and Without Apparent Motive" Aggravator:

Bennett challenged the last three aggravators, and the court found that the challenge to the "at random and without apparent motive" aggravator had merit.⁸

⁴ Although, Chidester admitted that he had ingested drugs after Bennett confessed to him.

⁵ To demonstrate good cause and prejudice to overcome the procedural bars, Bennett claimed that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), that his first post-conviction counsel was ineffective in failing to assert an absence of mitigating evidence at his penalty hearing, and that the district court erred in preventing first post-conviction counsel from investigating the case.

⁶ 373 U.S. 83 (1963).

⁷ The State appealed the district court's decision vacating Bennett's death sentence and ordering a new penalty hearing. Bennett cross-appealed the denial of the remainder of his claims.

⁸ On direct appeal, Bennett unsuccessfully challenged the same three aggravators. See *Bennett v. State*, 106 Nev. 135, 787 P.2d 797 (Nev. 1990) ("Bennett I"), overruled in part by *Leslie v. Warden*, 118 Nev. 773, 50 P.3d 440 (Nev. 2002).

Although Bennett had previously challenged this aggravator on direct appeal, the court, in *Leslie v. Warden*, subsequently held that the 1990 opinion (“Bennett I”) affirming Bennett’s conviction and sentence overstated the applicability of this aggravator to robbery-related killings.⁹ *Leslie* consequently overruled the Bennett I decision on this issue.¹⁰ Under these circumstances, the court declined to apply the doctrine of the law of the case (upon which the State relied) because to do so would unfairly impose a legal application upon Bennett that was expressly overruled.¹¹

According to the court, the facts of this case did not support the finding that Bennett killed the store clerk at random and without apparent motive. To show that Bennett unnecessarily killed the clerk in connection with the robbery is insufficient to prove that the murder was committed at random and without apparent motive.¹² As evidenced through shooting both the clerk and the only other customer in the store, the motive to kill was apparent: to complete the robbery and leave no witnesses.¹³ In addition, Bennett and Beeson cased other stores but left because bulletproof glass surrounded the cash register. This reflected purposeful, not random, behavior.¹⁴

Bennett raised this claim in an untimely and successive post-conviction habeas petition.¹⁵ Nonetheless, the court concluded that the finding of the improper aggravator, combined with the prejudicial impact of the *Brady* violations (identified below), so undermined the reliability of the jury’s sentencing determination that the application of the procedural bars to preclude consideration of Bennett’s claim would amount to a fundamental miscarriage of justice.

The State’s Appeal – *Brady* Claims:

The court conducted a *de novo* review to determine if the district court erred in granting Bennett’s petition based upon the State’s alleged violations of the disclosure requirements set forth in *Brady v. Maryland*.¹⁶ The court concluded that violations

⁹ 118 Nev. 773, 50 P.3d 440 (Nev. 2002). Specifically, the court held that the “aggravator is inappropriate when it is solely based upon the fact that the killing was unnecessary to complete the robbery.” *Id.* at 778, 59 P.3d at 445.

¹⁰ See *id.* at 779, 59 P.3d at 446.

¹¹ See *Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (Nev. 2001) (recognizing the court’s “discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted”).

¹² See *Leslie*, 118 Nev. at 779, 59 P.3d at 446.

¹³ The State also had evidence of this motive from a jailhouse informant, discussed later, who reported that Beeson said that he and Bennett intended to kill all witnesses.

¹⁴ Chidester’s testimony that Bennett boasted to him about a “killing spree” carried little weight because no other shootings occurred and there were no other specific facts to support it.

¹⁵ As such, it was Bennett’s burden to demonstrate that good cause exists for raising this claim again and that prejudice would result if the claim is not considered, or absent good cause, he must show that a fundamental miscarriage of justice would result from this court’s failure to consider the claim. See NEV. REV. STAT. 34.810; *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537.

¹⁶ 373 U.S. 83. “*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.” *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (Nev. 2000). “[T]here are three components to a *Brady* violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” *Id.* at 67, 993 P.2d at 37. To raise a claim in an untimely and/or successive post-conviction habeas petition, the petitioner has the burden of pleading and

occurred in regard to three items: the statement made by the jailhouse informant, Beeson's criminal records, and information that a witness was a paid informant.

Prior to Bennett's formal sentencing, the LVMPD interviewed Richard Perkins, who, in 1988, was a fellow inmate of Beeson in the Clark County Detention Center. According to Perkins, Beeson said that: (1) he and Bennett were on drugs; (2) they went into the store with the intention to rob the clerk and had agreed to kill all witnesses in the store¹⁷; (3) Bennett shot and killed the clerk; (4) he shot the customer but did not kill him; and (5) he planned the murder of the people in the store and convinced Bennett to do the killing.

Under *Brady*, this evidence was favorable to Bennett in that it provided mitigating evidence characterizing Bennett as a follower, with Beeson planning and instigating the murder and persuading Bennett to participate. Second, the State never produced Perkins' statement after the district court granted Bennett's motion for discovery of the statements. If the statements had been properly disclosed when the request was made, there would have been grounds for post-conviction habeas relief at that time. Third, the withholding of the evidence was material because there was a reasonable probability of a different result had there been disclosure, particularly when it is considered collectively with the other undisclosed evidence discussed below. Perkins testimony as to Beeson's admission that he planned the murder and convinced Bennett to do the killing would have corroborated Bennett and demonstrated that Beeson himself acknowledged that he had been the leader and Bennett the follower. This evidence could have been critical in the jury's decision-making process.

The State also violated *Brady* by failing to disclose the prior criminal history contained in Beeson's juvenile records. This was mitigating evidence, favorable to the defense, in that it illustrated Beeson's criminal sophistication and lent credibility to Bennett's theory that Beeson acted as the leader in committing the crimes.

Finally, the State failed to reveal that the Utah police had paid Chidester, a witness for the State, \$50 on each of four or five occasions for informant work.¹⁸ The jury may have given less weight to Chidester's testimony regarding the alleged "killing spree" if the jury had information supporting the inference that Chidester could have been tempted to exaggerate information to obtain benefits, monetary or otherwise, from the police.

Under *Brady*, these three instances of undisclosed evidence were collectively material to Bennett's case in mitigation. Considering this evidence, combined with the invalid aggravating circumstance, the court concluded that the district court correctly vacated Bennett's death sentence and ordered a new penalty hearing.

proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars. *See id.*; *see also* NEV. REV. STAT. 34.726(1); NEV. REV. STAT. 34.810(3).

¹⁷ According to the court, the State should have also disclosed this evidence because it was relevant to refute the aggravating circumstance that the murder was random and without apparent motive.

¹⁸ The State argued that it lacked actual knowledge of the evidence, but "the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." *Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (Nev. 1996) (quoting *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992)). In this case, a Utah detective was aware of the evidence; therefore, the court concluded that it was appropriate to charge the State with constructive knowledge.

Bennett also claimed that the State violated *Brady* with respect to other items of evidence, including: (1) Beeson's medical records; (2) Beeson's refusal to take a polygraph test; (3) the prosecutor's conversations with an eyewitness; (4) a crime lab report regarding gunpowder burns; and (5) a picture of a shoeprint. The court concluded that the State did not violate *Brady* in these respects.¹⁹

Reweighting/Harmless Error:

"[T]he Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless error review"²⁰ In reweighing, the court disregarded the invalid aggravating circumstances and reweighed the remaining permissible aggravating and mitigating circumstances.

Considering the remaining aggravators, the mitigating evidence that the jury heard, and the undisclosed mitigating evidence that the jury did not hear, particularly the evidence regarding Beeson's dominant role in the crimes, the court could not conclude beyond a reasonable doubt that the jury would have imposed the death penalty in the absence of the erroneous aggravator and the State's *Brady* violations. The court therefore affirmed the district court's order vacating Bennett's sentence of death and ordering a new penalty hearing.

Bennett's Cross-Appeal – Other Claims:

Bennett raised many other claims in his petition. Some claims had been previously addressed and rejected on direct appeal. As such, there doctrine of the law of the case prevented relitigation of these claims.²¹ The petition also raised a number of claims that should have been raised on direct appeal. These claims were waived pursuant to NRS 34.810(3) because Bennett failed to demonstrate good cause and prejudice for failing to raise them earlier.

Dissent

GIBBONS, J., concurring in part and dissenting in part:

Justice Gibbons concurred that the majority's decision based upon the holding of *Leslie*. However, because of the "undisputed" procedural bars, he dissented from the majority's conclusion that the court should address the merits of the case and affirm the district court's grant of a new penalty hearing. Instead, Justice Gibbons would have reinstated the death penalty.

BECKER, J., dissenting:

¹⁹ Bennett either failed to show that the State had a duty to disclose the evidence or that he was prejudiced by the nondisclosure.

²⁰ *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990).

²¹ *See Hall v. State*, 91 Nev. 314, 535 P.2d 797 (Nev. 1975); *cf. NEV. REV. STAT.* 34.810(3).

Justice Becker dissented from the majority's conclusion that Bennett's second petition for post-conviction relief was not successive and procedurally barred. Moreover, Bennett did not meet the second prong in *Leslie* requiring a finding of reasonable probability that, absent the invalid aggravator, the jury would not have imposed death.²² Justice Becker would have reversed the district court's judgment and reinstated the death penalty.

Conclusion

The court found that the "at random and without apparent motive" aggravator was erroneous in this case. When considered in combination with the State's *Brady* violations, particularly the State's failure to disclose evidence that Bennett's accomplice played a dominant role in the crimes, the court was unable to conclude beyond a reasonable doubt that the jury would have returned a verdict of death in the absence of these errors. The court therefore affirmed the district court's order vacating Bennett's sentence of death and ordering a new penalty hearing.

²² 118 Nev. 773, 59 P.3d 440 (Nev. 2002).