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Summary of Lisle v. State, 131 Nev. Adv. Op. 39 (June 25, 2015)

Adam Wynott
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CRIMINAL PROCEDURE: PROCEDURAL BARS TO POST-CONVICTION PETITIONS

Summary

The Court held that the petitions filed by the appellant, Kevin James Lisle (Lisle), were procedurally barred. The Court determined that a petitioner cannot present new evidence of mitigating circumstances in order to prove actual innocence of the death penalty. The Court determined that the claims of Lisle did not warrant relief and upheld the district court ruling.

Background

A jury found Lisle guilty of first-degree murder with a deadly weapon in the shooting of Kip Logan. The jury sentenced Lisle to death. Lisle filed a post-conviction petition challenging his conviction and sentence, which the district court dismissed. Lisle filed a second post-conviction petition claiming ineffective assistance of counsel. The district court dismissed the second petition and Lisle appealed.

Discussion

In order to file a post-conviction petition there are two procedural bars a petitioner must overcome: (1) the petitioner is limited to one² and (2) it must be filed in a timely manner.³ These procedural bars may be overcome if the petitioner proves that (1) a court's refusal to consider the petition on its merits would result in a fundamental miscarriage of justice and (2) good cause or actual prejudice for the delay exists.

Lisle failed to demonstrate good cause and prejudice

The Court has acknowledged that a *Brady*⁴ violation may be used to prove good cause and actual prejudice to overcome the procedural bars to a post-conviction petition. Proving a *Brady* violation requires that the petitioner: (1) prove cause by showing that the state, intentionally or inadvertently, withheld favorable evidence, (2) prove prejudice by showing the withheld evidence was material, and (3) make the claim within a reasonable time after the defense discovers the withheld evidence.

In this case, Lisle received the evidence at issue thirteen years before filing the petition. The Court found that Lisle did not provide facts that demonstrated the reasonable timeliness of his filing. Lisle did not meet the burdens required to prove a *Brady* violation.

Lisle made other good cause claims based on ineffective assistance of post-conviction counsel. Lisle filed the petition six years after the denial of his first post-conviction petition. The Court found that these claims were not made within a reasonable time, because the same time bar

¹ By Adam Wynott.

² See NEV. REV. STAT. §§ 34.810(1)(B)(2); 34.810(2).

³ NEV. REV. STAT. § 34.726(1).

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

applies to successive petitions. The Court determined that Lisle’s remaining claims lacked merit and could not overcome the procedural rules.

Lisle failed to demonstrate actual innocence

A court may still reach the merits of a petition barred for procedural reasons if failure to consider the petition would result in a fundamental miscarriage of justice. The petitioner must present new evidence to show that he is actually innocent or is not eligible for the death penalty.

Lisle did not demonstrate actual innocence of the crime

Lisle presented new evidence to prove his innocence of the crime. The Court found that the new evidence did not undermine the key testimonial evidence presented in the case. Thus, Lisle failed to demonstrate that, in light of the new evidence, no reasonable juror would have found him guilty of the crime.

Lisle did not demonstrate actual innocence of the death penalty

Lisle argued that he was innocent of the death penalty. He claimed that (1) the original evidence was insufficient to support the aggravating circumstance of the crime and (2) that based on new mitigating evidence no rational juror would have sentenced him to the death penalty.

Analyzing the first claim, the Court found that Lisle did not present any new evidence to support his claim regarding the aggravating circumstance. Without new evidence Lisle could not demonstrate actual innocence.

The second claim presented an issue of first impression for the Court: “can a claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim be based on a showing of new evidence of mitigating circumstances?” The Court focused on a Supreme Court precedent⁵ that rejected admitting new mitigating evidence when considering the exception to procedural bars. The Court cited two observations: (1) the inclusion of new mitigating evidence would lower the bar to the exception and (2) because mitigating evidence is subjective and broad, it would change the narrow exception to a broader gateway.

The Court examined the standards used when imposing the death penalty, noting two phases: (1) the “eligibility” phase, where the jury narrows the type of defendants eligible to receive the death penalty and (2) the “selection” phase, where the jury determines if an individual defendant is eligible for the death penalty. The Court uses the term “eligibility” to refer to both the narrowing and individualized consideration phases of the capital sentencing process, because Nevada law⁶ precludes a jury from issuing the death penalty if mitigating circumstances outweigh the aggravating circumstances.

The jury’s discretion to impose the death sentence does not expand the narrowing phase to include the individualized consideration phase. The weighing of mitigating and aggravating circumstances is part of the individualized consideration phase. The Court differentiated between

⁵ Sawyer v. Whitley, 505 U.S. 333 (1992).

⁶ See NEV. REV. STAT. § 175.554(3); NEV. REV. STAT. § 200.030(4).

actual innocence of the crime and mitigating evidence, because the elements of the crime are determined by statutory definitions, while mitigating evidence is not. Mitigating circumstances require a moral determination and cannot be confined by a particular statute, because it encompasses the multitude of human frailties.

The Court noted that the actual innocence inquiry must look to objective factors to determine if a defendant is eligible for the death penalty. The Court resisted opening up the actual innocence gateway to new mitigating evidence because doing so would allow the exception to consume the procedural bars. A defendant may not overcome the procedural bars to a petition by claiming innocence based on new mitigating evidence.

Conclusion

Thus, Lisle failed to overcome the procedural bars to his post-conviction petitions. He did not demonstrate his actual innocence in either the underlying crime or his sentence to the death penalty. The Court affirmed the district court's dismissal of the post-conviction petitions.