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Rippo v. State, 132 Nev. Adv. Op. 11 (Feb. 25, 2016)

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CRIMINAL LAW: DEATH PENALTY APPEAL

Summary

Rippo's claim, that the ineffective assistance of the counsel who represented him in the first post conviction hearing excused the procedural bars to claims raised in the second petition, was rejected. The Court provided guidance on two issues related to whether an ineffective-assistance-of-postconviction-counsel claim has been raised in a timely fashion: (1) when does a postconviction-counsel claim reasonably become available, and (2) what is a reasonable time thereafter in which the claim must be asserted. They held on (1) that the factual basis for such a claim is not reasonably available until the conclusion of postconviction proceedings in which the ineffective assistance allegedly occurred. They held on (2) that an ineffective assistance of postconviction counsel claim to excuse the procedural default of other claims has been filed within a reasonable time so long as it is filed within one year after entry of the district court's order or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. The Court also adopted the two-prong *Strickland* test to evaluate ineffective assistance of postconviction counsel claims.² The Court concluded that Rippo filed his petition within a reasonable time after the postconviction-counsel claims became available but the claims lacked merit. The Court rejected his other allegations of good cause and prejudice and affirmed the district court's decision to deny the petition as procedurally barred.

Background

The facts of the crimes involve the robbery and murder of two victims. Rippo's girlfriend Diana Hunt testified Rippo carried out his plan to rob the victims by using a stun gun to subdue them, binding and gagging them, and then strangling them. He then tried to conceal the evidence and stole the victim's car and credit cards, which he used to make purchases later. Rippo also told his girlfriend that he had returned to the apartment to cut the victim's throats and jump on their bodies. Michael Damon Rippo was found guilty of two counts of first-degree murder and related felonies and sentenced to death in 1996. The convictions were affirmed on appeal and he was denied relief in a postconviction petition. He filed a second postconviction petition for a writ of habeas in state court, which was denied for being untimely and successive.

Discussion

Rippo's petition raised claims for relief based on trial error, prosecutorial misconduct and failure to disclose evidence, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and ineffective assistance of post conviction counsel. Rippo acknowledged the petition was late under NRS 34.726(1) and most of the grounds subject to procedural defaults under NRS 34.810. He provided several explanations for these faults but the district court dismissed the petition. The district court's decision was reviewed de novo.

¹ By Kristian Kaskla.

² *Strickland v. Washington*, 466 U.S. 668 (1984).

Ineffective assistance of postconviction counsel as cause and prejudice to excuse a procedural default.

The opinion focused on Rippo's ineffective assistance of counsel claim. The right to effective assistance of postconviction counsel is only recognized when the appointment is statutorily mandated.³ The right did apply here. Here, the ineffective counsel claims involved two contexts: (1) a freestanding claim for relief from his conviction and sentence and (2) a ineffective assistance claim establishing "cause and prejudice" to excuse the procedural defaults of his claims. Three procedural bars are relevant to the analysis of the contexts: the second-or-successive-petition, the waiver bar, and the time bar.

Successive petitions and abuse of the writ.

NRS 34.810(2) limits second or successive habeas petitions. The petitions must be dismissed if: (1) it fails to allege new or different grounds for relief and the prior determination was on the merits or (2) new grounds are alleged and the courts find the failure raise them in the prior petition is an abuse of the writ. Here, the petition was dismissed because prior petition resolved all of the grounds previously raised and the new grounds did not have a showing of good cause for failure to raise them.

Failure to raise claims in prior proceedings.

Under NRS 34.810(1)(b), petitions are subject to dismissal if they raise grounds that could have been raised in a prior proceeding. The default may be excused by a showing of cause for the failure to present and actual prejudice. Here, the grounds raised in Rippo's petition could have been raised in the prior proceeding and thus are subject to dismissal.

Procedural default of cause-and-prejudice claim.

To excuse the procedural default of claims under NRS 34.810(1)(b) and (2) the petition must show "an impediment external to the defense" prevented them from presenting the claims previously. Rippo relies on his ineffective assistance claim for this purpose. However, an ineffective assistance claim that has been procedurally defaulted cannot be used to excuse the procedural default of another claim. Rippo's ineffective assistance claim was procedurally defaulted and thus could not be used.

Availability of postconviction-counsel claim and time within which it must be raised.

Under NRS 34.726(1), a habeas petition challenging a conviction or sentence must be filed within one year after entry, or if appealed, within a year after the court issues its remittitur on direct appeal. Rippo's petition was not filed within that time and he was required to show good cause for the delay. A showing of good cause requires (1) that the delay was not the petitioner's fault and (2) the dismissal would unduly prejudice the petitioner. Rippo asserted that the delay was due to ineffective assistance of postconviction counsel and that claim was not

³ Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 165, 912 P.2d 255, 258 (1996).

available at time of procedural default. The Court agreed his claim was not available because the claim's basis depends on the conclusion of postconviction proceedings, which occurred outside of the time period.

The claims unavailability was not enough because it must also be within "a reasonable time" after the claim becomes available. To determine what is reasonable the Court had to answer: (1) when a postconviction ineffective assistance claim becomes available and (2) what is a reasonable time thereafter to file a petition raising the claim.

The Court determined under (1) that the claim becomes available at conclusion of postconviction proceedings and that proceeding concluded when the court issued its remittitur in the postconviction appeal.

The Court determined under (2) an ineffective assistance of postconviction counsel claim has been raised in a reasonable time after it became available so long as the post conviction petition is filed within one year after entry of the district court's order disposing of the prior postconviction petition or, if appealed, within one year after the remittitur.

Here, the Court held that Rippo filed his petition within a reasonable time as required for the first component of NRS 34.726(1).

Undue prejudice to excuse untimely petition based on ineffective assistance of postconviction counsel and standard for evaluating postconviction counsel's effectiveness.

The second component of the good-cause showing under NRS 34.726(1) requires the petitioner demonstrates dismissal of the petition unduly prejudices him. Thus his claim must have merit for it to prejudice him. To determine the merit of his claim the Court decided to take the opportunity to "explicitly adopt the *Strickland* standard to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel."

The *Strickland* standard has two prongs requiring the petitioner demonstrate: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.⁴ The prejudice prong in the context of postconviction counsel requires a showing that counsel's deficient performance prevented the petitioner from establishing "that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." If the petitioner surmounts *Strickland's* high bar, and proves postconviction counsel's ineffective assistance, the claim meets the undue-prejudice component of the good-cause showing required.

Actual prejudice to excuse procedural default under NRS 34.810 based on ineffective assistance of post conviction counsel.

A postconviction-counsel claim is sufficient to establish cause to excuse the procedural default of another claim if the petitioner proves both prongs of the ineffective-assistance test. If

⁴ *Strickland*, 466 U.S. at 687.

the prejudice standard under Strickland is met, then the actual prejudice standard to excuse procedural default has also been met.

Here, Rippo did not meet both prongs of the ineffective-assistance test with respect to post conviction counsel and therefore did not demonstrate cause and prejudice to excuse the applicable procedural bars. Rippo did raise his postconviction-counsel claims within a reasonable time but failed to demonstrate the undue prejudice required to excuse the procedural defaults.

Judicial bias (claim 1).

Rippo alleged that his convictions and death sentences are invalid because the trial judge was biased and that his counsel was ineffective because they failed to challenge the trial judge's alleged bias. He argues that the district court erred in applying the procedural default and the law-of-the-case doctrine to this claim.

The judicial bias claim was based on allegations that the trial judge: (1) was the subject of a federal investigation at the time of trial, (2) knew the CCDA's Office and Metro was involved but failed to disclose the fact, and (3) was acquainted with a trial witness (Denny Mason) but did not disclose the fact because it would have incriminated the judge in the federal investigation. The law-of-the-case doctrine generally precludes further litigation of this issue but Rippo claimed that it should not apply because the facts are different than they were at appeal and the prior decision was based on the State's false representations.

The Court determined that there were no substantially different facts that would warrant an exception to the law-of-the-case doctrine. The allegations were raised in Rippo's opening brief on direct appeal and were rejected. The new facts Rippo alleged remained insufficient to establish judicial bias.

Rippo's judicial bias claim was based on a theory that the Judge was biased against criminal defendants generally to curry favor with the agencies investigating him. The Court determined such allegations are too speculative to warrant discovery or an evidentiary hearing. Thus the Court determined Rippo did not demonstrate grounds warranting reconsideration of the prior decision over the law-of-the-case doctrine.

The Court also determined he failed to demonstrate good cause and actual prejudice to excuse his failure to re-raise the bias claim in the first habeas petition. Rippo claimed that his counsel provided ineffective assistance in failing to investigate further. The Court rejected this because both trial and appellate counsel raised the issue and the new information was not available to the counsel at the time. Therefore, the postconviction-counsel claim lacked merit and was not sufficient to excuse procedural default of the judicial-bias claim.

Prosecutorial misconduct (claims 2 and 9)

Rippo raised numerous allegations of prosecutorial misconduct including: the State violated *Brady v. Maryland*, 373 U.S. 83 (1963); the State failed to correct false testimony by its witnesses; the State failed to disclose and misrepresented its involvement in the federal investigation of the trial judge; the prosecutors made improper arguments; and the State

intimidated a defense witness. The district court determined the claims were defaulted and several of the misconduct allegations were subject to the law-of-the-case doctrine.

Brady allegations

Rippo claims that the State withheld evidence, in violation of *Brady*, which could have been used to impeach several of the State's witnesses including: Thomas Sims, Thomas Christos, and Michael Beaudoin. *Brady* requires that a prosecutor disclose evidence favorable to the defense when it is material to guilt or to punishment. To establish a *Brady* violation the defendant must show (1) the State withheld evidence, (2) favorable to the accused because it is exculpatory or impeaching and (3) the prejudice resulted because the evidence was material.

The *Brady* allegations related to Sims and Christos focused on whether the State withheld evidence of cooperation agreements. A promise made by prosecution to a key witness in exchange for testimony requires disclosure under *Brady*. The Court determined that Rippo's allegations of favorable dispositions involving Sims and Christos could not establish explicit or tacit agreements between the State and the witnesses. Thus the *Brady* claim as to these witnesses was not sufficient to establish cause and prejudice.

The *Brady* allegations involving Beaudoin were similar but Rippo offered additional specific allegations. Rippo submitted a declaration in which Beaudoin indicated he was arrested on felony drug charges and he was contacted by one of the attorneys prosecuting Rippo. According to the declaration after the call his charges were reduced and he was able to avoid going to prison. The Court determined that the information was not sufficient to be material under *Brady* because the prosecution did not offer a tacit or explicit promise.

Thus the Court concluded the *Brady* claim lacked merit and could not establish cause and prejudice that his postconviction counsel was ineffective for failing to raise this *Brady* claim.

False testimony.

The Court rejected Rippo's claim that false testimony evidence could excuse the procedural default of his claims. Rippo asserted that three jailhouse informants (Levine, Ison, and Hill) gave false testimony. He alleges that prosecutors or police provided Levine and Ison with information about the case to make their testimony appear more credible and that by doing so the prosecution knowingly presented false or misleading testimony. However, this claim was procedurally barred and Rippo asserted two arguments to excuse the procedural bars. (1) The alleged withholding of evidence by the state was rejected as insufficient because Rippo would have known any falsity in the testimony at the time the witness testified. (2) The ineffective assistance of counsel to excuse procedural bars was rejected because the district court determined he was not prejudiced as Rippo admitted to his involvement in the murders.

The Court determined claim lacks merit because the information could have been used to impeach the witnesses but it would not have affected the jury's verdict nor was there a reasonable probability of a different outcome had the information been disclosed.

Rippo's allegations regarding Hill are different in that they affect a partial recantation. The Court determined that Hill's postconviction declaration did not suggest the prosecution knew or had reason to know part of his testimony was false. Thus, Hill's testimony also does not demonstrate the district court erred in determining Rippo did not demonstrate good cause and prejudice to excuse procedural default.

Prosecutorial misconduct in closing argument

Rippo asserted that the prosecutors committed misconduct during the guilt and penalty phase argument. The allegations were raised and rejected on direct appeal thus the Court determined they are barred by the law-of-the-case doctrine. The Court also rejected Rippo's suggestion that he has good cause because of cumulative errors because it was previously determined that there was no error.

The Court concluded that Rippo did not demonstrate any misconduct by the prosecutors and thus his postconviction-counsel claim also lacks merit.

Witness intimidation

The Court rejected the allegations of improper witness intimidation on direct appeal and thus concluded that it was precluded by the law-of-the-case doctrine.

Failure to investigate and present mitigating evidence (claim 3)

Rippo argued that the district court erred in procedurally defaulting his claim that trial counsel was ineffective for failing to investigate and present mitigating evidence. To excuse the procedural default he argues that postconviction counsel was ineffective for failing to raise the trial-counsel claim. The Court concluded that the claim was not sufficient to excuse the procedural default because it did not meet either prong of the *Strickland* test.

Rippo claimed that his postconviction counsel was ineffective because they did not assert an ineffective assistance claim based on trial counsel's failure present evidence that he suffered from a neuropsychological impairment. The Court determined that the psychological evaluations available to counsel did not reveal any major disorders and thus did not render the counsel ineffective for failure to seek additional evaluations.

Rippo's postconviction counsel claim based on trial counsel's failure to present a violence risk assessment expert was rejected because Rippo would have been subject to cross examination with evidence he threatened to kill a prison guard. Thus the claim lacked merit.

Rippo also asserted a postconviction counsel claim based on trial counsel's failure to present evidence Rippo was sexually and physically abused. Trial counsel did present some of this evidence but Rippo argued that they failure to adequately investigate and uncover more evidence. Trial counsel has a duty to conduct a thorough investigation of the defendant's background. The Court determined that trial counsels questions to Stacie (defendant's sister who

testified on his upbringing) and their failure to encourage her to be more detailed about the abuse was not outside the wide range of professionally competent assistance.

The Court was less confident regarding the more general allegation that trial counsel failed to interview and present testimony of other family members. However, Stacie's testimony and the letter counsel read into the record from Rippo's mother suggested that no one led the trial counsel to believe there was more significant physical or sexual abuse. Nor did Rippo allege he informed trial counsel about the abuse. Thus, the court determined Rippo did not overcome the presumption that trial counsel's performance was within the range of professionally competent assistance.

The Court also decided to consider the prejudice prong and were not convinced that "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. The Court noted that they characterize mitigating evidence as not particularly compelling. Thus they determined the additional mitigating evidence did not add anything compelling enough to conclude there was a reasonable probability that at least one juror would have struck a different balance in choosing between life and death. As the Court determined the omitted trial-counsel claim lacked merit he did not have cause to excuse the procedural default of that claim based on ineffective assistance of post conviction counsel.

Rippo's claim that the counsel should have argued specific mitigating circumstances and requested a special verdict was rejected because it was a strategic decision by counsel, which is virtually unchallengeable.

Rippo's argument that postconviction counsel was ineffective for failure to raise trial counsel's failure to litigate adequately the disclosure of records the Department of Parole and Probation possessed was rejected as lacking merit. The Court determined that the claim was procedurally defaulted and also failed the prejudice prong of *Strickland*.

Rippo's argument the district court erred in dismissing his claim that trial court erred in preventing him from cross-examining Diana Hunt regarding a psychiatric evaluation was rejected as lacking merit. The Court rejected the claim because he did not identify a discovery motion or other request for the evaluation that was denied by the trial court and thus did not demonstrate a viable issue that counsel could have raised.

Actual innocence

When petitioner cannot demonstrate cause and prejudice the district court can still excuse a procedural bar if the petitioner demonstrates that failing to consider the merits of any constitutional claims would result in a fundamental miscarriage of justice. Rippo claimed that he was ineligible because the three aggravating circumstances supporting his death sentence are invalid.

Rippo claimed that the evidence supporting the torture aggravating circumstance was insufficient. The Court rejected this claim on direct appeal and further concluded that it was without merit because there was evidence the stun gun was used for a purely sadistic purpose.

Rippo claimed that the other two aggravating circumstances are invalid for two reasons. The first argument was that his prior conviction was the product of an invalid guilty plea, which the court rejected based on review of the record. The second argument that his prior conviction should not be used as an aggravating circumstance because he was only 16 years old at the time was rejected based on *Roper*. The Court concluded that *Roper* only addressed whether a death sentence can be imposed for an offense committed before the defendant was 18, and as the murders were committed while Rippo was 26 the aggravating circumstances were valid. Therefore, as the aggravating circumstances were valid the Court determined he was not entitled to relief.

Conclusion

The Court determined that Rippo was not entitled to relief based on any of the raised claims and affirmed the order of the district court.