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Rippo v. State, 134 Nev. Adv. Op. 53 (Aug. 2, 2018) (en banc)

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CRIMINAL LAW: DEATH PENALTY APPEAL

Summary

The Court held that the appellant's petition challenging his conviction for two first-degree murders and death sentences was both untimely and successive. Further, it affirmed the district court's denial of the appellant's petition as procedurally barred and determined that Rippo did not show good cause and prejudice to excuse the procedural bars to his petition. The United States Supreme Court vacated the Court's opinion and remanded for further proceedings, reasoning that the Court applied the wrong legal standard as to Rippo's judicial bias claim. On reconsideration, the Court held that an evidentiary hearing was required with respect to several issues related to the judicial bias claim. Moreover, it affirmed the remainder of the district court's order but remanded for an evidentiary hearing on the judicial bias claim.

Background

Michael Damon Rippo and his girlfriend, Diana Hunt, devised a plan to rob two women, Denise Lizzi and Lauri Jacobson. The bodies of Lizzi and Jacobson were found in Jacobson's apartment on February 20, 1992. According to Hunt's testimony, 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. Rippo tried to conceal the evidence and stole the victim's car and credit cards, which he used to make purchases later. After Hunt suggested that they turn themselves in, Rippo told his girlfriend that he had returned to the apartment to cut the victim's throats and jump on their bodies. Witnesses provided testimony linking Rippo to property taken from the women and a medical examiner testified that Lizzi's injuries were consistent with strangulation. However, none of the victims' bodies revealed evidence of stun gun marks.

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. On appeal, the Supreme Court of Nevada 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. Upon granting certiorari, the United States Supreme Court held that standard for recusal was whether risk of bias was too high to be constitutionally tolerable and proceeded to vacate the judgment and remand the case for further proceedings.

¹ By Shady Sirsy.

Discussion

This matter is before this Court on remand from the United States Supreme Court.² 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 postconviction counsel. Rippo acknowledged the petition was not filed within the time period permitted by NRS 34.726(1) and was subject to various procedural defaults under NRS 34.810. He provided several explanations for these failures, but the district court dismissed the petition. In reviewing the district court's application of the procedural default rules, this Court gives deference to the court's factual findings but reviews the court's application of the law to those facts de novo.³

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

The opinion focused on Rippo's allegations that counsel appointed to represent him in his first postconviction proceeding provided ineffective assistance. The right to effective assistance of postconviction counsel is only recognized where appointment is statutorily mandated.⁴ In this case, the right did apply. The ineffective counsel claims involved two contexts: (1) a freestanding claim for relief from his conviction and sentence and (2) an ineffective assistance claim establishing "cause and prejudice" to excuse the procedural defaults of his claims.⁵ Three procedural bars set by statute are relevant to the analysis of the contexts: the second-or-successive-petition,⁶ the waiver bar,⁷ and the time bar.⁸

Successive petitions and abuse of the writ

The Court examined statutory provisions that limit second or successive habeas petitions that challenge a judgment of conviction or sentence. A petition is dismissed in either of two circumstances: (1) if "it fails to allege new or different grounds for relief and . . . the prior determination was on the merits" or (2) "if new and different grounds are alleged" and the court finds that the petitioner's failure "to assert those grounds in a prior petition constituted an abuse of the writ."⁹ Here, Rippo's prior petition was resolved on the merits and all of the grounds in Rippo's second petition had been raised in the prior petition or were new and different grounds for relief. Consequently, the second petition was subject to dismissal under the statute, absent a showing of cause and prejudice.¹⁰

² *Rippo v. State (Rippo III)*, 132 Nev. 95, 368 P.3d 729 (2016)

³ *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

⁴ *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).

⁵ See NEV. REV. STAT. § 34.724(1) (2017) ("Any person convicted of a crime and under sentence of death or imprisonment who claims 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. . . may. . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . .").

⁶ NEV. REV. STAT. § 34.810(2) (2017).

⁷ NEV. REV. STAT. § 34.810(1)(b) (2017).

⁸ NEV. REV. STAT. § 34.726(1) (2017).

⁹ NEV. REV. STAT. § 34.810(2) (2017).

¹⁰ NEV. REV. STAT. § 34.810(3) (2017).

Failure to raise claims in prior proceedings

Petitions are subject to dismissal if they raise grounds that could have been raised in a prior proceeding.¹¹ 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 are thus 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 or warrants presenting them again. Rippo primarily relied 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. Under NRS 34.726(1), 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 from the judgment of conviction.¹² Rippo's petition was not filed within that time and he was required to show good cause to excuse 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.¹³ Rippo asserted that the delay was due to ineffective assistance of postconviction counsel and that claim was not 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 that under the first prong, a claim became available at conclusion of postconviction proceedings and that proceeding concluded when the court issued its remittitur in the postconviction appeal. Under the second prong, 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. Because Rippo filed his petition within a reasonable time as required for the first component of NRS 34.726(1), the Court determined Rippo met the first component of the good-cause showing.

¹¹ NEV. REV. STAT. § 34.810(1)(b) (2017).

¹² *Dickerson v. State*, 114 Nev. 1084, 1087-88, 967 P.2d 1132, 1133-34 (1998) (construing NRS 34.726(1) to allow one year from remittitur on direct appeal only if direct appeal was timely).

¹³ *Id.*

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 to demonstrate dismissal if the petition unduly prejudices him or that his claim has merit for it to prejudice him. To determine the merit of his claim, the Court took 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.”¹⁴ The *Strickland* standard has two factors that require the petitioner to demonstrate: (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense.¹⁵ 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.”¹⁶ 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 under NRS 34.726(1).

Actual prejudice to excuse procedural default under NRS 34.810 based on ineffective assistance of postconviction 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.¹⁷ If 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. While, Rippo did raise his postconviction-counsel claims within a reasonable time, he 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 adequately 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 Clark County District Attorney’s Office and/or Las Vegas Metropolitan Department were 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.

¹⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁵ *Id.* at 687.

¹⁶ NEV. REV. STAT. § 34.724(1) (2017).

¹⁷ *See Lynch v. Ficco*, 438 F.3d 35, 49 (1st Cir. 2006) (“In theory, *Strickland* attacks (including its own prejudice prong) go to the separate ‘cause’ as opposed to the ‘prejudice’ standards for overcoming default”).

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. However, under the United States Supreme Court's directive, this Court's prior decision became irrelevant. On the merits of the judicial-bias claim, the inquiry is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."¹⁸ This Court found the answer may be yes, that Rippo's allegations that the trial judge knew about the State's involvement in the federal sting operation but lied about it and falsely denied that he had any connection to Mason or his business partner to avoid implicating himself in the federal bribery investigation are true. Because the substantive claim therefore may have merit based on the new information, this Court determined that discovery and an evidentiary hearing is needed to determine whether the allegations supporting the judicial-bias claim are true, and if so, whether prior postconviction counsel provided ineffective assistance by failing to investigate and re-assert 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)(claim 2); the State failed to correct false testimony by its witnesses (claim 2); the State failed to disclose and misrepresented its involvement in the federal investigation of the trial judge (claim 2); the prosecutors made improper arguments to the jury (claim 2); and the State intimidated a defense witness (claim 9). The district court determined that both claims 2 and 9 were procedurally defaulted and that several of the misconduct allegations were subject to the law-of-the-case doctrine.¹⁹

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.²⁰

The *Brady* allegations associated with 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

¹⁸ *Rippo IV*, 580 U.S. at ___, 137 S. Ct. at 907.

¹⁹ *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

²⁰ *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

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.¹ and he was able to avoid going to prison. The Court determined that the information was not enough to be material under *Brady* because the prosecution did not offer a tacit or explicit promise. 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

Rippo's alleged that false testimony evidence could excuse the procedural default of his claims. Rippo asserted that three jailhouse informants (David Levine, James Ison, and Donald 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. Rippo asserted two arguments to excuse the combat that bar that were rejected – (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 and (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 that the 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 also 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 (claim 9) on direct appeal and thus concluded that it was precluded by the law-of-the-case doctrine.²¹

Failure to investigate and present mitigating evidence (claim 3)

²¹ See *Hall*, 91 Nev. at 315, 535 P.2d at 798.

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, Rippo asserts that postconviction counsel was ineffective for failing to raise the trial-counsel claim. The Court determined that the claim was not enough 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 concluded that trial counsels' questions to Stacie (defendant's sister who testified on his childhood) 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. Further, Rippo did not allege he informed trial counsel about the abuse. Consequently, 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.²² The Court noted that they characterize mitigating evidence as not particularly compelling and 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 counsel should have argued specific mitigating circumstances and requested a special verdict was rejected, as it was a strategic decision by counsel, which is virtually unchallengeable.²³

Disclosure of records (claim 8)

²² *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

²³ *See Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decision are virtually unchallengeable absent extraordinary circumstances").

Rippo argued that the district court erred in dismissing his claim related to the trial court's decision to quash a subpoena for records that were in the possession of Parole and Probation. He argued that the trial court infringed on his constitutional right to present a defense and confront the witnesses against him, that trial counsel failed to "adequately litigate the disclosure of the records," and that appellate counsel should have raised the issue on direct appeal. To excuse the procedural default of these claims, Rippo asserted that prior postconviction counsel was ineffective for failing to raise them. The Court concluded that the postconviction-counsel claim lacks merit, consequently defaulting the trial-error and ineffective-assistance claims.

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 deficient. 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 18,²⁴ and as the murders were committed while Rippo was a week from his 27th birthday, the aggravating circumstances were valid. Therefore, as the aggravating circumstances were valid the Court determined that Rippo had not demonstrated he was ineligible for the death penalty.

Conclusion

The Nevada Supreme Court determined that Michael Damon Rippo is entitled to an evidentiary hearing as to the first claim in his petition but that his other claims lack merit. The Court affirmed in part, reversed in part, and remanded to the district court for further proceedings.

Dissent

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

Justice Pickering would remand not just for discovery and an evidentiary hearing but also briefing and argument on the mandate rule as it applies to Rippo's judicial bias claim. She believes that the reading of the Supreme Court's opinion in *Rippo v. Baker* is not clear. Her

²⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

colleagues read it as Rippo not being able to prevail without establishing ineffective assistance of first postconviction counsel. However, another reading of the U.S. Supreme Court's Rippo opinion is that, because a judge's unconstitutional failure to recuse violates due process and constitutes structural error, and because a now vacated decision resolved Rippo's appeal partly based on law-of-the-case, Rippo may be entitled to a new trial if he can show the State defeated Rippo's original judicial bias claim by falsely denying its involvement in the investigation of the judge.

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

Justice Cherry concurred with the majority's decision that when postconviction counsel is appointed pursuant to NRS 34.820, a challenge to that counsel's representation becomes available upon the conclusion of the first postconviction proceeding. He further agreed with the majority's adoption of the two-prong test in *Strickland* to evaluate claims of ineffective assistance of postconviction counsel. However, he disagreed with the majority's decision that a petition raising a claim of ineffective assistance of first postconviction counsel is filed within a reasonable time if it is entered within one year after the district court's order disposing of the prior petition or, if a timely appeal is taken from the district court's order, within one year after issuance of remittitur.

He believed that Rippo had produced sufficient support entitling him to an evidentiary hearing to prove his allegations that postconviction counsel provided ineffective assistance by failing to investigate and challenge trial counsel's performance. If Rippo is successful in proving allegations at an evidentiary hearing, he may secure a new penalty hearing.