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Chappell v. State, 137 Nev. Adv. Op. 83 (Dec. 30, 2021)

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Criminal Law: APPEAL DISMISSING A POSTCONVICTION PETITION FOR A WRIT OF HABEAS CORPUS

Summary:

In an opinion drafted by Justice Cadish, the Nevada Supreme Court considered a case in which several mandatory procedural bars apply to postconviction habeas petitions under NRS Chapter 34. A petitioner must demonstrate good cause and prejudice in order to overcome the mandatory procedural bars and avoid dismissal of a postconviction habeas petition. A claim of good cause must be raised by the petitioner within a reasonable time after it becomes available. The Court concludes that the ineffective assistance claims lack merit and affirmed the district court order dismissing Chappell's third postconviction petition for a writ of habeas corpus as procedurally barred.

Facts and Procedural History:

Nearly three decades ago, while appellant James Chappell was serving time in a Las Vegas jail for domestic battery, he was mistakenly released from custody. After being released, Chappell broke into the home of his ex-girlfriend, molested her, and then stabbed her to death with a kitchen knife. Chappell was found guilty of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary. The jury sentenced him to death for the murder, and the Court affirmed the judgment and sentence on direct appeal.²

Chappell asserted the ineffective assistance of his first postconviction counsel as good cause and prejudice to raise procedurally barred grounds for relief from the guilt phase of his trial. But he did not do so until after the penalty phase retrial he obtained in the first postconviction proceeding, the direct appeal from the judgment entered after the penalty phase retrial, and the remittitur issued on appeal from the district court order denying his second postconviction habeas petition

Chappell filed a postconviction appeal for a writ of habeas corpus. While the district court rejected Chappell's claims related to the guilt phase, it found that Chappell received ineffective assistance during the penalty phase and a new penalty hearing was ordered.³ At the penalty-phase retrial, the jury returned a death sentence, and the Court affirmed the sentence on appeal.⁴

After the penalty-phase retrial, Chappell filed a second postconviction petition for a writ of habeas corpus, this time challenging the death sentence imposed at the penalty phase retrial. The district court denied the petition, and the Court affirmed.⁵ A third postconviction petition for a writ of habeas corpus was filed in November of 2016. The district court dismissed the petition

¹ By Kalin Olson.

² *Chappell v. State* (Chappell I), 114 Nev. 1403, 972 P.2d 838 (1998).

³ *Chappell v. State* (Chappell II), Docket No. 43493 (Order of Affirmance, Apr. 7, 2006).

⁴ *Chappell v. State* (Chappell III), No. 49478, 2009 WL 3571279 (Nev. Oct. 20, 2009) (Order of Affirmance).

⁵ *Chappell v. State* (Chappell IV), No. 61967, 2015 WL 3849122 (Nev. June 18, 2015) (Order of Affirmance).

as procedurally barred after conducting a limited hearing on one of the claims. The case at hand is the appeal that followed.

Discussion:

The district court did not err in dismissing the petition as untimely, successive, and an abuse of the writ

Under NRS 34.726(1) "[A] petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court . . . issues its remittitur." Chappell filed his third postconviction habeas petition over 17 years after the remittitur issued in the appeal from the original judgment, and over 6 years after the remittitur issued in the appeal from the judgment entered after the penalty-phase retrial.

This third petition was subject to multiple, mandatory procedure bars. Many of the grounds for relief in the petition had been waived by Chappell because he could have raised them in the previous postconviction petitions, or on direct appeal. Chappell had to demonstrate good cause and prejudice in order to avoid dismissal based on the procedural bars. Referring to both his first and second postconviction counsel, Chappell claimed to demonstrate good cause and prejudice.

Ineffective postconviction counsel can give cause for a successive and untimely petition where counsel was appointed as a matter of right, but only if the counsel claim is not itself untimely and thus barred procedurally. A postconviction-counsel claim is raised within a reasonable time and is not procedurally barred when it is raised within one year of "the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred."⁶

Chappell did not timely raise the good-cause claims based on ineffective assistance of first postconviction counsel

The Court disagreed with Chappell's claims that the first postconviction counsel's ineffectiveness provides good cause to raise procedurally barred grounds for relief from the conviction, and that the third petition provided his first opportunity to pursue the claims. The remittitur in Chappell's first postconviction appeal was issued in May of 2006. Chappell had one year from this date to assert counsel's ineffectiveness as good cause to raise the challenges to his conviction but missed that deadline by almost a decade.

Relying on *Johnson v. State*,⁷ Chappell first argued that after obtaining relief from the original death sentence, no judgment of conviction to challenge in a postconviction petition existed until the new judgment was entered. However, the Court holding in *Johnson* dealt with a penalty phase retrial that had been granted on direct appeal, rather than a penalty phase retrial granted in a postconviction proceeding as was the case here. *Johnson* distinguished between

⁶ *Rippo*, 134 Nev. at 420, 423 P.3d at 1096.

⁷ *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017).

cases where the death sentence was reversed on direct appeal and those where the death sentence was vacated in a postconviction proceeding.⁸

Chappell next argued that if he had filed a petition raising the postconviction-counsel claims before the penalty phase retrial, appeal, and challenges were complete, there would have been confusion about whether the petition would be subject to the special rules that apply to petitions filed by a person who is under a death sentence. The Court disagreed, stating that requiring a person in Chappell's position to file a postconviction petition before a penalty phase retrial and related challenges are complete would not lead to possible confusion.

The Court again disagreed with Chappell's third argument that he could not raise his good cause claims sooner because first postconviction counsel continued to represent him in the penalty phase retrial and no new postconviction counsel was appointed to represent him on a second postconviction petition. The continued representation of Chappell did not impede his ability to file a second postconviction petition asserting that the first postconviction counsel's ineffectiveness provided good cause to raise procedurally barred challenges to the conviction.

Consistent with earlier cases, Chappell's good cause claims based on first postconviction counsel's ineffective performance were available when the remitter issued on appeal from the district court's order denying his petition. Because he filed the petition asserting those claims over a year later, the claims were untimely and could not provide good cause.

Chappell timely raised good-cause claims based on second postconviction counsel's alleged ineffective assistance

When Chappell raised claims that counsel's ineffectiveness during the second postconviction proceeding provide good cause to raise procedurally barred grounds for relief, he did so within one year after they became available. This met the first component of the good cause showing required under NRS 34.726(1). To satisfy the second component, Chappell also had to prove that the counsel was ineffective.

Chappell's claims that second postconviction counsel provided ineffective assistance lack merit

To prove that second postconviction counsel was ineffective, Chappell had to show "(1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced [him]."⁹ Conclusory or general assertions of deficient performance are insufficient, and a petitioner must specifically articulate how counsel's performance prejudiced the petitioner. When considering whether Chappell proved that second postconviction counsel provided ineffective assistance, the Court addressed the merits of the procedurally barred grounds for relief

Failure to support claims related to evidence of Fetal Alcohol Spectrum Disorders

Chappell argued that penalty phase counsel should have presented evidence of Fetal Alcohol Spectrum Disorders (FASD) and of Chappell's irreversible brain damage due to prenatal

⁸ *Id.* at 575, 402 P.3d at 1273.

⁹ *Rippo*, 134 Nev. at 423, 423 P.3d at 1098.

exposure to alcohol and drugs. The second postconviction petition included a similar claim that was rejected on its merits. Chappell argued that second postconviction counsel did not support the claim with enough evidence, or in a compelling manner. After conducting an evidentiary hearing on this claim, the district court concluded that penalty phase counsel presented most of the evidence Chappell hoped to introduce and rejected the postconviction counsel claim. Chappell failed to demonstrate that he would have been granted relief had the FASD claim been handled differently by second postconviction counsel.

Failure to raise grounds for relief based on ineffective assistance during jury selection at the penalty phase retrial

Chappell claimed that second postconviction counsel provided ineffective assistance by omitting multiple procedurally barred grounds for relief related to jury selection at the penalty phase retrial. He alleges that penalty phase counsel should have challenged several biased venire members who ultimately were seated on the jury for the penalty phase retrial, that the trial court erroneously denied his for-cause challenges of three venire members who did not serve on the jury during the penalty phase retrial, and that penalty phase counsel did not attempt to rehabilitate death-scrupled venire members.

Chappell's appellate arguments and pleading are deficient. The appellate arguments rely on ineffective assistance of second postconviction counsel to overcome the procedural bars to his claim, but his pleadings do not allege in what ways counsel's performance was ineffective. Chappell did not show that second postconviction counsel acted unreasonably in omitting these claims, and thus failed to demonstrate cause and prejudice.

Failure to raise grounds for relief based on evidence of Chappell's traumatic childhood

Chappell argued that penalty phase counsel did not investigate and present evidence of his traumatic childhood. According to Chappell, counsel should have presented more evidence about his family history of substance abuse and mental illness. Attempting to overcome the procedural bars to this claim, Chappell asserted that second postconviction counsel provided ineffective assistance in omitting it, but his pleadings omitted anything specific about counsel's performance in this regard.

Penalty phase counsel's omission did not prejudice Chappell. The record revealed that several jurors found several mitigating circumstances that covered the subjects identified in this claim, and that postconviction counsel pursued a reasonable strategy focused on eliminating the single aggravating circumstance that, if successful, would have made Chappell ineligible for the death penalty. Thus, the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to present expert witnesses

Chappell argued that penalty phase counsel should have presented evidence of his drug addiction through an addiction expert, the effects of drugs on the brain through a neuropharmacologist, and his childhood through an expert on trauma. Chappell again failed to specifically allege how second postconviction counsel performed deficiently in this area.

Failure to prepare witnesses

Chappell argued that penalty phase counsel did not adequately prepare witnesses to testify during the penalty phase retrial. Chappell failed to present valid argument that the State was able to discredit certain witnesses because penalty phase counsel did not adequately prepare them to testify, nor did he show prejudice due to failure to adequately prepare those witnesses.

Failure to object to prosecutorial misconduct

Chappell complained about multiple instances of alleged prosecutorial misconduct, claiming that penalty phase counsel should have objected. The record revealed that second postconviction counsel raised some of the prosecutorial misconduct arguments, but the Court rejected them. Chappell failed to prove that second postconviction counsel provided ineffective assistance.

Failure to object during penalty phase retrial

Chappell claimed that penalty phase counsel should have made various objections during the penalty phase retrial. The petition indicates that Chappell raised some of these allegations in his direct appeal after the penalty phase retrial and the Court rejected them. The remaining allegations are addressed and rejected by the Court.

Failure to challenge jury instructions

Chappell contended that penalty phase counsel did not object to erroneous jury instructions and that second postconviction counsel provided ineffective assistance by omitting related penalty-phase-counsel claims. He again made no specific allegation about counsel's performance. The trial court correctly instructed the jury in the penalty phase retrial.

Failure to challenge the death penalty

Chappell raised numerous challenges to Nevada's death penalty scheme and his death sentence. That the penalty is applied in an arbitrary and capricious way, and the total time on death row renders the sentence unconstitutional. By not raising these claims on appeal from the judgment entered after the penalty phase retrial, Chappell waived these claims and must demonstrate good cause and actual prejudice to assert them. Chappell's pleadings and appellate arguments were deficient in demonstrating good cause and prejudice.

Ineffective assistance of appellate counsel

Chappell claimed appellate counsel who represented him did not effectively argue claims he raised elsewhere in the third petition. The allegations about counsel's performance are once again vague and fail to sufficiently assert that second postconviction counsel unreasonably omitted the appellate-counsel claims.

Cumulative error as good cause

Chappell argued that in order to take into account their cumulative effect alongside the claims presented in the third petition, the district court should have considered several claims

that he raised in his prior appeals and petitions. The claims raised in the prior proceedings were rejected on the merits and thus, this argument fails.

Actual innocence

Chappell contends that even if he has not demonstrated cause and prejudice, he can overcome the procedural bars based on actual innocence. This requires Chappell to “make a colorable showing that he is actually innocent of the crime or is ineligible for the death penalty.”¹⁰ Chappell claimed he is innocent of burglary, robbery, and murder, but did not identify any new evidence instead choosing to focus on inconsistencies of the evidence presented at trial.

Statutory laches

Under NRS 34.800, Chappell's petition was also subject to dismissal. The statute states that a petition may be dismissed if the delay in filing the petition prejudices the State in either responding to the petition or retrying the petitioner. The State pleaded laches under NRS 34.800, and the district court found that Chappell had not rebutted the presumption of prejudice. The majority of the claims asserted by Chappell in the third petition are based on grounds which Chappell had knowledge of long before he filed the third petition.

Conclusion:

Various mandatory procedural bars foreclosed Chappell's petition, and he repeatedly failed to show good cause and prejudice to overcome those bars. Chappell's untimely claims about first postconviction counsel's performance, and the alleged ineffective assistance of second postconviction counsel could not constitute good cause, and Chappell failed to show actual prejudice. The ineffective assistance claims lack merit, and thus the Court affirmed the district court's order dismissing the petition.

¹⁰ Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).