

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

7-12-2022

Thomas v. State, 138 Nev. Adv. Op. 37 (May 26, 2022)

Candace Mays

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Law Commons](#)

Recommended Citation

Mays, Candace, "Thomas v. State, 138 Nev. Adv. Op. 37 (May 26, 2022)" (2022). *Nevada Supreme Court Summaries*. 1511.

<https://scholars.law.unlv.edu/nvscs/1511>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

CRIMINAL LAW & PROCEDURE: AN IN-DEPTH ANALYSIS OF THE PROCEDURAL AND MERIT-BASED THRESHOLDS FOR RELIEF ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

Summary

The Nevada Supreme Court reviewed the district court’s denial of the petitioner’s petition for post-conviction relief, which the lower court issued without an evidentiary hearing. The Court considered whether the district court erred in denying the petition without a hearing based on several contentions raised by the petitioner on appeal. The Court ultimately affirmed the order in part, reversed it in part, and remanded the case for further proceedings on the two claims for which the appellant was entitled to relief.

Facts and Procedural History

The appellant, Marlo Thomas, was charged with murder with a deadly weapon for his involvement in the armed robbery of his former workplace, in which two employees were fatally stabbed. Thomas was convicted of two counts of murder and received a death sentence for each.

In a series of appeals and post-conviction habeas petitions spanning 25 years, Thomas’ convictions and sentences have been affirmed. The instant case represents an appeal from an order in Thomas’ third post-conviction petition. The petition, filed 18 years after the disposition of his immediate appeal, sought relief on the grounds of ineffective assistance of counsel in every stage of his case from trial to the most recent habeas petition. The district court denied Thomas’ petition for a writ of habeas corpus without an evidentiary hearing, citing procedural bars to the petition. Thomas appealed.

Discussion

On appeal, Thomas argued that the district court erred in dismissing the petition without conducting an evidentiary hearing on the merits of claims.

The Supreme Court, like the district court, first addressed the procedural issues of the case to determine whether further consideration was warranted given the facts at hand. The Court determined that most of Thomas’ claims were barred either as untimely or insufficiently plead. Regarding the merits of Thomas’ claims for relief, many were unsupported by the evidence.

¹ Candace Mays.

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

First, the Court noted that the petition for relief based on ineffective assistance of first post-conviction counsel was untimely, citing NRS §34.726(1)². The Court, citing *Chappell v. State*³, clarified that a claim of ineffective assistance of counsel *can* constitute good cause for delay in petitioning for post-conviction relief if the claim itself is not already barred by time. Since Thomas had filed several petitions since his severance from his first post-conviction counsel and had not raised the claim, it was untimely and thus, procedurally barred.

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

The court held that under NRS 34.820(1)(a)⁴, Thomas' claim of ineffective assistance of second postconviction counsel was timely since the present appeal was his first opportunity to challenge the sentences imposed and that he had a right to effective assistance of counsel while doing so.⁵ The Court discussed the merits of Thomas' claims that he was prejudiced by second counsel's performance throughout the remainder of the opinion.

Only two of Thomas's claims regarding second postconviction counsel's ineffectiveness warrant an evidentiary hearing

The Court relied on the test established for determining the merits of an ineffective assistance of counsel claim in *Strickland v. Washington*⁶. The two prongs of the test are deficient performance and prejudice. In the analysis that followed, the Court agreed that by not raising both the issues of post-conviction counsel's failure to present mitigation evidence and the failure to challenge counsel's performance during voir dire constituted conduct that warranted an evidentiary hearing.

Failure to present certain mitigation evidence

While the court acknowledged the wide discretion counsel has in establishing a trial strategy, the Court's comparison of post and second post-conviction counsel's presentations established a sufficient basis for an ineffective assistance claim. They reasoned that the post-conviction counsel failed to present significant mitigating evidence that may have provided context for understanding Thomas' circumstances. This evidence included information about his mental and physical health, trauma, family history, early home life, and evidence suggesting developmental challenges. The Court determined this was likely not harmless error and thus, it

² NEV. REV. STAT. § 34.726(1) (limiting the permissible period for challenging the validity of judgments to a year absent good cause for the delay).

³ *Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935 (2021)

⁴ NEV. REV. STAT. § 34.820(1)(a).

⁵ *See, Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997) which the court cited in their determination that there was good cause to excuse any delay in bringing the challenge.

⁶ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

was unreasonable for second post-conviction counsel not to challenge the performance of counsel below on these grounds.

Failure to challenge venire members based on unwillingness to consider mitigation or all available sentences

The Court agreed that the second post-counsel's silence on first counsel's failure to meaningfully participate in the voir dire process to exclude jurors who expressed prejudicial opinions warranted an evidentiary review. Some jurors in the hearing below expressed views and opinions, that clearly signaled bias. The Court held that this was not a clear error since the jurors may have been valuable to the defense for other reasons, but the lower court erred in not conducting an evidentiary hearing to establish those motivations. The Court cited the *Ross v. Oklahoma*⁷ holding, that a defendant is entitled to a new sentencing proceeding if he was sentenced to death by a jury that included a biased juror, in this determination.

The Court, however, was not convinced by Thomas' claims of ineffective assistance of counsel on the remaining theories.

Failure to litigate claim regarding jury misconduct

While the Court agreed that second counsel should have reasonably challenged post-conviction counsel's silence during voir dire, they maintained fidelity to the discretion of counsel to formulate and implement trial strategy, including 'intrinsic' juror misconduct.⁸

Failure to allege that the State did not comply with SCR 250

Thomas argued that, in violation of SCR 250⁹, the court failed to renew their notice of intent to seek the death penalty after the first successful penalty phase challenge. The Court rejected this argument, citing the statute's absence of a requirement that the must state give renewed notice. The Court determined that absent these express requirements, the State's original notice of intent, served in 1996, would suffice as notice for the subsequent proceedings.

Failure to raise a fair-cross-section challenge

The Court, in assessing Thomas claim that it was ineffective assistance of counsel for both post and second post-conviction counsel to not challenge venire for insufficient representation, laid out the *Rippo*¹⁰ test for a successful fair-cross-section challenge. To prevail, Thomas would need to show that "(1) the group he alleges was "excluded is a distinctive group in the community;" (2) the group's representation "in jury venires is not fair and reasonable in relation to the number of such persons in the community;" and (3) the underrepresentation is due to "systematic

⁷ *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

⁸ Citing *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003), the Court noted that juror misconduct is incredibly difficult to prove and as such, will only rise to a level warranting a retrial in exceptional circumstances.

⁹ NEV. SUP. CT. R. 250 requires notice of intent to seek the death penalty to be served on a defendant "not less than 15 days" before the date set for trial.

¹⁰ *Rippo v. State*, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006).

exclusion of the group in the jury-selection process.”¹¹ While Thomas prevailed on the first prong, the Court determined that he failed to sufficiently satisfy prongs two and three, and thus they found no error in the district court’s rejection of the challenge.

Failure to move to exclude evidence of prior convictions

The Court noted that since evidence of prior conviction is generally admissible, counsel reasonably withheld objections to the admissibility. The Court, citing *Reno*, noted that counsel does not have to raise every possible objection to be effective.

Failure to argue that excessive courtroom security during the penalty phase retrial prejudiced the defense

Finding that there may be reasonable grounds for choosing not to pursue such an argument, the Court determined Thomas had not sufficiently established doing so was clearly erroneous.

Waiver of selection phase opening statement

The Court, again, acknowledged the broad discretion counsel has in developing and implementing a trial strategy. Under such deference, the Court did not agree that this constituted ineffective assistance of counsel.

Failure to challenge instances of prosecutorial misconduct

The Court, citing an earlier opinion in *Reno*¹² rejected Thomas’ assertion that secondary counsel’s silence on post-conviction counsel’s failure to challenge instances of prosecutorial misconduct equated to ineffective assistance of counsel.

Thomas argues that it was prosecutorial misconduct to show a photographic presentation, where photos of the victims were morphed into images of their bodies, at trial. He claims that the presentation of this graphic had no purpose but to inflame members of the jury. The Court disagreed that failure to object is a clear error, noting that the decision not to object may have been deliberate, as not to bring additional attention to it. The Court also rejected the discount of the contentions about the unchecked personal attacks by the prosecutor on the appellant’s ability to feel remorse. The Court’s notion was that absent evidence that the verdict would have been otherwise, it was not compelled to disrupt the lower court’s fidelity to upholding the procedural bars on Thomas’ claims. Therefore, they found no error.

Failure to raise trial-error claims on appeal from the judgment entered after the penalty phase retrial

The Court declined to address this claim raised by Thomas.

¹¹ *Id.*

¹² In re: *Reno*, 146 Cal.Rptr.3d 297, 283 P.3d at 1210 holding that “the mere omission of a claim developed by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent” (quotation marks omitted)).

Failure to allege judicial bias

Steadfast in their deference to counsel in trial strategy, the Court held that it was not objectively erroneous for counsel not to allege judicial bias.

Cumulative error as good cause

As to Thomas' claim of cumulative error should be sufficient cause to overcome procedural bars, the Court rejects this argument, noting that actions not deemed erroneous do not together constitute an error.

Actual innocence

Thomas additionally argued that his youth at the time of the crimes and his borderline intellectual functioning render him ineligible for the death penalty, even without a showing of cause or prejudice. He cited the admonishment of executing the intellectually disabled in *Pellegrini v. State*¹³. The Court concluded that Thomas had not met his burden of establishing 'actual innocence' on either of those theories, especially given the aggravating circumstances.

Statutory laches

The Court yielded to the district court on the issue of laches in accordance with NRS 34.800¹⁴.

Conclusion

The Court remanded for further proceedings on the impact of first post-conviction counsel's failure to present mitigating evidence, and to determine the impacts of ineffective assistance of counsel throughout the voir dire process. The case was otherwise affirmed.

¹³ *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹⁴ NEV. REV. STAT. 34.800; The Court cited *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006), in which clarified that the decision to dismiss a petition under NRS 34.800 is discretionary.