

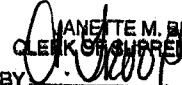
IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 44706

FILED

DEC 08 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

In June 1982, appellant Cary Williams broke into the home of Allen and Katherine Carlson. He obtained an 8- to 10-inch knife from the kitchen and walked through the house. Discovering Katherine, who was eight months pregnant, sleeping in her bed, Williams repeatedly stabbed her. She died, having suffered 38 knife wounds. The fetus died as well from a lack of oxygen due to Katherine's death. The medical examiner concluded that puncture wounds on Katherine's body indicated that she had been tortured before the fatal wounds were inflicted.

Williams was subsequently arrested and eventually confessed to burglarizing the Carlson home and murdering Katherine. The State sought the death penalty based on the following aggravating

circumstances: the murder was committed during the commission of a burglary; the murder was committed during the commission of a robbery; the murder was committed for the purpose of avoiding lawful arrest for the burglary of the Carlson home; and the murder involved torture and depravity of mind. Williams pleaded guilty to burglary, manslaughter, and murder. A three-judge panel found all the aggravating circumstances beyond a reasonable doubt and sentenced Williams to death. This court affirmed the conviction and death sentence.¹

Williams subsequently filed six petitions collaterally challenging his conviction, which were denied by the district court. Williams unsuccessfully sought relief in this court on appeal.² It is the sixth petition that is the subject of this appeal.³

Williams filed his latest petition approximately sixteen years after this court issued the remittitur from his direct appeal. Therefore, Williams's petition was untimely filed.⁴ And his petition is successive

¹Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987).

²Williams v. Warden, Docket No. 29084 (Order Dismissing Appeal, August 29, 1997) (concerning the fifth petition); Williams v. State, Docket No. 20732 (Order Dismissing Appeal, July 18, 1990) (concerning the fourth petition); Williams v. State, Docket No. 19172 (Order Dismissing Appeal, July 12, 1988) (concerning the second and third petitions); Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987) (concerning his direct appeal and first post-conviction petition).

³He also unsuccessfully sought post-conviction relief in federal court.

⁴See NRS 34.726.

because he had previously filed five post-conviction petitions in the district court.⁵ Williams's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁶ He argues that the district court erred in dismissing his petition as procedurally barred for several reasons, none of which excuse the procedural default rules. Accordingly, we conclude that the district court properly dismissed the petition.

Williams first argues that he demonstrated good cause to consider his latest petition because he has been represented by counsel throughout the proceedings and that he should not be "penalized for delay that is not his fault." However, he offers no further explanation of how counsel's representation precluded a timely filing of his petition.

Williams next argues that he demonstrated good cause because federal due process forbids this court "from applying NRS 34.726" to his successive petition. He contends that "[i]t is well-established that new procedural rules cannot be applied retroactively in a court decision to find a default during any period that precedes the date of that decision without infringing on a petitioner's due process rights." However, Williams fails to explain the relevance of this legal principle or how it excuses the procedural defaults plaguing the instant petition. Therefore,

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(1)(b), (3).

we conclude that Williams's vague argument provides no good cause upon which to excuse well established procedural default rules.

Williams also asserts that he has shown good cause because at the time post-conviction counsel was assigned to him in 1983, there was a mandatory right to the appointment of counsel and, therefore, he had a right to the effective assistance of counsel. Citing this court's 1997 decision in Crump v. Warden, Williams argues that this court recognized that mandatory appointment of counsel entitled a petitioner to the effective assistance of that counsel and that a petitioner may show good cause by demonstrating that his counsel was ineffective.⁷ According to Williams, because Crump was decided after his last habeas petition was dismissed, he cannot be faulted for his failure to present his allegations of cause earlier because "this court's prior erroneous determination that he did not have a right to the effective assistance of counsel in his 1988 state court petition constituted an impediment external to the defense sufficient to excuse his failure." However, even assuming that Crump provided any excuse for his noncompliance with procedural default rules, Williams waited six years after Crump was decided to raise this matter in the instant petition. We conclude that this was an unreasonable delay.⁸

Williams next argues that he has shown good cause to

⁷113 Nev. 293, 302-03, 934 P.2d 247, 253 (1997).

⁸See Griffin v. State, 122 Nev. ___, ___ n.22, 137 P.3d 1165, 1170 n.22 (Adv. Op. No. 63, July 13, 2006).

consider the instant petition because the district court failed to address his allegation that the State committed a violation of Brady v. Maryland⁹ as a basis to excuse procedural default rules. However, having reviewed Williams's argument and the supporting documentation included in the appendix, we conclude that he failed to demonstrate any Brady violation. Therefore, we conclude that he has not shown good cause on this basis.

Finally, Williams argues that procedural default rules do not bar his petition because this court has inconsistently applied them. This court recently addressed a similar claim that it has treated procedural bars as discretionary rules and rejected it.¹⁰ Moreover, we reiterate that the statutory procedural default rules are mandatory and that any prior inconsistent application of these rules does not provide a basis to ignore them.¹¹ We conclude that Williams failed to demonstrate good cause on this basis.

Thus, except for one claim discussed below, Williams did not show good cause to overcome the procedural bars to his habeas petition. Moreover, we conclude that Williams failed to demonstrate actual prejudice pursuant to NRS 34.810(3); therefore, the district court did not err in denying his petition.

⁹373 U.S. 83 (1963).

¹⁰See State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1077 (2005).

¹¹See id.

One of Williams's claims warrants further discussion. He contends that the burglary and robbery aggravating circumstances found in his case must be stricken pursuant to McConnell v. State,¹² requiring reversal of his death sentence. This court recently held that McConnell has retroactive application.¹³ Thus, it appears that Williams has good cause for failing to raise this claim previously;¹⁴ however, he must still demonstrate actual prejudice.

In McConnell, we deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."¹⁵ In charging Williams with murder, the State alleged theories of premeditated murder and of felony murder based on the burglary. Williams pleaded guilty to first-degree murder. The sentencing panel found as one aggravating circumstance that he committed Katherine's murder during the perpetration of a burglary. As it is unclear from the plea canvass upon which theory or theories of murder Williams

¹²120 Nev. 1043, 102 P.3d 606 (2004).

¹³Bejarano v. State, 122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 92, November 16, 2006).

¹⁴See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (stating that good cause might be shown where the "legal basis for a claim was not reasonably available at the time of any default").

¹⁵McConnell, 120 Nev. at 1069, 102 P.3d at 624.

pleaded guilty, we conclude that the burglary aggravating circumstance must be stricken pursuant to McConnell.

McConnell also precludes the State from "selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance."¹⁶ Here, the State used the burglary to establish the first-degree felony murder and alleged the robbery as another aggravating circumstance to support a death sentence. We conclude that under the facts of this case that the burglary and the robbery constituted an indivisible course of conduct having one criminal purpose. Accordingly, we conclude that the robbery aggravating circumstance must be stricken as well.

After striking the burglary and robbery aggravating circumstances, two remain: the murder was committed for the purpose of avoiding a lawful arrest, and it involved torture and depravity of mind. This court may uphold a death sentence based in part on an invalid aggravator either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review.¹⁷ If we conclude beyond a reasonable doubt that the jury would have found Williams death eligible and imposed death despite the erroneous aggravating circumstances, then

¹⁶Id. at 1069-70, 102 P.3d at 624-25 (quoting People v. Harris, 679 P.2d 433, 449 (Cal 1984)).

¹⁷See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

the error was harmless, and his claim is procedurally barred because he failed to demonstrate actual prejudice.¹⁸ After reweighing here, we conclude beyond a reasonable doubt that absent the erroneous aggravators the sentencing panel would have found Williams death eligible and imposed a sentence of death.

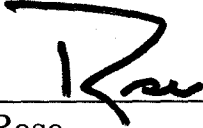
The stricken burglary and robbery aggravators constitute in effect one significant aggravator based on the circumstances of the killing.¹⁹ The bulk of the State's case in aggravation remains valid. The only mitigating circumstance the sentencing panel found was that Williams was 19 years old when he committed the murder. We are confident that the sentencing panel would not have considered this mitigator significant enough to outweigh the aggravating circumstances that the murder involved torture and was committed for the purpose of avoiding a lawful arrest. We further conclude that the panel would have returned a death sentence given this atrocious murder, which involved torturing and killing an eight-month pregnant woman and her fetus by stabbing her 38 times.


¹⁸See Browning v. State, 120 Nev. 347, 364, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002).


¹⁹See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

Having considered Williams's arguments and concluded that the district court did not err in dismissing his habeas petition as procedurally barred, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Rose


_____, J.
Becker


_____, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk