IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCIS JAMES JOHNSON A/K/A
FRANCES G. JOHNSON A/K/A
FRANCES JAMES JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46145

FILED

NOV 29 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Francis James Johnson's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On March 31, 1995, the district court convicted Johnson, pursuant to a jury verdict, of burglary while in the possession of a deadly weapon and sexual assault with the use of a deadly weapon. The district court sentenced Johnson to serve a prison term of seven years for the burglary and two consecutive terms of life for the sexual assault. We dismissed Johnson's direct appeal.[1] The remittitur issued on March 27, 1997.

On June 12, 2001, Johnson filed an untimely proper person post-conviction petition for a writ of habeas corpus in the district court.

[1]Johnson v. State, Docket No. 27065 (Order Dismissing Appeal, February 26, 1997).

06-24360

The district court denied the petition, and we affirmed the district court's judgment on appeal.[2]

On August 10, 2004, Johnson's federal public defender filed a second petition for a writ of habeas corpus in the district court. The State opposed the petition and Johnson filed a reply. The district court held an evidentiary hearing and subsequently denied the petition. This appeal follows.

Johnson's petition was filed more than seven years after we dismissed his direct appeal and issued our remittitur. Therefore, Johnson's petition is both untimely and procedurally barred absent a demonstration of good cause for the delay and undue prejudice.[3] To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules.[4] Such an impediment "may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'"[5]

To excuse the procedural defects, Johnson argued that the factual basis for his claim was not discovered until January 27, 2004, when his federal public defender found a jury note in the district court's evidence vault. During Johnson's trial, the deliberating jury sent a note to the trial judge which read, "[t]here is a question as to whether or not the

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[2]Johnson v. State, Docket No. 38524 (Order of Affirmance, July 25, 2002).

[3]See NRS 34.726(1).

[4]Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

[5]Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (internal quotation marks omitted)).

knife can cut the bathing suit. Can we attempt to cut the suit with the knife?" Nine years later, Johnson's federal public defender discovered the jury note while working on a federal habeas corpus petition. Johnson claimed that he was unaware of the existence of the jury note, he did not know how to request trial exhibits, and the trial judge mishandled the jury note during deliberations.

In an affidavit filed in the district court, the trial judge later recounted her recollections of the events surrounding the jury note. Although she could not recall who wrote "no" and the date on the bottom of the note or whether counsel were contacted regarding the note, the trial judge did recall her pretrial instruction to the jury: "Do not do any research or make any investigation about the case on your own." And she recalled instructing her staff to respond "no" to the jury's question. She further observed that her answer would have been the same if counsel were present because to answer otherwise would have violated her pretrial instruction by allowing the jury to independently investigate the case.

The district court concluded that neither Johnson's inexperience with the procedures for requesting trial exhibits nor the trial judge's alleged mishandling of the jury note qualified as impediments external to the defense. Because Johnson failed to establish good cause for the untimely petition, the petition was procedurally barred, and we explicitly conclude that it should have been denied on that basis.[6] Nonetheless, we also conclude that the district court correctly determined

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[6]See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of a claim on the merits unless state court rendering judgment relied "clearly and expressly" on the procedural bar) (citation omitted).

that Johnson's petition lacked merit, and we affirm the district court's decision on that separate, independent ground.[7]

In his petition, Johnson claimed that he was denied his right to be present during the critical portions of the trial proceedings as a result of the trial court's procedural and substantive handling of a jury inquiry. On appeal, Johnson claims that the district court erred in determining that the jury's note did not implicate NRS 175.451 and that the trial court's response to the note was consistent with applicable law. Johnson also claims that the trial court's handling of the jury note was not a harmless error. We disagree.

First, we note that Johnson's reliance on Rogers v. United States[8] is misplaced. Here, unlike in Rogers, the jury note was not "tantamount to a request for further instructions,"[9] but rather a request for permission to see if a knife that was admitted into evidence was capable of cutting a bathing suit that was also admitted into evidence. The jury had already been instructed that it could "not do any research or make any investigation about the case on [its] own." Accordingly, we conclude that the trial court was not communicating with the jury on a substantive matter.[10] Moreover, we note that in Rogers, the United States

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[7]See id. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding").

[8]422 U.S. 35 (1975).

[9]Id. at 39.

[10]See Daniel v. State, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003), cert. denied 541 U.S. 1045 (2004).

Supreme Court was construing a federal rule of criminal procedure and not Nevada law.[11]

Second, we conclude that the district court correctly determined that the jury note did not implicate NRS 175.451. NRS 175.451 provides that

> After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or his counsel.

(Emphasis added.) The plain language of the statute is unambiguous. Here, the jury note did not reflect a disagreement between the jurors as to any part of the testimony nor did it indicate that the jury desired to be informed on some point of law. Accordingly, the trial court was not required to respond to the note in the presence of the district attorney and the defendant or his counsel.

Third, we conclude that the trial court's response to the jury note was consistent with applicable law. We have previously stated that that "[i]n addition to the mandatory admonishment pursuant to NRS 175.401, district judges should also admonish jurors in criminal cases that they are not to visit the crime scene or make any independent investigations."[12] Such an admonishment ensures that the defendant

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[11]Rogers, 422 U.S. at 39-41.

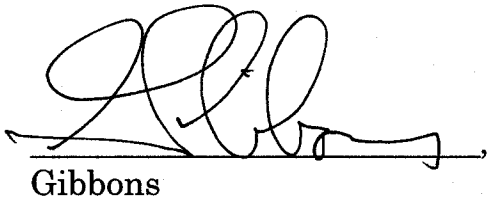
[12]Rowbottom v. State, 105 Nev. 472, 487 n.7, 779 P.2d 934, 943 n.7 (1989), overruled on other grounds by Jezdik v. State, 121 Nev. 129, 11-P.3d 1058 (2005).

receives "a fair trial with impartial jurors deciding a case only on admissible evidence presented in court."[13] The trial judge's response to the jury note simply affirmed its pretrial instruction on independent investigations.

Finally, we conclude that any error resulting from the trial court's decision to communicate to the jury on this matter, without first notifying Johnson, was harmless because the trial court correctly responded to the jury's question.[14]

Having considered Johnson's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

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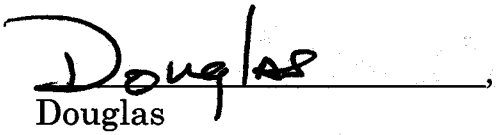
Maupin



_____, J.
Douglas

cc: Eighth Judicial District Court Dept. 16, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[13]Id. at 487, 779 P.2d at 943.

[14]See Cavanaugh v. State, 102 Nev. 478, 484, 729 P.2d 481, 484-85 (1986).