IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY PETROCELLI,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, JACKIE CRAWFORD,
Respondent.

No. 47168

FILED

JUL 26 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

In March 1982, appellant Tracy Petrocelli fled from the state of Washington after killing his girlfriend and traveled to Reno, where he visited a used car dealer, James Wilson. Wilson complied with Petrocelli's request to test drive a Volkswagen pickup truck. The two men left the dealership with Wilson driving the truck. The next day, the truck was discovered with bloodstains and bullet holes in the passenger side. Shortly thereafter, Wilson's body was found; his wallet was missing. Wilson had been shot in the neck, heart and back of the head at close range. A jury convicted Petrocelli of first-degree murder and robbery with the use of a deadly weapon and sentenced him to death.

This court affirmed Petrocelli's conviction and sentence on direct appeal.[1] He then filed a petition for post-conviction relief, which

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

the district court denied. This court affirmed the judgment of the district court.[2] Several years later, Petrocelli filed a second petition for post-conviction relief, which the district court denied. On appeal, this court affirmed the district court's denial.[3] Petrocelli also sought federal relief.[4] On August 11, 2003, he filed in the Nevada district court another post-conviction petition for a writ of habeas corpus, which the district court denied after conducting an evidentiary hearing. This appeal followed.

The petition that is the subject of this appeal was filed approximately 18 years after this court decided Petrocelli's direct appeal; therefore, his petition is untimely.[5] The petition is also successive.[6] To overcome these procedural bars, Petrocelli must demonstrate good cause for the delay and prejudice.[7] Moreover, as the State pleaded laches, he must overcome the rebuttable presumption of prejudice to the State.[8]

In the proceedings below, Petrocelli claimed that our decision in McConnell v. State[9] rendered one of two aggravating

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[2]Petrocelli v. State, Docket No. 17956 (Order Dismissing Appeal, June 23, 1988).

[3]Petrocelli v. Warden, Docket No. 23065 (Order Dismissing Appeal, December 22, 1993).

[4]Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001).

[5]NRS 34.726(1).

[6]NRS 34.810(1)(b).

[7]NRS 34.726(1); NRS 34.810(3).

[8]NRS 34.800(2).

[9]120 Nev. 1043, 102 P.3d 606 (2004).

circumstances invalid and entitled him to a new penalty hearing.[10] In McConnell, this court 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."[11]

At Petrocelli's trial, the State advanced two alternative theories of first-degree murder: (1) that the murder was committed with premeditation and deliberation; and (2) that it was committed during the perpetration of a robbery. The verdict does not specify the theory or theories upon which the jury relied in finding Petrocelli guilty of first-degree murder. Further, during the penalty phase, the jury found, as alleged by the State, that the murder was aggravated under NRS 200.033(4) because it was committed during the commission of a robbery.[12] Thus, because the jury's guilty verdict could have been based on the State's alternative theory of felony murder, the robbery aggravating circumstance was improper under our holding in McConnell. The rule adopted in McConnell applies retroactively to Petrocelli under our holding in Bejarano v. State.[13] Under these circumstances, we conclude that Petrocelli can demonstrate good cause

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[10]This issue was raised below in Petrocelli's supplemental habeas petition. Although the issue was fully briefed by the parties, the district court did not specifically address it in the order dismissing the petition. Nonetheless, the district court implicitly rejected Petrocelli's argument by dismissing the petition on procedural grounds.

[11]Id. at 1069, 102 P.3d at 624.

[12]See NRS 200.033(4).

[13]122 Nev. ___, 146 P.3d 265 (2006).

for raising this claim again.[14] Accordingly, under our holdings in McConnell and Bejarano, the robbery aggravating circumstance must be stricken.

To invalidate his death sentence, however, Petrocelli must still demonstrate actual prejudice resulting from the jury's consideration of this erroneous aggravating circumstance. In Clemons v. Mississippi, the United States Supreme Court held that in states like Nevada, which require the weighing of aggravating and mitigating circumstances prior to imposition of the death penalty, appellate courts may uphold a death sentence that was based in part on an invalid aggravator by reweighing the aggravating and mitigating circumstances or conducting a harmless-error review.[15] To uphold Petrocelli's sentence, this court must carefully scrutinize the import and effect of the invalid aggravating factor on the jury's decision and conduct an individualized harmless-error review or reweighing of the remaining aggravating and mitigating circumstances to "determine what the sentencer would have done absent the [invalid]

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[14]Notably, in his direct appeal from his judgment of conviction and sentence, Petrocelli argued that the jury's consideration of the underlying felony of robbery as an aggravating circumstance constituted reversible error without a specific finding by the jury that the murder was deliberate and premeditated. This court rejected that argument at that time. Petrocelli, 101 Nev. 46, 52-54, 692 P.2d 503, 508-09 (1985).

[15]494 U.S. 738, 741 (1990)("the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review"); see also Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993).

factor."[16] If after such a review this court concludes beyond a reasonable doubt that the erroneous aggravating circumstance has had no impact on the validity of his sentence, then Petrocelli has not demonstrated the requisite prejudice to overcome the procedural default. Petrocelli nonetheless challenges this court's authority to engage in such analyses on two bases. As discussed below, because the Supreme Court has not expressly retreated from its holding in Clemons, we reject his contentions.

First, Petrocelli contends that any appellate reweighing or harmless-error review violates the United States Supreme Court holding in Ring v. Arizona.[17] Specifically, he contends that under Ring, the Sixth Amendment right to a jury trial requires a sentencing jury, rather than a judge, to engage the fact-finding necessary to impose a death sentence.[18] Clemons expressly held, however, that:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that one or more valid remaining

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[16]See Stringer v. Black, 503 U.S. 222, 230 (1992).

[17]536 U.S. 584 (2002).

[18]Notably, both the United States Supreme Court and this court have held that Ring does not have retroactive application on collateral review. See Schriro v. Summerlin, 542 U.S. 348 (2004); Colwell v. State, 118 Nev. 807, 816, 59 P.3d 463, 469 (2002).

> aggravating factors outweigh the mitigating evidence.[19]

Until such time as the Supreme Court expressly holds that the appellate reweighing or harmless error review permitted by Clemons is no longer permissible under its holding Ring, this court will continue to adhere to the rule of Clemons.[20] Accordingly, we reject this contention.

Petrocelli next asserts that appellate reweighing of the aggravating and mitigating circumstances constitutes impermissible fact finding by this court. This argument, however, has been repeatedly rejected.[21] For example, as we previously explained in Canape v. State:

> As stated in Clemons, . . . "It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases in 'weighing' States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed."
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> Historically, the Nevada Supreme Court has frequently been called upon to make a factual determination whether there is substantial evidence to support a verdict. Until relieved of this responsibility by the 1985 legislature, our court routinely engaged in proportionality review of death sentences. This required weighing of aggravating and mitigating evidence. We are still required to weigh evidence in considering whether the death

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[19]494 U.S. at 745.

[20]See Browning, 120 Nev. at 363, 91 P.3d at 51; Chappell v. State, 114 Nev. 1403, 1410, 972 P.2d 838, 842 (1998);

[21]See Leslie, 118 Nev. 773, 59 P.3d 440; Bridges v. State, 116 Nev. 752, 6 P.3d 1000 (2000); Canape, 109 Nev. at 881-82.

> sentence is excessive or the result of passion, prejudice or any arbitrary factor.[22]

Accordingly, we reject this contention as well.

Petrocelli next contends that even if reweighing is permissible, our analysis should exclude consideration of Dr. Lynn Gerow's testimony during the penalty hearing as it violated doctor-patient privilege[23] and his Fifth Amendment right to remain silent. Even assuming this testimony was improperly admitted, however, it has had no impact on our reweighing or harmless error analysis. At the penalty hearing, after Petrocelli testified on his own behalf and the defense introduced reports from psychiatrist Dr. John Chappel and psychologist Dr. Martin Gutride, Dr. Gerow testified during the State's rebuttal case. Dr. Gerow testified that persons suffering from psychopathic personality, like Petrocelli, and who have a history of violence tend to repeat violent acts and thus the propensity for further violence is high. Both Dr. Chappel and Dr. Gutride diagnosed Petrocelli with antisocial personality disorder and described him as dangerous to others. Dr. Chappel offered a more positive prognosis than Dr. Gerow in terms of Petrocelli's response to treatment, concluding that treatment might prevent any further homicidal outbursts of rage. Dr. Gutride,

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[22]Canape, 109 Nev. at 882, 859 P.2d 1034-35 (quoting Clemons, 494 U.S. at 748-49).

[23]See NRS 49.225 (providing that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family." See also NRS 49.215; NRS 49.235; NRS 49.245.

however, was less optimistic than Dr. Chappel, concluding that Petrocelli's ability to profit from mental health treatment was questionable in light of the depth of his mistrust of others. Dr. Gerow testified that he had not reviewed Dr. Gutride's report but agreed with Dr. Chappel's diagnosis.[24] Accordingly, because Dr. Gerow's testimony was essentially cumulative, we conclude that any error in admitting Dr. Gerow's testimony did not unduly prejudice Petrocelli.

Petrocelli next argues that we should conduct our reweighing analysis without regard to an alleged erroneous instruction on clemency.[25] On direct appeal, this court concluded that this

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[24]We also cannot ignore that the jury heard other compelling evidence of Petrocelli's violent propensities during the guilt phase of his trial when the State presented evidence that he had killed his girlfriend five months before Wilson's murder. Although this evidence could not have been alleged at that time as an aggravating circumstance (because he had not yet been formally convicted of the girlfriend's murder), the jury could have properly considered it in exercising its discretion to impose a death sentence after it had determined that Petrocelli was death eligible, i.e., that that no mitigating circumstances were sufficient to outweigh one or more aggravating circumstances.

[25] The district court instructed the jury, in pertinent part:

> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this court will impose that sentence. Whether or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

instruction was not erroneous,[26] although we subsequently directed district courts to eliminate any reference to the Board of Pardons in jury instructions.[27] In any event, the matter of clemency has no impact on our reweighing analysis.

Petrocelli also contends that pursuant to the United States Supreme Court's decision in Brown v. Sanders,[28] we may not give any weight to the remaining aggravating circumstance involving the prior violent felony kidnapping conviction because it is unrelated to Wilson's murder, for which he was on trial. This is a misreading of Brown. In Brown, the Ninth Circuit Court of Appeals held that the California courts could uphold the death sentence at issue in that case only by finding that the jury's use of invalid special circumstances was harmless beyond a reasonable doubt or by independently reweighing the sentencing factors.[29] The Supreme Court reversed the Ninth Circuit's ruling and held:

> We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing states, . . . if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the

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[26]Petrocelli, 101 Nev. at 54-56, 692 P.2d at 509-11.

[27]114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998).

[28]546 U.S. 212, 220 (2006) (holding that).

[29]546 U.S. at 215; see also Sanders v. Woodford, 373 F.3d 1054 (9th Cir. 2004).

> weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(Emphasis added.) Brown addresses the circumstances under which "non-weighing" states may uphold a death sentence without reweighing or conducting harmless-error review. It's holding is wholly inapplicable to the situation presented in this case. Nothing in Brown suggests that appellate reweighing or harmless-error review as approved by Clemons may not be conducted under circumstances present here.[30] And other jurisdictions have so held.[31] Petrocelli's argument is without merit.

Petrocelli argues that in determining whether consideration of an erroneous aggravating circumstance was harmless beyond a reasonable doubt, we must focus on how much weight the State placed on the invalid aggravating circumstance compared to the emphasis placed on the valid one.[32] Petrocelli contends that we should find persuasive the fact that the State never argued that Petrocelli should

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[30]Brown, at 218 n.3.

[31]See Meyers v. State, 133 P.3d 312, 337 (Okla. Crim. App. 2006) (holding that after the Brown decision, "it will continue to reweigh the evidence and uphold the death sentence if the remaining aggravating circumstances outweigh the mitigating circumstances and the weight of the improper aggravator is harmless"); State v. Rollins, 188 S.W.3d 553, 574 & n.16 (Tenn. 2006) (holding that the Brown decision did not alter its application of harmless error analysis when reviewing the jury's consideration of an invalid aggravating circumstance).

[32]See Browning, 120 Nev. at 364-65, 91 P.3d at 52 (wherein we considered the emphasis the State placed in closing argument on invalid aggravating circumstances in our harmless error analysis); see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003).

receive a death sentence because of his kidnapping conviction but instead focused on Petrocelli's future dangerousness. As noted above, the parameters of our reweighing function are firmly established; we will consider all relevant matters in assessing the effect on the jury of the invalid aggravating factor and what the jury would have done in the absence of that factor. With those guidelines in mind, we now turn to an analysis of whether the death sentence imposed by the jury should stand under the circumstances.

After striking the robbery aggravating circumstance, one remains: Petrocelli had been previously convicted of a felony involving the use or threat of violence against the person of another.[33] Specifically, he was convicted of the second-degree kidnapping of his girlfriend, Melanie Barker. Despite Petrocelli's attempt to minimize the seriousness of this offense, Barker's mother testified that after the kidnapping, Barker was hysterical and her face had been beaten. Another witness testified that Barker approached her in a restroom and told the witness that she was being kidnapped and "getting knocked around." Barker asked the witness to call the police.

In mitigation, Petrocelli introduced two reports of psychiatric evaluations that detailed his troubled childhood and drug abuse. These reports detailed the following: Petrocelli's difficult relationship with his adoptive parents; his violent actions while serving in the Marine Corps, which eventually led to his dishonorable discharge from the service; his depression and suicide attempt; his use of alcohol, Valium, speed, and marijuana; his increasing difficulty over the years in

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[33]See NRS 200.033(2)(b).

controlling his impulses and temper; and his mental and emotional distress. Additionally, Petrocelli testified about the circumstances surrounding Barker's kidnapping.

After thoroughly reviewing the record, we conclude that the mitigating evidence presented is wholly insufficient to outweigh the single remaining aggravating circumstance. Although only one aggravating circumstance remains, it is a significant one under the particular circumstances present here, and the weight properly accorded to that aggravating factor substantially outweighs the minimal and measurably unpersuasive mitigating evidence presented. We are convinced beyond a reasonable doubt that given the negligible value of the mitigating evidence revealed by our review of the record before us that the jury would have found Petrocelli death eligible even in the absence of the invalid aggravating factor.

Furthermore, as noted above, the jury heard evidence presented in the guilt phase respecting the circumstances of Barker's murder. Specifically, Petrocelli attempted to drag Barker out of her place of employment, Barker resisted and a struggle ensued, culminating in Petrocelli killing her with the same gun he used to kill Wilson. The jury could have properly considered this evidence, after finding him death eligible, in the exercise of its discretion to impose the death sentence for the senseless and brutal murder of James Wilson.

Under these circumstances, we conclude beyond a reasonable doubt that the jury would have found Petrocelli death eligible and sentenced him to death even in the absence of the invalid aggravating circumstance. Because we have concluded that the death sentence must stand, we further conclude that Petrocelli's claim is

procedurally barred and he has failed to demonstrate actual prejudice sufficient to overcome the applicable procedural bars.

Petrocelli also contends that the district court erred in dismissing his claims of ineffective assistance of trial and appellate counsel. He argued that his trial counsel was ineffective for not seeking to suppress Dr. Gerow's testimony on the ground that Dr. Gerow failed to advise Petrocelli of his Miranda[34] rights prior to interviewing him.[35] Petrocelli also asserted that his appellate counsel was ineffective for not challenging on appeal the admission of Dr. Gerow's testimony as violative of the doctor-patient privilege. As Petrocelli's petition was untimely filed and successive, these claims are procedurally barred absent a showing of good cause and prejudice.[36]

Petrocelli argues that he demonstrated good cause for not raising these claims previously because the State failed to disclose a letter Dr. Gerow sent to the State advising that he considered Petrocelli competent to stand trial and legally sane. However, even assuming that Petrocelli's trial and appellate counsel were unaware of Dr. Gerow's letter, he failed to adequately explain how this circumstance precluded him from presenting his claims previously. And, as we explained above, Petrocelli failed to show that the admission of Dr. Gerow's testimony unduly prejudiced him in light of other compelling evidence demonstrating his future dangerousness. Consequently, there was no

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[34]Miranda v. Arizona, 384 U.S. 436 (1966).

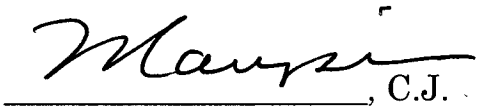
[35]Trial counsel objected to Dr. Gerow's testimony on the basis that it violated doctor-patient privilege.

[36]NRS 34.726; NRS 34.810.

reasonable probability that the result of the proceeding would have been different even if trial counsel had objected to the challenged testimony.[37] Therefore, we conclude that the district court did not err in dismissing these claims.

Having considered Petrocelli's arguments and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



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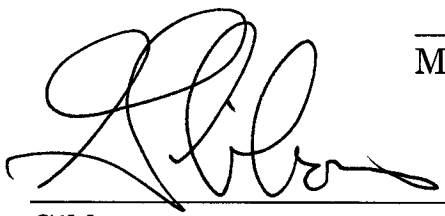

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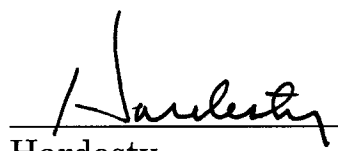

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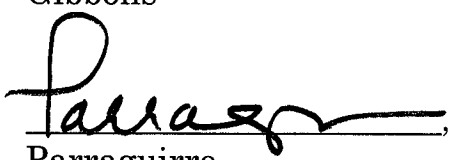

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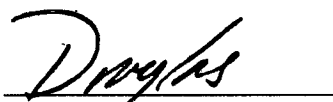

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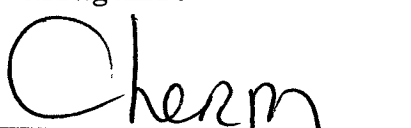

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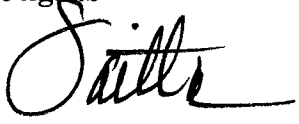

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Saitta

cc: Second Judicial District Court Dept. 7, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[37]See Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (a claim of ineffective assistance of trial counsel must show deficient performance and prejudice, i.e., "a reasonable probability that, but for counsel's errors, the result of the trial would have been different").