

IN THE SUPREME COURT OF THE STATE OF NEVADA

HERBERT D. WESLEY A/K/A  
HERBERT DWAYNE WESLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48991

**FILED**

JAN 06 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

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. Eighth Judicial District Court, Clark County; Elizabeth Halverson, Judge.

Appellant Herbert D. Wesley stabbed to death his father, Isaac Wesley, and his stepmother, Doella Wesley. A jury convicted him of two counts of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon for the theft of property belonging to the victims. This court affirmed the judgment of conviction and death sentence. Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996).

In this appeal from a district court order denying his post-conviction petition for a writ of habeas corpus, Wesley raises three significant issues—(1) the district court erred by concluding that his petition was procedurally barred under NRS 34.726; (2) the district court erred by denying his claim that McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), mandates reversal of his death sentence; and (3) the district court erred by denying several claims of ineffective assistance of trial and appellate counsel related to the guilt and penalty phases of trial.

We conclude that the district court erred by determining that Wesley's post-conviction habeas petition was procedurally barred. However, because the district court nonetheless resolved Wesley's claims on the merits, we may consider the propriety of the district court's rulings on his claims. Because we conclude that Wesley is entitled to relief pursuant to McConnell and remand this matter for a new penalty hearing, we need not consider Wesley's other claims related to the penalty hearing. We further conclude that the district court did not err by denying Wesley's claims related to the guilt phase of the trial.

Procedural bar under NRS 34.726

The district court concluded that the petition was not timely filed and therefore was procedurally barred under NRS 34.726, reasoning that the first "meaningful" petition—the supplement filed by court-appointed counsel in December 2004—was filed more than one year after this court issued its remittitur on direct appeal. We disagree with the district court's reasoning. Wesley timely filed a proper person post-conviction petition while his direct appeal was pending and filed a proper person supplement to the petition several months after this court's remittitur issued. Because Wesley timely filed the petition in July 1996, we conclude that the district court erred in applying the procedural bar under NRS 34.726.<sup>1</sup>

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<sup>1</sup>We decline the State's invitation to revisit our decision in Powell v. State, 122 Nev. 751, 756-58, 138 P.3d 453, 457-58 (2006), holding that NRCP 15(c) does not apply in habeas proceedings and that the district court has the discretion to allow a habeas petitioner to supplement a post-conviction petition with new claims even though the supplemental petition was filed beyond the one-year limitation provided in NRS 34.726(1). In

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Application of McConnell v. State

Wesley contends that the district court erred by denying his claim that he is entitled to a new penalty hearing because the robbery aggravator found for Isaac's murder must be stricken pursuant to McConnell and the jury's consideration of that invalid aggravator was not harmless. We conclude that Wesley can show good cause as required under NRS 34.810(1)(b) and (3) for failing to raise this claim at trial or on direct appeal because McConnell is retroactive, Bejarano v. State, 122 Nev. 1066, 1070, 1076, 146 P.3d 265, 268, 272 (2006). We further conclude that Wesley can show actual prejudice as required by NRS 34.810(1)(b) and (3). First, the robbery aggravator is invalid under McConnell because the State relied on the same felony to support one of the two theories on which it pursued the first-degree murder conviction and the verdict form does not specify the theory on which the jury based its verdict. See

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particular, we are not persuaded by the State's argument because it would result in post-conviction counsel, to which Wesley was statutorily entitled, being limited to the claims raised in a proper person petition, which significantly undermines the purpose behind the mandatory appointment of post-conviction counsel for first post-conviction petitions in death penalty cases. See NRS 34.820(1) (providing that "[i]f a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence, the court shall . . . [a]ppoint counsel to represent the petitioner"); NRS 34.750(3) (providing that "[a]fter appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents"); Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 651-52 (2006) (holding that in certain limited circumstances, district court may allow post-conviction habeas petitioner to raise new issues for first time at an evidentiary hearing).

McConnell, 120 Nev. at 1069, 102 P.3d at 624. Second, after reweighing the aggravating circumstances and the mitigating circumstances, see Clemons v. Mississippi, 494 U.S. 738, 741 (1990); Browning v. State, 120 Nev. 347, 363-65, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 782-84, 59 P.3d 440, 446-48 (2002), we are not convinced that the jury's consideration of the invalid aggravator is harmless.

After invalidating the felony aggravator, two remain—(1) Wesley had been previously convicted of a felony involving the use or threat of violence to another person (assault and robbery) and (2) the murder involved torture, depravity of mind, or the mutilation of the victim. To support the prior-violent-felony aggravator, the State presented evidence that Wesley had been convicted of assault with a deadly weapon and robbery stemming from an incident in which Wesley and another man robbed a pizza delivery woman of \$70 and several pizzas. During the course of the robbery, a man came upon the scene and Wesley seized the man's car keys. Wesley also fired a gun at the pizza delivery woman to dissuade her from following him. To support the torture, depravity of mind, or mutilation aggravator, the State produced evidence showing that Wesley stabbed Isaac approximately 18 times in the head, neck, chest, abdomen, and right hand.

In mitigation, Wesley presented testimony from nine family members, all of whom were also related to the victims by blood or marriage, urging the jury to show mercy because Wesley's death would be yet another tragedy for the family to endure. Several of those witnesses also testified that Wesley was devastated by the death of his mother, with whom he was very close. One of Wesley's school teachers testified that he was shocked by Wesley's involvement in the murders and "wouldn't have

seen trouble coming from [Wesley].” A mental health expert testified that Wesley had an IQ of 77, read at a fifth-grade level, and had the math skills of a sixth grader.

Relying on Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 283 (2006), the State argues that the focus of the reweighing analysis after invalidating a McConnell aggravator is on the eligibility determination and the record in this case supports the conclusion that the jury would have found Wesley death eligible for Isaac’s murder even if it had considered only the two valid aggravating circumstances. In particular, the State points out that the two valid aggravating circumstances were the only aggravating circumstances that the jury found with respect to Doella’s murder and that the jury found that those two aggravating circumstances “outweigh any mitigating circumstance or circumstances,” as reflected in the verdict form as to the sentence imposed for Doella’s murder.

The State’s argument has some appeal as to the jury’s eligibility determination but we remain unconvinced that the invalid aggravator resulted in harmless error. We recognize that, consistent with Rippo, the eligibility decision generally will be the focus of reweighing/harmless-error analysis following invalidation of a McConnell aggravator and that the facts and circumstances underlying the invalid aggravator could have been considered as “other matter” evidence during the selection decision. 122 Nev. at 1093, 146 P.3d at 283-84. But we are not convinced that the invalid McConnell aggravator had no impact on the jury’s selection decision given the unique circumstances of this case. Our conclusion in this respect is influenced by the jury’s decision, apparently during the selection phase, to impose a death sentence for Isaac’s murder

while imposing a sentence of life without the possibility of parole for Doella's murder. Explanations for this distinction are speculative at best, particularly given that Wesley stabbed Doella 36 times, twice the number of stab wounds he inflicted on Isaac. One particularly relevant possibility is that the jury imposed a death sentence for Isaac's murder based on the number of aggravators it had found. Under the circumstances, we cannot conclude that it is clear that absent the invalid aggravator the jury would have imposed a death sentence for Isaac's murder. Therefore, Wesley has demonstrated actual prejudice to excuse his procedural default of this claim, and he is entitled to a new penalty hearing.<sup>2</sup>

Claims of ineffective assistance of counsel related to the guilt phase

Wesley argues that the district court erred by denying several claims of ineffective assistance of trial and appellate counsel related to the guilt phase of the trial. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review," Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court's purely factual findings are entitled to deference, Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). Under the two-part Strickland test, a defendant must show that counsel's performance (1) fell below an

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<sup>2</sup>Wesley argues that this court should set aside his death sentence and impose a sentence of life in prison without the possibility of parole pursuant to NRS 177.055(3)(c), which outlines this court's mandatory review of a death sentence on direct appeal from a judgment of conviction and death sentence. This is not a direct appeal and therefore NRS 177.055 is inapplicable. The appropriate remedy under this court's reweighing analysis in this setting is to remand the matter for a new penalty hearing.

objective standard of reasonableness (2) resulting in prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996).

Deterioration of relationship between trial counsel

Wesley argues that the district court erred by denying his claim that the deterioration of the relationship between trial counsel rendered them ineffective. The principle source of tension between counsel appears to have stemmed from a disagreement over the handling of an allegation of an inappropriate relationship between the trial judge and one of the prosecutors. Although the record shows that the relationship between counsel was strained, we conclude that Wesley failed to demonstrate that this circumstance resulted in ineffective assistance. During the evidentiary hearing, neither counsel identified any aspect of the representation that suffered as a result of tension in their relationship. And nothing in the trial transcript suggests that any deterioration in counsel's relationship affected their representation of Wesley. Because Wesley failed to establish that counsel's performance was deficient as a result of the strained relationship, we conclude that the district court did not err by denying this claim.

Alleged misconduct of trial judge and prosecutor

Wesley contends that the district court erred by denying his claim that trial counsel were ineffective for failing to fully investigate the alleged relationship between the trial judge and the prosecutor before bringing it to the district court's attention and for failing to seek an evidentiary hearing on the matter. However, Wesley has not identified what additional investigation would have revealed to bolster the

allegation. Nor did either counsel identify during the evidentiary hearing any adverse decision or action by the trial judge suggesting that he was biased against Wesley as a result of the allegation. Because Wesley failed to show that counsel were deficient in this regard or prejudice, we conclude that the district court did not err by denying this claim.<sup>3</sup>

Jury selection method

Wesley argues that the district court erred by denying his claim that trial counsel were ineffective for failing to raise a claim that the jury was not drawn from a fair cross section of the community. Wesley presented only general assertions that the jury selection method in Clark County systematically excluded African Americans and other minorities, offering no specific evidence to support the claim. And he failed to explain whether any minorities were included in the venire. These allegations do not demonstrate deficient performance. Because Wesley failed to make sufficient factual allegations that, if true, would entitle him to relief, we conclude that the district court did not err by denying this claim without an evidentiary hearing.<sup>4</sup>

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<sup>3</sup>Wesley also complained that counsel were ineffective because their supervisor instructed them not to pursue recusal of the trial judge after bringing the allegation of inappropriate conduct to the district court's attention. However, other than his bare allegation, Wesley produced no evidence supporting this claim; therefore, we conclude that the district court did not err by denying this claim. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>4</sup>To the extent Wesley argues that his trial was unfair because the jury selection method used by Clark County resulted in the systematic underrepresentation of African Americans and other minorities, this claim could have been raised on direct appeal and therefore is procedurally  
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Effects of medications taken during trial

Wesley asserts that the district court erred by denying his claim that trial counsel were ineffective for failing to investigate the effects of medication he took during trial. He suggested that his medication affected his mental capabilities at trial and rendered invalid the results of tests performed by a mental health expert. Wesley failed, however, to support these assertions with any specific factual allegations suggesting that counsel knew or should have known that he was under the influence of medication or that the medication adversely affected him in any way. Because Wesley asserted nothing more than a bare claim for relief unsupported by any specific factual allegations demonstrating ineffective assistance of trial counsel, the district court did not err by denying this claim without an evidentiary hearing. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Premeditation instruction

Wesley contends that the district court erred by denying his claim that trial counsel were ineffective for failing to object to the premeditation instruction, commonly known as the Kazalyn instruction.<sup>5</sup> In Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000), this court disapproved of the Kazalyn instruction on the mens rea required for

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barred absent a showing of good cause and prejudice. NRS 34.810(1)(b)(2), (3). Because Wesley failed to overcome the procedural default, the district court did not err by denying this claim.

<sup>5</sup>Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

a first-degree murder conviction based on willful, deliberate, and premeditated murder and provided the district courts with new instructions to use in the future. Recently, in Nika v. State, 124 Nev. \_\_\_, \_\_\_, \_\_\_, 198 P.3d 839, 848, 850-51 (2008), cert. denied, No. 09-5928, 2009 WL 2524052 (U.S. October 13, 2009), this court held that Byford constituted a change in state law that has no retroactive application to convictions that were final when Byford was decided. Because Byford constituted a change in state law, counsel had no basis for challenging the Kazalyn instruction as it represented a correct statement of the law at the time of Wesley's trial. Id. at \_\_\_, 198 P.3d at 851. Accordingly, the district court did not err by denying this claim.<sup>6</sup>

Failure to federalize issues on appeal

Wesley contends that the district court erred by denying his claim that appellate counsel were ineffective for not raising numerous direct appeal claims in the context of federal constitutional violations to preserve them for federal review. Although in his post-conviction petition Wesley cited to general federal authority to support these claims, he failed to adequately explain how citation to federal constitutional principles would have garnered relief on appeal. Because Wesley failed to show a reasonable likelihood that the result of his direct appeal would have been

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<sup>6</sup>To the extent Wesley argues that appellate counsel were ineffective for not challenging the premeditation instruction on appeal, he failed to show that this issue had a reasonable probability of success. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Therefore, we conclude that the district court did not err by denying this claim.

different if counsel had “federalized” these matters, we conclude that the district court did not err by denying this claim.

Partiality and bias of jury

Wesley asserts that the district court erred by denying his claim that appellate counsel were ineffective for failing to challenge the partiality and bias of the jury “to get around the ruling on voir dire issue.”<sup>7</sup> However, he failed point to anything in the record showing that the jury empanelled was biased such that appellate counsel should have challenged the jury’s partiality. Because Wesley asserted nothing more than a bare allegation of ineffective assistance in this regard, we conclude that the district court did not err by denying this claim. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Cumulative prejudice

Wesley argues that the cumulative effect of counsel’s deficiencies invalidated his convictions. Because we conclude that trial and appellate counsel were not deficient for any of the reasons he asserted, no cumulative error affected his convictions. Therefore, the district court did not err by denying this claim.

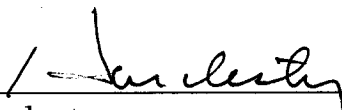
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<sup>7</sup>Wesley offered no explanation of this claim; however, it appears that he is referring to a claim raised on direct appeal concerning the district court’s instruction to counsel to refrain from inquiring into the details of a juror’s prior jury service. Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996). This court concluded that Wesley was not prejudiced by the district court’s limitation on voir dire because the juror was removed by a peremptory challenge and Wesley did not assert any jury partiality or bias. Id.

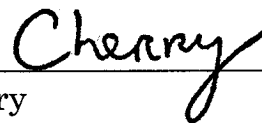
Conclusion

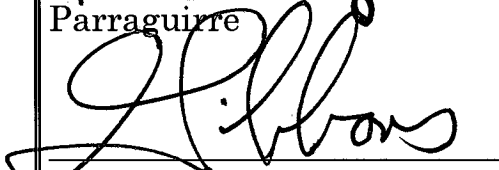
We conclude that the felony aggravator respecting Isaac's murder must be stricken pursuant to McConnell and that the error was not harmless; therefore, we remand this matter for a new penalty hearing. We affirm the district court's order denying relief on the claims raised in the post-conviction petition related to the guilt phase of trial. Accordingly, we


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>8</sup>

  
\_\_\_\_\_, C.J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Eighth Judicial District Court Dept. 23, District Judge  
Joel M. Mann, Chtd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

<sup>8</sup>The Honorables Michael Douglas and Nancy Saitta, Justices, voluntarily recused themselves from participation in the decision in this matter.