

***Browning v. State of Nevada*, 124 Nev. Adv. Op. Citation 50 (July 24, 2008)¹**

Criminal Law – Sentence of Death Appeal

Summary

This is an appeal from a sentence of death after remand for a new penalty hearing.

Disposition/Outcome

Appellant Paul Lewis Browning's sentence of death is affirmed. Browning raised several issues on appeal, none of which warrant relief.

Factual and Procedural History

Browning stabbed Hugo Elson to death during the commission of a robbery at Elson's jewelry store. Browning escaped the scene of the crime with several pieces of jewelry. He was charged with burglary, robbery with the use of a deadly weapon, murder with the use of a deadly weapon, and escape from a detention facility. The State sought the death penalty which the jury imposed after finding Browning guilty of all charges. The Nevada Supreme Court affirmed the conviction and death sentence were affirmed.²

The Nevada Supreme Court subsequently granted Browning post-conviction relief because the district court erred by denying his claim that counsel was ineffective.³ The Court remanded the matter for a second penalty hearing. During this hearing, the State presented multiple witnesses and introduced testimony, documents, and photographs at the original trial. The State presented testimony by the original forensic pathologist and the police detectives who worked the case at the time. The State also presented testimony by Randall and Vanessa Wolff who, as Browning's neighbors, heard him confess to the crime and saw him with the spoils. They proceeded to turn him in the law enforcement. The State also presented witnesses who established Browning's prior felony convictions as well as victim impact testimony. Finally, Browning called several witnesses in mitigation mostly consisting of family members testifying to his good character.

The State alleged four aggravating circumstances in seeking the death penalty. The jury found all four aggravating circumstances and no mitigating circumstances. The jury unanimously found that the aggravating circumstances outweighed any mitigating circumstances and imposed a sentence of death. Browning alleges his penalty hearing was erroneous on several grounds, which, individually and cumulatively, entitle him to relief.

¹ By Philip Erwin.

² *Browning v. State*, 104 Nev. 269, 757 P.2d 351 (1988).

³ *Browning v. State*, 120 Nev. 347, 91 P.3d 39 (2004)

Discussion

A. Introduction of Alleged False and Misleading Evidence

Browning asserts that the district court erred in preventing him from presenting certain evidence during post-conviction proceedings that would allegedly establish a bulk of evidence from the original proceeding false or misleading.

1. Evidence Related to Randall and Vanessa Wolff

Randall Wolff testified that Browning committed the robbery because his girlfriend, Marcia Gaylord, was in jail and he needed bail money. Later evidence showed that Gaylord was released from jail on the morning the robbery and murder of Elson took place. Browning asserts that this discredited the State's original theory of motive. The Court held that this evidence was irrelevant to the penalty hearing because Browning's guilt had already been established. Furthermore, Browning failed to show how he was prejudiced by this information. The evidence failed to show why this evidence mitigated or disproved any aggravating circumstance.

Browning also alleges that Randall Wolff falsely testified at trial that he received nothing in return for his testimony. Later evidence showed that Randall Wolff was subject to a separate criminal proceeding and the judge in that case was informed of his cooperation in Browning's trial. Furthermore, after Browning's trial, the lead prosecutor assisted Randall Wolff in getting a job. However, the prosecutor testified that Randall Wolff received no benefits prior to Browning's original trial. The Court held that this information should have been disclosed to the defense, but there was no indication that the outcome of Browning's original trial would have been different or that its absence from the jury's consideration rendered Browning's penalty hearing unfair.

Browning further alleges that the district court erred by precluding him from introducing evidence that Vanessa Wolff received benefits for her testimony in his original trial. The Court held that Browning had not substantiated this claim and denied relief.

Browning also argued he is entitled to a new trial because Vanessa Wolff was likely under the influence of drugs when she testified at trial. The Court held that Browning failed to show how this would have changed the outcome of the original trial and noted that the jury was well aware of Vanessa Randall's drug abuse.

Lastly, Browning argues that it was misleading to allow testimony by a police detective that the only assistance Vanessa Wolff received was assistance in entering a rehabilitation program in light of the evidence of the other benefits the Wolffs received. Once again, the Court held that this evidence was not significant enough to change the outcome of the penalty hearing.

After stating that even if it was error to not admit any of the evidence, Browning still failed to show prejudice that resulted. The Court then addressed the claim that this evidence may

have reflected that he did not commit the robbery and murder of Elson. The Court held that relief was not warranted on this basis because Browning had already been adjudged guilty and the evidence was not relevant to the sentencing decision. The Court acknowledged the U.S. Supreme Court's holding in *Oregon v. Guzek*⁴ that stated a capital murder defendant has no constitutional right to present additional alibi evidence at resentencing that was inconsistent with his prior conviction and shed no light on the manner in which he committed the crime for which he was convicted. The Court further noted that its decisions in *Hominick v. State*⁵ and *McKenna v. State*⁶ reflect the general policy that the focus of a penalty hearing is the defendant's character and record and the circumstances of the offense, not the defendant's guilt or innocence, as that matter has previously been decided. The Court concluded that Browning was precluded from presenting evidence that could shed doubt on his guilt and that the aforementioned evidence was irrelevant regardless.

Finally, Browning argued that the aforementioned evidence was relevant to mitigation. The Court concluded that Browning failed to show prejudice and that both juries in the original trial and second penalty hearing were privy to extensive information about the Wolff's misdeeds. Browning's penalty hearing was not unfair on this account.

2. *Other Evidence Alleged to have been False and Misleading*

Browning alleged that the district court erred in admitting multiple pieces of evidence from the crime scene and his motel room. The Court held that Browning failed to show this evidence's relevance to mitigation and that this argument is also seemingly aimed at projecting doubt on his original conviction. Once again, Browning may not challenge his conviction in a penalty hearing.

3. *Evidence Relevant to Prove Aggravating Circumstances*

Browning argued that the district court erred by not allowing the admission of evidence relevant to the robbery and burglary aggravating circumstances. Specifically, he wanted to introduce evidence that the Wolff's kept some of the stolen jewelry which would have proved their involvement in the crime. He also asserts that the Wolffs planned the crime in conjunction with an unidentified Cuban man who committed the murder. Browning alleges this evidence would defeat the burglary and robbery aggravation circumstances.

The Court disagreed. The penalty hearing jury could conclude beyond a reasonable doubt that Browning killed Elson and that the aggravating circumstances were warranted. Furthermore, nothing supported Browning's Cuban man theory and establishing the Wolff's participation would not defeat the aggravating circumstance finding.

B. *Reconsideration of Harmlessness Respecting the Admission of Improper Evidence During the Guilt Phase*

⁴ 546 U.S. 517, 523 (2006)

⁵ 108 Nev. 127, 141, 825 P.2d 600, 609 (1992).

⁶ 114 Nev. 1044, 1059, 968 P.2d 739, 749 (1998).

When addressing Browning's post-conviction habeas petition, the Court noted two deficiencies in his trial counsel's representation. The trial counsel failed to present certain evidence and object to an improper statement by the prosecution. The Court also noted that the prosecution erred by failing to divulge the benefits given to Randall Wolff in exchange for his testimony and by making an unfounded inference at trial. However, the Court concluded that evidence of Browning's guilt was overwhelming and there is no reasonable probability that would not have been convicted of the crime. Browning argues that the Court should reconsider the harmlessness of these errors and grant him a new trial as relief. The Court held that the overwhelming evidence supports Browning's conviction and the holding of harmlessness is appropriate.

C. Jurisdiction of Senior Judge to Preside over Browning's Second Penalty Hearing

Browning argues that it was error to have a senior judge preside over the second penalty hearing because he was not properly appointed and it is inappropriate to have a retired judge preside over a capital trial. The Court held nothing precludes a senior judge from presiding over capital trials and the senior judge was properly appointed.

D. Removal of Juror for Cause

Browning alleges that the district court erred by removing a juror for cause. The juror in question stated that he was opposed to the death penalty, but could foresee a case where it would be appropriate. After a series of hypothetical questions, the district court judge asked whether the juror felt it could be appropriate for the death penalty where the defendant robbed a jewelry store and stabbed the owner to death. The juror answered that he would not impose the death penalty. The prosecution challenged the juror for cause and the district court granted it over objection of defense counsel.

The Court began its analysis by noting the trend away from the rule that a prospective juror must express absolute opposition to the death penalty irrespective of the facts of the case.⁷ The Court noted instances when the removal of a juror was upheld where the juror stated the death penalty would only be appropriate in the absolute worst of circumstances.⁸ The Court held that because the juror stated it would be appropriate in a case that is the "worst-of-the-worst" and inappropriate in Browning's case, the district court was correct in removing the juror for cause.

E. Mitigation Verdict Form

After the jury verdict in the second penalty hearing, Browning alleged that two verdict forms were not given to the jury including those that listed mitigating circumstances that could outweigh the imposition of a death sentence. The district court found that the jury had all the verdict forms and that even if it was missing the disputed forms, the verdict would be unchanged because of testimony by the jury foreman that the jury had the list of mitigating circumstances.

⁷ See *Bean v. State*, 86 Nev. 80, 87, 465 P.2d 133, 138 (1970).

⁸ See *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 406 (2001); *Walker v. State*, 113 Nev. 853, 867, 944 P.2d 762, 771 (1997).

The Court held that the district court's findings were supported by substantial evidence and that the record shows the jury considered the list of mitigating factors. Furthermore, Browning failed to demonstrate prejudice in light of the jury foreman's testimony and an instruction that the jury did not have to impose death under any circumstances.

F. Instructions Respecting Felony-murder Aggravating Circumstances

Browning argued that the district court erred in instructing the jury respecting the elements of the aggravating circumstances and set forth in NRS 200.033(4). The statute enumerates the felonies that implicate the aggravating circumstances and requires that the person charged "killed or attempted to kill the person murdered" or "knew or had reason to know that life would be take or lethal force used." He alleges that the district court failed to advise the jury of the last two elements which prejudiced him because he contested the fact that he was solely responsible or responsible at all for the murder of Elson.

The Court stated that Browning failed to object to the relevant instruction so he must show plain error and that it affected his substantial rights. The Court held that Browning did not meet this burden. The Court ruled that although Browning attempted to show another individual's involvement at the second penalty hearing, the evidence from the guilt phase, as presented to the jury in the penalty hearing, overwhelmingly showed his guilt. There was no prejudice here.

G. Prosecutorial Misconduct

Browning asserts that prosecutorial misconduct during the second penalty hearing entitled him to a new penalty hearing. For the most part, Browning failed to object to the alleged instances of misconduct. The prosecutor's use of the word "evil" merely expressed the gravity of the crime charged. The prosecutor's statements regarding the possibility of parole were correct because Browning had a violent criminal record, had been placed on parole at least twice, and that he committed Elson's murder while on parole. Furthermore, the prosecution's criticism of defense counsel did not prejudice Browning and are harmless beyond a reasonable doubt.

H. Denial of Browning's Request for Investigative Funds

Browning argues it was error for the district court to deny his request for information on the death penalty from the State or, in the alternative, to grant the defense funds for a full investigation. The Court held that Browning failed to demonstrate prejudice from the absence of this information or that the information would have been admissible during the penalty hearing.

I. Use of Leg Restraints during the Penalty Hearing

Browning argues that it was error for the district court to order him to wear leg restraints during the penalty hearing. The Court held that district court's brief statement of concern for public safety failed to state any specific concern in this case that would justify the use of leg restraints. However, the leg restraints were concealed from the jury for the entirety of the penalty hearing so no relief is warranted.

J. Admission of Allegedly Improper Hearsay Evidence

Browning alleges that the district court erred by failing to exclude testimonial hearsay statements from the penalty hearing. The Court noted that Browning failed to object to all instances of this allegedly improper hearsay testimony so it was subject to review for plain error. The Court held that no relief was warranted under any standard of review because the rule forbidding testimonial hearsay at such hearings does not apply to capital penalty hearings. The Court also held that Browning failed to demonstrate why any of the challenged testimony should have been excluded as unreliable.

K. Alleged Admission of Evidence in Violation of Bennett v. District Court

Browning argues that the district court erred by allowing the introduction of evidence of his criminal history which was not introduced in his first penalty hearing in violation of *Bennett v. District Court*.⁹ Although the district court ruled that any evidence of Browning's criminal history that was not admissible at his first trial was inadmissible in his second penalty hearing, he asserts that the court allowed such evidence against its own order. The Court held, and Browning acknowledges, that *Bennett* is not on point because that case involved the State seeking to prove additional aggravating circumstances during a retrial which was not the case here.

The Court held that there was only one instance of new evidence of prior bad acts being introduced at his second penalty hearing that wasn't first introduced during the original trial. The manner in which the evidence was presented was just different. Furthermore, even if the Court extended the *Bennett* rule, the challenged testimony did not reveal any fact or circumstance respecting Browning's prior felony convictions or other bad acts that did not appear at the original penalty hearing.¹⁰ Furthermore, Browning does not claim that he was surprised by any of the challenged evidence or that the required notice by the State was inadequate. No relief is warranted on this claim.

L. Cumulative Error

The Court denied Browning's argument that the cumulative effect of the aforementioned errors warranted the reversal of his death sentence.

M. Mandatory Appellate Review of Death Sentence

The Court is required by statute to review every death sentence and consider whether 1) the evidence support the finding of the aggravating circumstances; 2) the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor; and 3) the death sentence is excessive, considering both the crime and the defendant.

⁹ 121 Nev. 802, 121 P.3d 605 (2005).

¹⁰ The Court noted the one exception but held it harmless.

The Court held that the evidence of the crime, Browning's prior convictions, and his parole status at the time of the crime supported the four aggravating circumstances found. The Court next found that nothing suggested the jury verdict was the result of passion, prejudice, or any arbitrary factor. Finally, the Court ruled that the death sentence was not excessive and Browning's mitigating evidence did not warrant a decrease in sentence considering the viciousness of the murder and his penchant for violent crime.

Conclusion

The Court addressed every alleged error Browning raised and found that any error committed during the second penalty hearing was not so egregious as to warrant relief. Accordingly, the Court affirmed Browning's sentence of death.