

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ESCOBEDO-GUEVARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44366

FILED

SEP 14 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from the district court's denial of a petition for writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On June 27, 2000, the district court convicted appellant, pursuant to a guilty plea, to one count of lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of life in the Nevada State Prison, with the possibility of parole after serving ten years. This court affirmed the judgment of conviction.¹ The remittitur issued on June 26, 2001.

On November 21, 2001, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court conducted an evidentiary hearing in which appellant was present and represented by counsel. On November 23, 2004, the district court denied appellant's petition. This appeal followed.²

¹Escobedo-Guevara v. State, Docket No. 36484 (Order of Affirmance, May 30, 2001).

²Appellant is represented by counsel in this appeal.

Appellant argues that the district court erred in determining appellant's claims of ineffective assistance of counsel lacked merit. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.³ Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

First, appellant claims that the district court erred in finding counsel was not ineffective for failing to move to strike a psychosexual report because the therapist was not qualified pursuant to NRS 176A.110⁷ to provide an opinion on whether appellant was a danger to the community. Appellant failed to demonstrate that the district court erred in finding counsel's performance was not ineffective. The Parole and Probation officer called attention to the fact that the therapist was not qualified to make such a recommendation, and the court ordered a

³Strickland v. Washington, 466 U.S. 668 (1984).

⁴See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁷See 1997 Nev. Stat., ch. 524, section 7, at 2504.

reevaluation and recommendation from a licensed clinical psychologist, which effectively cured any defect. The district court stated that it carefully considered the therapist's report as to character and the clinical psychologist's report as to the future dangerous recommendation, but it did not consider the therapist's recommendation as to future dangerousness. The appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced and would have insisted on going to trial if counsel had moved to strike the therapist's report. Thus, the district court did not err in denying this claim.

Second, appellant claims that the district court erred in finding counsel was not ineffective for failing to move to strike the presentence investigation report and its addendum because the Parole and Probation officer relied on the therapist's flawed recommendation. Appellant fails to demonstrate that the district court erred in finding counsel was not ineffective. The Parole and Probation officer was aware of the therapist's lack of qualifications to make a future dangerousness recommendation. The district court ordered Parole and Probation to write an amended presentence investigation report. Parole and Probation reaffirmed its recommendation in the interest of community safety, as well as with the realization that the defendant must take responsibility for his actions. Appellant failed to demonstrate that counsel's performance was deficient, or that he would have insisted on going to trial had his counsel objected to the presentence investigation report. Thus, the district court did not err in denying this claim.

Third, appellant claims that the district court erred in finding counsel was not ineffective for failing to move to strike the therapist's psychosexual report because the therapist interviewed appellant for no

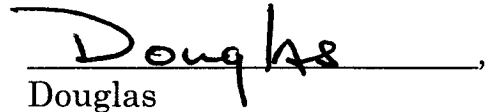
more than ten or fifteen minutes, spoke in English when appellant's first language was Spanish, and failed to use a Hispanic interpreter. Appellant's claim is not supported by the record and the district court did not err in finding counsel was not ineffective for failing to move to strike the therapist's psychosexual report. The therapist testified that he took three years of Spanish at the University, in which he received high grades. The district court questioned the appellant during the evidentiary hearing, and determined that the facts that the therapist had obtained during his interview with appellant were accurate and similar to the facts that the licensed psychologist had elicited. Appellant failed to demonstrate that counsel's performance was ineffective. Accordingly, the district court did not err in denying this claim.

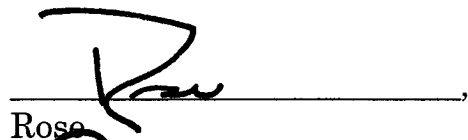
Finally, appellant claims that the district court erred in finding counsel was not ineffective for advising new counsel to stipulate to a life sentence instead of advising him to object to the addendum to the presentence investigation report because it relied on the psychosexual recommendation of the therapist. Appellant failed to demonstrate that the district court erred in finding counsel's performance was not ineffective. The district court stated that it did not consider the therapist's assessment as to appellant's future dangerousness. Appellant benefited from his plea agreement in that all other counts that could have been prosecuted were dismissed. Appellant appeared before the court to plead guilty with a translator and stated that he understood the sentence pursuant to the plea agreement. During his plea canvass, appellant stated that he believed that he had time to adequately confer with counsel and to explore all factual and legal issues in his case. He also acknowledged that the statements in the plea agreement had been

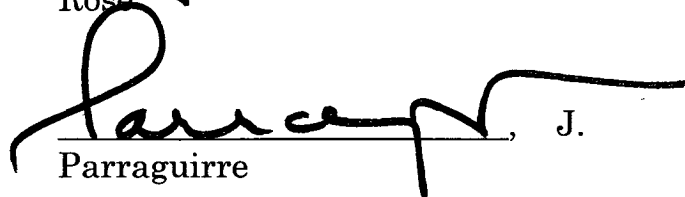
translated for him. Appellant failed to demonstrate that counsel's performance was deficient or that he would have insisted on going to trial had counsel objected to the presentence investigation report rather than stipulating to appellant's understood sentence. Accordingly, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Douglas

 J.
Rose

 J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk