

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JAVIER VASQUEZ-HERNANDEZ,
Respondent.

No. 44982

FILED

NOV 16 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting in part respondent Javier Vasquez-Hernandez's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Vasquez-Hernandez was initially charged on March 7, 2002, by way of a criminal complaint, with one count of level-one trafficking in a controlled substance, two counts of level-two trafficking in a controlled substance, and one count of level-three trafficking in a controlled substance. On December 13, 2002, Vasquez-Hernandez was convicted, pursuant to a guilty plea, of one count of level-three trafficking in a controlled substance. The district court sentenced Vasquez-Hernandez to serve a prison term of 10-25 years and ordered him to pay a fine of \$50,000.00; he also received 283 days credit for time served in presentence confinement. Vasquez-Hernandez did not pursue a direct appeal from the judgment of conviction and sentence.

On October 24, 2003, Vasquez-Hernandez filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Vasquez-Hernandez and counsel filed a supplement to the petition. The State filed

a motion to dismiss Vasquez-Hernandez's petition, and Vasquez-Hernandez filed an opposition to the motion to dismiss. On February 26, 2004, the district court entered an order dismissing all but one of Vasquez-Hernandez's claims. On October 8, 2004, the district court conducted an evidentiary hearing on the remaining claim and concluded that Vasquez-Hernandez's various counsel were ineffective for not providing him with "any advice on the subject of substantial assistance to avoid a mandatory prison sentence."¹ (Emphasis added.) Accordingly, the district court granted Vasquez-Hernandez relief on the one claim and ordered a new sentencing hearing.

Prior to the entry of the district court's order, the State filed a motion for reconsideration seeking leave to present additional evidence. The State argued that the grounds for relief articulated by the district court varied from the claim raised in Vasquez-Hernandez's petition. Specifically, the State contended that, in his petition, Vasquez-Hernandez did not claim that counsel were ineffective for failing to advise him with regard to providing substantial assistance, but rather that counsel were ineffective "in that they failed to take steps to arrange a meeting between petitioner and police officers so that petitioner might render substantial assistance to officers and thereby become eligible for leniency." In the motion, the State sought the opportunity to prove that Vasquez-Hernandez "was possessed of sufficient knowledge concerning [NRS

¹NRS 453.3405(2) provides that the district court may reduce or suspend the sentence of any person convicted of trafficking in a controlled substance "if [it] finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any . . . person involved in trafficking in a controlled substance."

453.3405]” and that his counsel and law enforcement officials “provided the necessary advice and that petitioner himself elected not to contact police and to provide information.” Vasquez-Hernandez opposed the State’s motion, arguing that the State’s claim points out “a distinction without a difference.” The district court refused to consider additional evidence and denied the State’s motion. On March 15, 2005, the district court entered an order granting Vasquez-Hernandez relief. The State has now filed this timely appeal.

The State contends that the order of the district court granting Vasquez-Hernandez relief is not supported by the evidence. The State concedes that several of Vasquez-Hernandez’s lawyers during his period of presentence confinement “did little but obtain continuances.” The State also points out, however, that it was Vasquez-Hernandez, himself, who “precluded the last attorney from remedying the defects of the past when he refused an additional continuance in order to render substantial assistance and instead insisted on being sentenced, knowing full well . . . that the purpose of the proposed continuance was to allow him [the] opportunity for leniency.” We agree with the State and conclude that the district court erred in granting Vasquez-Hernandez relief and ordering a new sentencing hearing.

This court has repeatedly stated that the factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.² In this case, the district court’s finding is not supported by substantial evidence.

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

During the sentencing hearing conducted on December 13, 2002, the following exchange took place –

MR. ALIAN [defense counsel]: Thank you, your Honor. Once again, your Honor, to give this gentleman an opportunity to work with some people, we are going to respectfully ask this matter be continued another three weeks.

THE COURT: He has been in custody a substantial period of time. Mr. Vasquez-Hernandez, do you have any objection to the continuance of your case, sir?

MR. ALIAN: Your Honor, at this time my client has indicated to me he does not wish to continue this matter and wants to go forward today. He understands what the recommendation is.

...

THE COURT: Mr. Vasquez-Hernandez, is there any statement you wish to make prior to sentence in your case?

DEFENDANT (In English): Yes, sir. . . . I know I go a long time to prison, but other good thing is about my program, HISTEP. . . . I'm going to prison, but I want to say thank you, because I come to you because I know when I get out, I know some day, and I know how I can live my life without drugs, sir.

THE COURT: . . . You know that of course a prison sentence is mandatory in this case.

DEFENDANT (In English): Yes, sir.

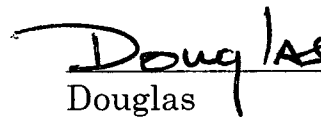
THE COURT: You discussed that with your counsel?


DEFENDANT (In English): Yes, sir.

Based on all of the above, we conclude that the district court erred in granting Vasquez-Hernandez relief.³

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, J.
Douglas

 _____, J.
Rose

 _____, J.
Parraguirre

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

³The State also contended that the district court abused its discretion in refusing to allow the presentation of additional evidence after its oral ruling. In light of our disposition of this case, we need not address the issue.