

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAQUIN MATIAS RIVERA-JIMENEZ
A/K/A JOQUIN MATIAS RIVERA-
JIMENEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45177

FILED

MAY 17 2006

BY *[Signature]*
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant Joaquin Matias Rivera-Jimenez's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Rivera-Jimenez was arrested after making three separate methamphetamine sales to confidential informants. He waived his preliminary hearing and entered into a plea agreement in which he agreed to plead guilty to one count of level-three trafficking. In exchange, the State agreed not to pursue other criminal charges arising from Rivera-Jimenez's arrest and to recommend no more than a 10- to 25- year prison sentence.¹ After the guilty plea was entered, the State dismissed the charges against codefendant Juan Bernardo Arambula-Soto, the district court convicted Rivera-Jimenez pursuant to his plea, and Rivera-Jimenez was sentenced to serve a prison term of 120 to 300 months and ordered to

¹See NRS 453.3385(3).

pay a \$50,000.00 fine. We affirmed the judgment of conviction on direct appeal.²

Rivera-Jimenez filed a timely post-conviction petition for a writ of habeas corpus in the district court. The district court held an evidentiary hearing and subsequently denied the petition. This appeal follows.

Rivera-Jimenez claims that his appellate counsel was operating under a conflict of interest. Rivera-Jimenez specifically asserts that attorney Charles Diaz represented his codefendant, Arambula-Soto, during pretrial proceedings in this case, and therefore could not ethically argue against Arambula-Soto on direct appeal or testify in any meaningful manner during the evidentiary hearing. Rivera-Jimenez further contends that he was not informed of the conflict and did not provide a written waiver.

To show a Sixth Amendment violation of his right to counsel, Rivera-Jimenez must demonstrate both an actual conflict and an adverse effect on his attorney's performance.³ "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."⁴

²Rivera-Jimenez v. State, Docket No. 39497 (Order of Affirmance, October 15, 2002).

³Cuyler v. Sullivan, 466 U.S. 335, 348 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (providing that prejudice is presumed "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance" (citation omitted, emphasis added)).

⁴Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

During the evidentiary hearing, Diaz testified that he was asked to represent Rivera-Jimenez after the charges against Arambula-Soto were dismissed and Rivera-Jimenez had been sentenced. Diaz informed Rivera-Jimenez that he had represented Arambula-Soto during the trial phase of the case. Diaz did not see a conflict of interest and did not seek a written waiver.⁵ Diaz further testified that none of the information he obtained while representing Arambula-Soto was relevant to Rivera-Jimenez's direct appeal, and that his representation of Arambula-Soto had no effect on his representation of Rivera-Jimenez.

The district court found that the record did not support the existence of an actual conflict. Rivera-Jimenez has not demonstrated that the district court's finding is not supported by substantial evidence or is clearly wrong.⁶ Accordingly, we conclude that Rivera-Jimenez has failed to demonstrate that the district court erred in denying his habeas petition on this ground.

Rivera-Jimenez also claims that appellate counsel provided ineffective assistance because he failed to litigate two critical issues: (1) that his sentence was cruel and unusual because he was sentenced to a prison term of 120 to 300 months whereas the charges against his codefendant were dismissed, and (2) that Rivera-Jimenez was denied equal protection of the law because as an illegal immigrant he did not have the same opportunities as U.S. citizens and legal immigrants to seek relief under NRS 453.3405(2).

⁵We note that a client's waiver of a potential conflict arising from joint representation need not be in writing. See SCR 158(7).

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

These two claims were not presented in the written post-conviction petition filed on November 12, 2003. It is unclear as to whether the district court permitted Rivera-Jimenez's counsel to amend the habeas petition to include these claims of ineffective assistance of counsel.⁷ However, even if the district court permitted the claim of cruel and unusual punishment to be added to the petition, the claim is without merit.⁸ Arambula-Soto and Rivera-Jimenez did not receive disparate sentences because Arambula-Soto was not convicted of a crime and sentenced. Therefore, Rivera-Jimenez has failed to demonstrate that this claim had a reasonable probability of success on appeal.⁹

⁷At the conclusion of the evidentiary hearing, post-conviction counsel advised the district court:

I've had a chance to discuss with my client the question of whether he is willing to take the risk to the finish line and go to trial on a withdraw of plea. It is his decision that he would like to stand within his guilty plea, limit his petition to the issues of the conflict of counsel, appellate issues and the issue of sentencing.

...

So with that amendment to the petition, I believe your Honor is prepared to be able to take the case under submission.

⁸Cf. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990) (providing that "sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms").

⁹See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.").

We remand the equal protection claim for further consideration by the district court.¹⁰ If the district court did indeed permit Rivera-Jimenez's counsel to amend the habeas petition to include this claim at the hearing conducted on January 6, 2005, it must provide the State with an opportunity to file a response.¹¹ The district court must enter written findings and conclusions,¹² either rejecting the claim because it was not raised¹³ or, if the district court permitted amendment, resolving the claim. We further note that it may be necessary for the district court to conduct an evidentiary hearing to resolve this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Rivera-Jimenez's claims that his appellate counsel was operating under a conflict of interest and was ineffective for failing to raise a claim of cruel and unusual punishment on direct appeal lack merit. Accordingly, we

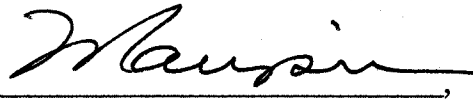
¹⁰See Walch v. State, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996) ("Ordinarily, if a party fails to raise an issue below, this court need not consider it on appeal.").

¹¹See NRS 34.745(1).

¹²See NRS 34.830(1) ("Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court.").

¹³See Barnhart v. State, 122 Nev. ___, ___, ___ P.3d ___, ___ (2006) (providing that "the district court is under no obligation to consider issues that are raised by a petitioner for the first time at an evidentiary hearing").

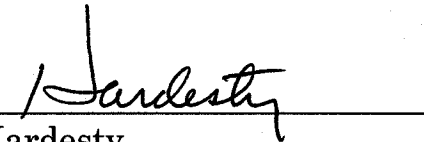
ORDER the judgment of the district court AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁴

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁴This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.