IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS RODRIGUEZ-GUERRERO, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 46046
JESUS RODRIGUEZ-GUERRERO, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 46047

FILED

MAY 10 2006

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Jesus Rodriguez-Guerrero was convicted, pursuant to a guilty plea, of two counts of trafficking in a controlled substance in separate cases. For the level III conviction, Rodriguez-Guerrero was sentenced to a prison term of 48-180 months. For the level I conviction, he was sentenced to a consecutive prison term of 12-30 months.

Counsel filed a motion to reconsider or modify the sentence asserting the court had relied on a mistake of fact. Appellate counsel filed an untimely petition for a writ of habeas corpus on May 6, 2003, more than one year after the judgment of conviction was filed.[1] Rodriguez-Guerrero's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.[2] A petitioner may be entitled to review

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[1] NRS 34.726(1).

[2] See id.

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of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.[3] The district court granted an evidentiary hearing on the matter finding that its failure to timely rule upon the motion for reconsideration constituted an impediment external to the defense.[4] Nonetheless, the district court denied the petition on the merits. Rodriguez-Guerrero asserts four claims on appeal to this court.

First, Rodriguez-Guerrero claims counsel was ineffective for filing a motion to reconsider sentence instead of filing a direct appeal, and therefore he was denied his right to a direct appeal. 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[5] The district court found that Rodriguez-Guerrero did not ask counsel to pursue an appeal. The court found counsel did discuss appellate remedies with him. Additionally, the court found the circumstances of the case did not give rise to a situation indicating that Rodriguez-Guerrero would benefit from receiving advice about his right of appeal. "[P]urely factual findings of an inferior tribunal regarding a claim of ineffective assistance are

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[3]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[4]Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated.)

[5]Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

entitled to deference on subsequent review of that tribunal's decision."[6] We conclude Rodriguez-Guerrero failed to demonstrate that his counsel was ineffective for not filing a direct appeal.

Second, Rodriguez-Guerrero claims the district court abused its discretion when it dismissed his petition by concluding that there were no meritorious appellate issues that should have been raised by counsel. The district court found Rodriguez-Guerrero's claim he was promised a sentence of probation was not credible. Additionally, the district court found that the circumstances of the case did not give rise to a situation indicating the petitioner enjoyed any reasonable likelihood or probability of success on appeal. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[7] We conclude Rodriguez-Guerrero has failed to show the district court abused its discretion.

Third, Rodriguez-Guerrero asserts the State breached the plea bargain agreement when it disagreed with agents of the State indicating Rodriguez-Guerrero offered substantial assistance and by opposing probation. Rodriguez-Guerrero's assertion that the State breached the plea agreement is belied by the record.[8] A review of the plea agreement indicates that Rodriguez-Guerrero understood that "even though the State and I have reached this plea agreement, the State is reserving the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement." Additionally, the plea agreement makes no mention,

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[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); see Strickland v. Washington, 466 U.S. 668, 698 (1984).

[7]Riley, 110 Nev. at 647, 878 P.2d at 278.

[8]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

much less a promise of a probation recommendation. Finally, Rodriguez-Guerrero's sentence was far below the maximum the State was permitted to argue for. Accordingly, Rodriguez-Guerrero has failed to show that the State breached the plea agreement.

Lastly, Rodriguez-Guerrero contends NRS 453.3405(2)[9] mandates that he should have been sentenced to probation. Nowhere in the statute is there a mention of an entitlement to probation. And finally, we note that the granting of probation is discretionary.[10] Having concluded that Rodriguez-Guerrero's contentions are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____ , J.
Douglas

_____ , J.
Becker

_____ , J.
Parraguirre

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[9]NRS 453.3405(2): "The judge, upon an appropriate motion, _may_ reduce or suspend the sentence of any person convicted of [drug trafficking] . . . if he finds that the convicted person rendered substantial assistance . . . ."

[10]See NRS 176A.100(1)(c).

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