

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE GAXIOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47125

FILED

AUG 03 2006

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE AMENDED JUDGMENT OF CONVICTION

This is a proper person appeal from an order denying appellant Jose Gaxiola's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On September 25, 2003, the district court convicted Gaxiola, pursuant to a jury verdict, of five counts of sexual assault of a minor under 14 years of age and two counts of lewdness with a child under 14 years of age. The district court sentenced Gaxiola to serve various consecutive and concurrent terms of imprisonment, amounting to life with the possibility of parole. We affirmed Gaxiola's sexual assault convictions and reversed his lewdness convictions on direct appeal.¹

On January 6, 2006, Gaxiola filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the

¹Gaxiola v. State, 121 Nev. ___, 119 P.3d 1225 (2005).

district court declined to appoint counsel to represent Gaxiola or to conduct an evidentiary hearing. On March 22, 2006, the district court denied Gaxiola's petition. This appeal follows.

In his petition, Gaxiola presented nine claims, eight of which could have been raised on direct appeal.² Specifically, that (1) the testimony of a nurse regarding the victim's injuries violated his Fourteenth Amendment rights, (2) the police interrogated him outside the presence of his attorney and in violation of his right to remain silent, (3) his sexual assault convictions were obtained in violation of the corpus delicti rule, (4) his sentence constituted cruel and unusual punishment, (5) there was a lack of physical evidence, (6) there was insufficient evidence, (7) the police lied about the existence of DNA evidence during an interrogation and the interrogation documents containing this lie were used at trial, and (8) there was cumulative error because the jury was misled by physical evidence which did not corroborate the victim's account of the offenses. Gaxiola did not demonstrate good cause for failing to raise these claims on direct appeal and he did not show actual prejudice.³

Gaxiola also presented a claim of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that

²NRS 34.810(1)(b)(2).

³NRS 34.810(3).

counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.⁴ The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.⁵

Gaxiola claimed that trial counsel was deficient for allowing him to be convicted of both lewdness and sexual assault, and then for allowing the conviction of the greater offense to stand. On direct appeal, we reversed one lewdness conviction because it was obtained in violation of the corpus delicti rule, and we reversed the other lewdness conviction because it was redundant and did not comport with legislative intent.⁶ Under these facts, Gaxiola has not demonstrated that he was prejudiced by his counsel's performance. Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁷

Although we conclude that the district court did not err in denying Gaxiola's post-conviction petition for a writ of habeas corpus, our review of the record reveals several clerical errors. The amended judgment of conviction incorrectly states that Gaxiola was convicted

⁴Kirksey v. State, 122 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

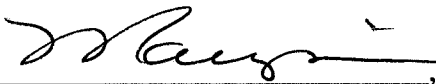
⁵Strickland, 466 U.S. at 697.

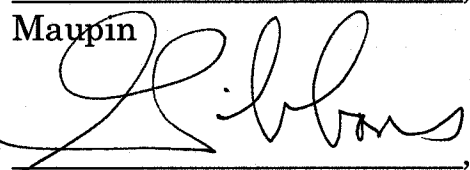
⁶Gaxiola, 121 Nev. at ___, 119 P.3d at 1233-36.

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

pursuant to a guilty plea when, in fact, he was convicted as the result of a jury verdict. And it fails to set forth the sentence for count five, an offense for which Gaxiola was adjudged guilty.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the amended judgment of conviction.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Jennifer Togliatti, District Judge
Jose Gaxiola
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See NRS 176.105(1)(c).