

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO R. DUARTE A/K/A PEDRO
RAFAEL DUARTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49279

FILED

SEP 18 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from an order of the district court denying appellant Pedro Duarte's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On October 10, 2003, Duarte was convicted, pursuant to a jury verdict, of one count of conspiracy to commit robbery, two counts of attempted murder, three counts of attempted robbery, and one count of possession of a stolen vehicle. The district court sentenced Duarte to serve a prison term of 12 to 48 months for the conspiracy count; two consecutive terms of 60 to 240 months for the attempted murder counts, to run concurrently to the conspiracy count; three consecutive terms of 24 to 240 months for the attempted robbery counts, to run consecutively to the other counts; and a concurrent term of 12 to 36 months for the possession count. This court affirmed Duarte's judgment of conviction on direct appeal.¹

¹Duarte v. State, Docket No. 42256 (Order of Affirmance, June 15, 2005).

On June 23, 2006, Duarte filed a timely proper person post-conviction petition for a writ of habeas corpus. Duarte retained counsel and counsel filed a supplemental petition. The State responded. On March 14, 2007, after hearing argument, the district court denied Duarte's petition. This appeal follows.

Duarte contends that the district court erred in rejecting his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³ An evidentiary hearing is warranted if the petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.⁴

First, Duarte contends that the district court erred in rejecting his claim, without conducting an evidentiary hearing, that trial counsel was ineffective for failing to have DNA evidence tested. Assuming, without deciding, that trial counsel was deficient in not independently

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 697.

⁴See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

testing frozen DNA cells, Duarte failed to demonstrate that the retesting of the DNA evidence would have had a reasonable probability of exonerating him, and thus, he failed to demonstrate that he was prejudiced. As we stated in Duarte's direct appeal,

[t]he DNA expert who recovered the saliva testified that submerging the mouthpiece in fluid was the most effective DNA extraction method. Furthermore, the PCR test, the manner of DNA testing used by the State's expert, has been shown to be "reliable and trustworthy for use within the forensic context."⁵

Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Duarte contends that the district court erred in rejecting his claims, without conducting an evidentiary hearing, that trial counsel was ineffective for failing to investigate and call witnesses. Specifically, Duarte contends that trial counsel should have called Duarte's wife and sister-in-law to testify that phone records used during trial to prove communications between Duarte and codefendant Jose Vigoa actually reflected calls that Duarte's wife made to her sister, Vigoa's wife. Duarte also contends that trial counsel should have allowed Vigoa to testify because he would have testified that Duarte was not the getaway driver. Attached to Duarte's supplemental petition is a declaration signed by Vigoa which states that Duarte was not the getaway driver. The district court determined that Duarte did not suffer any prejudice for any alleged "shortcomings" in his counsel's performance.

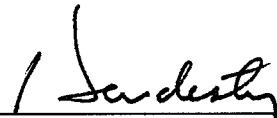
⁵Duarte, Docket No. 42256 (Order of Affirmance).


Based on the record before us, we are unable to conclude that Duarte's claim is sufficiently belied by the record to preclude an evidentiary hearing on the claims that counsel was ineffective for failing to investigate and call witnesses. Accordingly, we remand this case to the district court for an evidentiary hearing on Duarte's claims that counsel was ineffective for failing to investigate and call defense witnesses.⁶


⁶Duarte also asserts that the district court erred by denying his remaining claims without conducting an evidentiary hearing. Duarte contends that his trial counsel was ineffective for failing to (1) procure a DNA expert; (2) have investigator Needham investigate police procedure and call Needham as an expert witness; (3) argue the warrant affidavit was factually wrong; (4) hire a fingerprint expert; (5) communicate with Duarte; (6) move for mistrial when the jury was exposed to a uniformed SERT team in the courtroom; (7) move for a mistrial when the jury witnessed Duarte being handcuffed; (8) have all fingerprints tested to demonstrate they did not belong to Duarte; (9) move for a mistrial based upon a hung jury and object to an Allen charge; (10) move for an advisory verdict of acquittal based upon witness misidentification; (11) emphasize misidentification in closing argument; (12) move for a change of venue; (13) move for a Batson hearing when the State used peremptory challenges to remove Hispanic jurors from the panel; (14) meet with Duarte to formulate direct appeal issues; (15) request a limiting instruction on the water-bottle evidence; and (16) challenge the chain of custody of a license plate. Duarte further contends that appellate counsel was ineffective for failing to assert on direct appeal that (1) the presence of the SERT team in the courtroom unfairly prejudiced Duarte; (2) his convictions for conspiracy to commit robbery and attempted robbery merged and constituted a double jeopardy violation; and (3) Duarte's statement to police was custodial interrogation and should have been suppressed because it was taken in violation of Miranda. We have reviewed these claims and conclude that Duarte failed to demonstrate that his trial and appellate counsel were ineffective. Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing *continued on next page . . .*

Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁷


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jennifer Togliatti, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

... continued

Strickland, 466 U.S. 668). Accordingly, the district court did not err in denying these claims without conducting an evidentiary hearing.

⁷We also reject Duarte's claim that cumulative error denied him his right to a fair trial. See generally Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (noting that factors relevant to a claim of cumulative error "include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged'" (internal citation omitted)).