IN THE SUPREME COURT OF THE STATE OF NEVADA

ALISANDRO BARAJAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49430

FILED

NOV 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant Alisandro Barajas's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On July 18, 2003, the district court convicted Barajas, pursuant to a jury verdict, of one count of trafficking in a controlled substance. The district court sentenced Barajas to serve a prison term of 10 to 25 years and ordered him to pay a $50,000 fine. We affirmed the judgment of conviction.[1]

On April 6, 2004, Barajas filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Barajas, and counsel filed a supplemental petition. The State moved to dismiss the petition. In its motion, the State acknowledged Barajas's original petition, but only addressed the claims that were raised in Barajas's supplemental petition. Neither Barajas's opposition nor the State's reply addressed the claims raised in the original petition.

[1]Barajas v. State, Docket No. 41921 (Order of Affirmance, February 25, 2004).

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On August 4, 2005, the district court ordered the State's motion granted in part and denied in part. The district court order addressed three of the four claims raised in Barajas's supplemental petition. The district court denied two of the claims outright and it denied the third claim in a separate order that followed an evidentiary hearing. Because the district court orders did not finally dispose of the claims, we declined to consider Barajas's appeal.[2]

On May 12, 2006, the district court entered an order resolving all of the claims raised in Barajas's supplemental petition and purporting to resolve all of the claims raised in his original petition. On appeal, we ordered a limited remand and instructed the district court to set forth the specific findings of fact and conclusions of law that formed the basis for its decision to deny the claims in Barajas's original petition.[3]

On October 11, 2006, the district court entered an order resolving three of the four claims raised in Barajas's original petition. The district court determined that Barajas might be entitled to relief on the remaining claim and ordered further proceedings regarding that claim. Because the district court order did not finally dispose of the petition, we declined to consider Barajas's appeal.[4]

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[2]Barajas v. State, Docket No. 46684 (Order Dismissing Appeal, April 20, 2006).

[3]Barajas v. State, Docket No. 47474 (Order of Limited Remand, September 28, 2006).

[4]Barajas v. State, Docket No. 47474 (Order Dismissing Appeal, December 11, 2006).

On March 29, 2007, the district court entered an order resolving the final claim raised by Barajas in his original petition. This appeal follows.

Barajas raises four claims 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 "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."[5] "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."[6] To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."[7] Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.[8] "However, a district court's factual finding regarding a claim of ineffective assistance of

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[5]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[6]Id. (citing Strickland, 466 U.S. at 697).

[7]Id. at 988, 923 P.2d 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

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

counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong."[9]

First, Barajas contends that trial counsel was ineffective for failing to file a pretrial motion to suppress evidence obtained during the search of the car he had been driving. Barajas specifically claims that the search was illegal because it flowed from an improper traffic stop and unwarranted detention, there were no exigent circumstances, and his consent to the search was the result of official intimidation and was invalid because he did not own the car. Barajas further claims that appellate counsel was ineffective for failing to litigate this issue on appeal.

The district court found this contention to be without merit and otherwise repelled by the record. We note that during the evidentiary hearing held on this claim, trial counsel testified that

> There was probable cause for the stop. There was a signed consent form to search the car, both in Spanish and in English. Based on that information, we did not feel that it was in the best interest of Mr. Barajas and in the interest of the time on the case to file a motion to suppress that we felt would not have been granted.

And that appellate counsel testified that

> by the time the trooper asked [Barajas] whether or not he could search the car, a determination that a traffic stop -- or a traffic ticket would not be issued, a warning was only given, had been completed, and then he asked [Barajas] if he could search the car.

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[9]Ennis v. State, 122 Nev. 694, 705, 137 P.3d 1095, 1102 (2006) (citing Riley, 110 Nev. at 647, 878 P.2d at 278).

> [Barajas] even had a discussion with [the trooper] about whether or not he had to consent and then ultimately did consent to the search. So, you had a valid traffic stop, followed by a warning, followed by a request and consent, oral and in writing, so I didn't think that that would be an issue that could be raised on appeal.

Based on this testimony, we conclude that the district court's finding is supported by substantial evidence and is not clearly wrong.[10]

Second, Barajas contends that trial counsel was ineffective for failing to investigate whether the traffic stop, search, and arrest were products of racial profiling.[11] Barajas specifically claims that State Trooper Sines had previously engaged in racial profiling under similar circumstances: "The defendants were released, not cited for a traffic violation, and then asked to allow a search of the vehicle." However, Barajas does not explain why trial counsel would have reason to know that State Trooper Sines had previously engaged in racial profiling.

The district court found that this claim was conclusory, lacked the necessary specificity to warrant an evidentiary hearing, and was repelled by the record. We note that State Trooper Miller testified that at approximately 1:40 a.m. he observed the vehicle that Barajas was driving cross over the fog line, travel for 100 feet before regaining the travel lane, and fail to signal when it exited the interstate. Trooper Miller initiated a

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[10]To the extent that Barajas also claims that trial counsel was ineffective for failing to request a "mere presence" jury instruction, we note that this claim was not presented to the court below and we decline to consider it here. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

[11]See generally NRS 289.820.

traffic stop and, after talking with Barajas, informed him that he would not get a traffic citation and was free to leave. As Barajas began to walk away, Trooper Miller asked if he could ask a few more questions. Barajas consented and subsequently consented to a search of the vehicle. Trooper Miller arrested Barajas after discovering methamphetamine in the vehicle. Trooper Sines testified that he arrived on the scene after Trooper Miller had initiated the traffic stop. Trooper Sines assisted with the vehicle search, but did not speak to Barajas at all. Based on this testimony, we conclude that the district court's finding is supported by substantial evidence and is not clearly wrong.

Third, Barajas contends that trial counsel was ineffective for failing to properly impanel the jury. Barajas specifically claims that trial counsel did not assert his right to eight peremptory challenges and appellate counsel failed to raise the number of peremptory challenges as an issue on appeal.[12]

The district court found that this claim was conclusory, lacked the necessary specificity to warrant an evidentiary hearing, and was repelled by the record. Our review of the record reveals that after the jury was impaneled, counsel had given their opening statements, and the State's first witness had testified, the district court informed the parties that they were entitled to eight peremptory challenges because Barajas was facing a potential life sentence. The district court asked the parties if they wanted to waive the remaining four peremptory challenges. After

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[12]Barajas cites to Morales v. State, 116 Nev. 19, 21-22, 992 P.2d 252, 253 (2000) (holding that error involving "improper limitation of peremptory challenges is not subject to harmless error analysis").

discussing the matter with trial counsel, Barajas informed the district court that he understood and waived his right to the four additional peremptory challenges. In his post-conviction petition, Barajas failed to explain why counsel was deficient for allowing him to waive the remaining peremptory challenges and he did not identify the venire members that counsel should have challenged. Under these circumstances, we conclude that the district court's finding is supported by substantial evidence and is not clearly wrong.

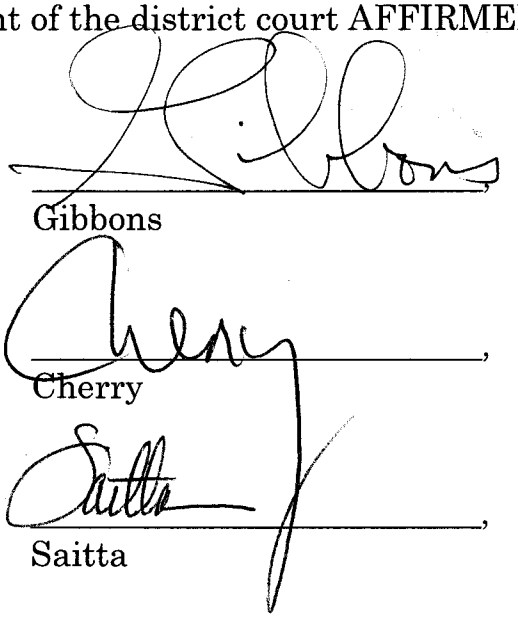
Fourth, Barajas contends that trial counsel was ineffective for failing to object to the prosecutor's closing argument. Barajas specifically claims that no evidence was adduced at trial to support the prosecutor's statement that "[n]ot too many people drive four pounds of methamphetamine half across the country so they can make what, five hundred bucks and another [five] hundred when he got back to Tijuana or hey, you drive this car, you can keep it. You'll have a car." Barajas further claims that appellate counsel was ineffective for failing to challenge the prosecutor's improper statement on appeal.

The district court found that this claim was conclusory, lacked the necessary specificity to warrant an evidentiary hearing, and was repelled by the record. We note that the jury heard evidence that Barajas was driving from Sacramento to Salt Lake City, he did not know the owner of the vehicle, and approximately four pounds of methamphetamine were found in the vehicle. Because this evidence supports the prosecutor's statement and Barajas has not demonstrated that the prosecutor exceeded

the boundaries of acceptable argument and comment,[13] we conclude that the district court's finding is supported by substantial evidence and is not clearly wrong.

Having considered Barajas's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Robert H. Perry, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[13]See Klein v. State, 105 Nev. 880, 883-84, 784 P.2d 970, 972-73 (1989).