

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL ISAAC MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49941

FILED

OCT 21 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE AND REMAND
TO CORRECT JUDGMENT OF CONVICTION

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

On October 6, 2003, the district court convicted appellant Samuel Isaac Marquez, pursuant to a jury verdict, of murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary while in possession of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison a term of 40 to 100 years for murder with the use of a deadly weapon, 60 to 180 months for robbery with an equal and consecutive term for the deadly weapon enhancement, and 48 to 180 months for burglary while in possession of a deadly weapon. The robbery and burglary sentences were imposed to run concurrently,

and both were to run consecutive to the murder sentence. This court affirmed appellant's judgment of conviction and sentence on appeal.¹

On March 21, 2007, appellant filed a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent appellant. On July 11, 2007, the district court denied appellant's petition without conducting an evidentiary hearing. This appeal follows.

Appellant argues that the district court erred in denying his ineffective assistance of counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³

First, appellant argues that his trial counsel was ineffective for conceding appellant's guilt during closing argument. Appellant fails to

¹Marquez v State, Docket No. 42305 (Order of Affirmance, March 22, 2006).

²See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting test set forth in Strickland).

³Strickland, 466 U.S. at 697.

demonstrate that his trial counsel was deficient during closing arguments. In Jones v. State, this court concluded that it was ineffective assistance of counsel to concede guilt during closing arguments when the defendant had entered a not guilty plea and had testified at trial that he had not committed the crime.⁴ During Jones' murder trial, he testified that he never harmed the victim.⁵ However, trial counsel's closing argument directly contradicted the testimony of Jones by acknowledging that the evidence showed Jones killed the victim but argued that Jones was only guilty of second-degree murder.⁶

In the instant case, counsel's closing argument was consistent with appellant's trial strategy to argue that appellant performed the physical act, but that he lacked the necessary state of mind. During the opening statement, counsel informed the jury that they would hear evidence concerning appellant's state of mind and that the jury needed to find that appellant had performed the physical act together with the necessary state of mind to find appellant guilty of murder. Dr. Chambers testified concerning appellant's mental state, but the district court determined his testimony was not sufficient to demonstrate that appellant

⁴110 Nev. 730, 737-38, 877 P.2d 1052, 1056-57 (1994).

⁵Id. at Nev. 735, 887 P.2d at 1055.

⁶Id. at Nev. 736, 887 P.2d at 1055.

met the legal definition of insanity.⁷ As such, the district court did not instruct the jury on insanity. As counsel was precluded from arguing that appellant was insane during the commission of the crime, he attempted to argue that the mental difficulties Dr. Chambers concluded appellant suffered from should lessen appellant's culpability. Thus counsel's argument was consistent with the theory of defense. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to investigate additional expert witnesses to testify concerning appellant's mental state. Appellant fails to demonstrate that he was prejudiced. Appellant has not identified any additional expert that could have bolstered his insanity defense or demonstrated a reasonable probability of a different outcome at trial.⁸ Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to properly endorse Abraham Marquez, appellant's brother, as a witness. The district court did not permit appellant to call Abraham Marquez to testify because he had not been endorsed as a possible witness and had been in the courtroom the entire trial up to that point. Appellant argues that Abraham Marquez would have been able to testify about

⁷See Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001).

⁸See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

appellant's drug and alcohol abuse, appellant's debt, appellant's access to money at his place of employment, and appellant's history of mental illness. Appellant fails to demonstrate that he was prejudiced. Here, Abraham Marquez's testimony concerning appellant's drug and alcohol abuse would have been redundant because Dr. Chambers had already testified concerning appellant's drug use. Further, appellant did not advance any factual evidence in the district court concerning Abraham Marquez's possible testimony of appellant's mental health history.⁹ In addition, appellant fails to demonstrate that information concerning appellant's debt or his access to money would have had a reasonable probability of changing the results of the trial. As such, appellant fails to demonstrate a reasonable probability of a different outcome had Abraham Marquez testified at trial. Therefore, the district court did not err in denying this claim.

We note that in our review there appears to be an error on the face of the judgment of conviction. The sentence of 40 to 100 years for count one exceeds the permissible sentence for murder.¹⁰ It appears that the district court meant to sentence appellant to serve in the Nevada State prison a term of 20 to 50 years for murder plus an equal and consecutive term of 20 to 50 years for the deadly weapon enhancement. Accordingly, we remand this matter for the district court to enter a corrected judgment

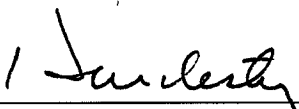
⁹Id.

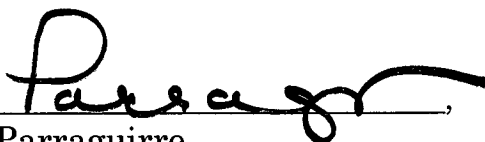
¹⁰See 1999 Nev. stat., ch 319, § 1, at 1334-1335.

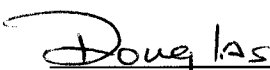
of conviction. Further, we direct the district court to transmit the corrected judgment of conviction to the Department of Corrections.

Consistent with the prior discussion, having considered Marquez's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED AND REMAND TO CORRECT JUDGMENT OF CONVICTION.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jennifer Togliatti, District Judge
Christopher R. Oram
Samuel Marquez
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk