

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODRIGO RAMOS CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50055

FILED

OCT 13 2008

TRACIE LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing in part, and denying in part, appellant Rodrigo Chavez's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On June 20, 2002, the district court convicted Chavez, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Chavez to serve a prison term of 10 years plus an equal and consecutive term for the deadly weapon enhancement. This court affirmed Chavez's judgment of conviction on direct appeal.¹

On November 24, 2004, Chavez filed a post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. With the assistance of appointed counsel, Chavez filed a supplemental petition and an opposition to the motion to dismiss.

¹Chavez v. State, Docket No. 39987 (Order of Affirmance, December 8, 2003).

The district court dismissed all claims raised in the petition, and the supplemental petition, except for one. Following an evidentiary hearing, the district court denied the remaining claim in Chavez's petition. This appeal followed.

In his petition, appellant contends that trial counsel were ineffective. 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 A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁴ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

Chavez was initially tried in 2000. In that trial, the district judge gave the jury an advisory instruction that insufficient evidence existed to convict Chavez. The jury disregarded the district court's advice;

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

³Strickland, 466 U.S. at 697.

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

however, they could not reach a unanimous verdict. As a result, the district court declared a mistrial.

Three weeks later, Chavez moved the district court to enter a judgment of acquittal, specifically as to the charges of first- and second-degree murder and involuntary manslaughter. Trial counsel argued that the district court had found insufficient evidence and the jury had unanimously rejected a guilty verdict for first- or second-degree murder based on a finding that there was no malice. The jury had also unanimously rejected a guilty verdict for involuntary manslaughter, but it was split on voluntary manslaughter.

The district judge recused himself, in response to the State's oral motion requesting he do so, stating that his "objectivity has been tainted, so in the interests of justice, I am removing myself from the case." He filed a recusal order requiring the case to be randomly reassigned to another district judge. The motion for acquittal was never ruled on.

Chavez contends that his first trial counsel was ineffective for failing to poll the jury and file a timely motion for acquittal. This court held in Chavez's direct appeal that a motion for acquittal applies only after a verdict has been reached.⁶ Accordingly, Chavez cannot demonstrate prejudice because the jury never reached a verdict at his first trial. To the extent that Chavez argues that he was placed in double jeopardy because he faced the same charges during his second trial, a

⁶Chavez, Docket No. 39987 (Order of Affirmance, December 8, 2003); see also NRS 175.381(2).

discharge of the jury for failure to reach a verdict is not a bar to a future trial.⁷

Chavez next contends that the district court erred in dismissing claims without holding an evidentiary hearing.

First, Chavez contends that an evidentiary hearing should have been held for his claim that trial counsel was ineffective for failing to ensure that jury instruction no. 27 from the first trial was included in the second trial. Jury instruction no. 27 stated:

If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

Chavez failed to demonstrate that omitting this instruction impacted the jury's verdict. Instructions were included that informed the jury that Chavez was presumed innocent unless the State proved otherwise beyond a reasonable doubt, defined the degrees of murder and manslaughter, and described and defined the law as to self-defense. Accordingly, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Second, Chavez contends that the district court erred in dismissing, without an evidentiary hearing, his claim that trial counsel was ineffective for failing to object to the "acquit first transition" instruction. The instruction stated in part:

⁷State v. Eisentrager, 76 Nev. 437, 439-40, 357 P.2d 306, 307 (1960).

You should first examine the evidence as it applies to Murder in the First Degree. If you unanimously agree that the defendant is guilty of Murder in the First Degree, you should sign the appropriate verdict form and request the bailiff to return you to court.

If you cannot agree that the defendant is guilty of Murder in the First Degree, you should then examine the evidence as it applies to murder in the Second Degree

If you cannot unanimously agree that the defendant is guilty of Murder in the Second Degree, then you should examine the evidence as it applies to Voluntary Manslaughter. . . .

If you cannot unanimously agree that the defendant is guilty of Manslaughter, then you should find the defendant not guilty.

The above instruction is not an “acquittal first” instruction, but rather an “unable to agree” instruction, as approved by this court in Green v. State.⁸ Accordingly, the district court did not err in dismissing this claim without an evidentiary hearing.

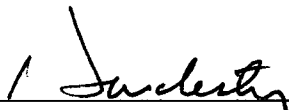
Finally, Chavez contends that his trial counsel at his second trial was ineffective for failing to properly investigate. Specifically, Chavez contends that trial counsel failed to investigate and find two witnesses that lived in the apartment complex and witnessed the death.

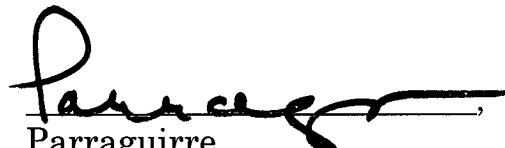
Following an evidentiary hearing on this issue, at which these witnesses testified, the district court found that the witnesses’ testimony would not have altered the outcome of the trial and Chavez failed to demonstrate that counsel could have found the witnesses. In particular,

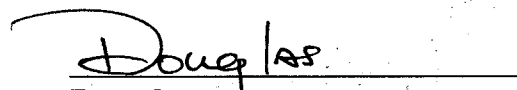
⁸119 Nev. 542, 548, 80 P.3d 93, 96-97 (2003).

we note that the witnesses testified that, after the two initial confrontations, Chavez retreated to his apartment, and exited brandishing a knife, at which point, Chavez and the victim began to fight for a third time and Chavez stabbed the victim. Several witnesses testified to this at the trial, and thus, the testimony offered at the evidentiary hearing was redundant and presented no new evidence. Both witnesses testified that they did not make statements to the police, which would have made it difficult to locate them, especially several years later. Chavez has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Chavez has not demonstrated that the district court erred as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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