

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAUL HERNANDEZ-CHAVEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50467

**FILED**

OCT 13 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant Saul Hernandez-Chavez's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Hernandez-Chavez was convicted, pursuant to a guilty plea, of one count of driving under the influence causing substantial bodily harm.<sup>1</sup> The district court sentenced Hernandez-Chavez to serve a prison term of 32-80 months. Hernandez-Chavez did not pursue a direct appeal from the judgment of conviction and sentence.

On July 19, 2007, Hernandez-Chavez filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Hernandez-Chavez, conducted an evidentiary

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<sup>1</sup>Hernandez-Chavez was initially charged with three counts each of driving under the influence causing substantial bodily harm and reckless driving causing substantial bodily harm.

hearing, and on September 28, 2007, entered an order dismissing Hernandez-Chavez's petition. This timely appeal followed.

Hernandez-Chavez contends that the district court erred by finding that he did not receive ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that (1) counsel's errors were so severe that there was a reasonable probability that the outcome would have been different,<sup>2</sup> or (2) but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>3</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>5</sup> A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.<sup>6</sup>

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

<sup>4</sup>Strickland, 466 U.S. at 697.

<sup>5</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

<sup>6</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); see also Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

First, Hernandez-Chavez contends that counsel was ineffective for failing to advise him about his right to a direct appeal. Specifically, Hernandez-Chavez claims that he is “not familiar with the American court system,” did not understand his appellate rights, and therefore, “deserved an explanation” from counsel.

We conclude that Hernandez-Chavez has failed to demonstrate that counsel was ineffective in this regard. There is no constitutional requirement that counsel must inform a defendant who pleads guilty of the right to pursue a direct appeal unless that defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.<sup>7</sup> In the instant case, Hernandez-Chavez does not allege that he asked counsel to file an appeal or otherwise expressed a desire to appeal. Further, Hernandez-Chavez has not indicated that there was a direct appeal claim that had a reasonable likelihood of success. Additionally, the written guilty plea agreement informed Hernandez-Chavez about the limited right to appeal his conviction.<sup>8</sup> And finally, testimony at the evidentiary hearing indicated that a Spanish-language interpreter reviewed the guilty plea agreement with Hernandez-Chavez prior to the entry of his plea. Therefore, we conclude that the district court did not err by rejecting this claim.

Second, Hernandez-Chavez contends that counsel was ineffective for failing to conduct an adequate pretrial investigation.

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<sup>7</sup>See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

<sup>8</sup>See Davis, 115 Nev. at 19, 974 P.2d at 659.

Hernandez-Chavez claims that he provided a “viable reason” for the single-car accident and “it is likely” he would have proceeded to trial had counsel requested an independent investigation and accident reconstruction, conducted “independent witness interviews,” and reviewed the blood test.

We conclude that Hernandez-Chavez has failed to demonstrate that counsel was ineffective in this regard. Hernandez-Chavez’s claim that he would have proceeded to trial and faced significantly more exposure to criminal liability is mere speculation. Moreover, Hernandez-Chavez’s former counsel testified at the evidentiary hearing and stated that he did investigate the facts of the case and considered Hernandez-Chavez’s explanation for the accident – a blown tire – along with the discovery, which included the police reports and medical information pertaining to the injured victims. Counsel testified that he discussed options with Hernandez-Chavez and explained that the Nevada Highway Patrol (NHP) report concluded that the accident was due to “a drift to the right side, overcorrection and loss of control.” We also note that the declaration of arrest completed by a NHP officer stated that the left front tire separated from the rim flange, causing the vehicle to overturn, after Hernandez-Chavez lost control of the vehicle. Therefore, we conclude that the district court did not err by rejecting this claim.

Finally, Hernandez-Chavez contends that his guilty plea was not entered voluntarily, knowingly, and intelligently. Specifically, Hernandez-Chavez claims that (1) the district court did not advise him about his appellate rights or discuss the elements of the offense and what the State would have to prove if the matter proceeded to trial, and (2) due

to the language barrier, he did not understand the plea agreement and that the interpreter only “explained the documents ‘a little.’”

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>9</sup> Further, this court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion.<sup>10</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>11</sup>

We conclude that Hernandez-Chavez failed to carry his burden. The written guilty plea agreement, signed by Hernandez-Chavez, was read to him in Spanish prior to the entry of his plea and, during the plea canvass, he indicated that he did not have any questions regarding the agreement. The guilty plea agreement detailed the elements of the offense to which Hernandez-Chavez was pleading and the constitutional rights he was waiving. At the evidentiary hearing on his petition, Hernandez-Chavez initially testified that the Spanish-language interpreter explained the agreement only “a little bit,” but on cross-examination, acknowledged that the interpreter went through the agreement paragraph by paragraph. Hernandez-Chavez’s former counsel testified that he met several times with him to discuss the plea negotiations and his options prior to the entry of his guilty plea. Counsel

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<sup>9</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

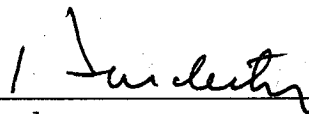
<sup>10</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

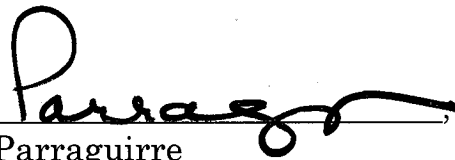
<sup>11</sup>State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

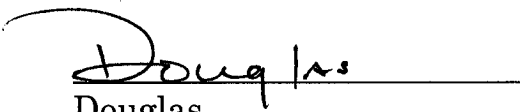
also stated that he reviewed the plea agreement with Hernandez-Chavez sitting "side-by-side" with the interpreter. Therefore, based on the totality of the circumstances, we conclude that the district court did not err by rejecting this claim.

Having considered Hernandez-Chavez's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. John P. Davis, District Judge  
Stephen B. Rye  
Attorney General Catherine Cortez Masto/Carson City  
Nye County District Attorney/Tonopah  
Nye County Clerk