

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS GONZALEZ-SOTO,
Appellant,
vs.
WARDEN, SOUTHERN DESERT
CORRECTIONAL CENTER, BRIAN
WILLIAMS,
Respondent.

No. 56328

FILED

JUL 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Ingerson*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND


This is an appeal from an order of the district court partially dismissing and partially denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.


On appeal from his petition filed on August 24, 2009, appellant claims that the district court erred in denying his claim that trial counsel was ineffective for failing to object to the admission of evidence that was seized during the search of appellant's residence. The State concedes in its confession of error that the district court erred by not holding an evidentiary hearing on this issue.

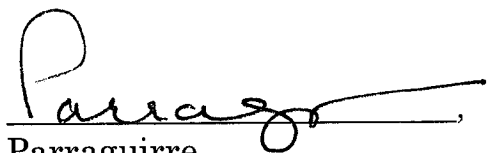
After reviewing the briefs submitted, the record on appeal, and the district court's order, we conclude that the district court erred in determining that an evidentiary hearing was not warranted. The district court concluded that this court already determined that the search did not violate the Fourth Amendment because appellant's wife consented to the search. Therefore, appellant would be unable to demonstrate a reasonable probability of a different outcome had counsel objected based on

appellant's refusal to consent. However, case law clearly states that a search may be invalid despite one occupant's consent if the other occupant is present and refuses permission to search. Georgia v. Randolph, 547 U.S. 103, 120 (2006). If appellant informed his trial counsel that he was present and refused to consent and trial counsel failed to object to the evidence based on this information, then this would have constituted a specific fact that, if true, would have entitled appellant to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, an evidentiary hearing on this issue is necessary, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹We note that appellant abandoned the other four claims raised in his petition in the district court when he filed, on March 16, 2010, a non-opposition to the State's partial motion to dismiss.