

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ZAMORA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36389

**FILED**

OCT 12 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Rinaldi*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant was convicted, pursuant to a jury verdict, of one count of trafficking in a controlled substance in violation of NRS 453.3385(3). The district court sentenced appellant to serve a term of 10-25 years in prison, and to pay a fine of \$50,000.00. Appellant was given credit for 130 days time served. Appellant's direct appeal of his conviction was dismissed by this court. *Zamora v. State*, Docket No. 30691 (Order Dismissing Appeal, March 23, 1998).

On February 18, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court appointed counsel to represent appellant, and on October 28, 1999, conducted an evidentiary hearing. On January 18, 2000, the district court denied appellant's petition. This timely appeal followed.

In his petition, appellant presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel

are entitled to deference when reviewed on appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.<sup>1</sup> Moreover, appellant has not demonstrated that the district court erred as a matter of law. Accordingly, for the reasons stated in the attached order of the district court, the order of the district court is affirmed.

It is so ORDERED.<sup>2</sup>

Young J.  
Young

Maupin J.  
Maupin

Becker J.  
Becker

cc: Hon. Connie J. Steinheimer, District Judge  
Attorney General  
Washoe County District Attorney  
Karla K. Butko  
Washoe County Clerk

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<sup>1</sup>Counsel's fast track statement, in fact, does not even acknowledge the existence of the district court's findings of fact, conclusions of law and judgment.

<sup>2</sup>On appeal, appellant also contends that his trial counsel was ineffective for failing to raise the procuring agent defense. This issue was not raised below. We therefore decline to consider it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

0-4  
24 Order

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JAN 18 2000

AMY HARVEY, CLERK

By: *WCS*  
ADMIN. ASST

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE

\* \* \*

DAVID ZAMORA,

Petitioner,

v.

Case No. CR97P0662

JOHN IGNACIO, WARDEN,  
NEVADA STATE PRISON,

Dept. No. 4

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

This cause came before the court upon a Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner Zamora was represented by an experienced attorney, Paul Giese, when he was charged with trafficking in a controlled substance in violation of NRS 453.3385(3), a felony. He pleaded not guilty and the cause was tried to a jury. Zamora was found guilty and sentenced to a term of 25 years imprisonment with parole eligibility in 10 years. He appealed but the judgment was affirmed by an Order Dismissing Appeal.

He then filed his petition for writ of habeas corpus

1 alleging several variations of ineffective assistance of counsel.  
2 The court appointed counsel who filed a supplemental petition and  
3 the evidence was heard on October 28, 1999. At the close of that  
4 hearing, the court ordered additional briefing relating to the  
5 testimony of Betty Dailey, a confidential informant who purchased  
6 the drugs from Zamora. Upon review of the briefs and upon  
7 evaluation of the relative credibility of the witnesses, the  
8 court finds that the fine imposed in this case should be vacated,  
9 but that the petition is otherwise denied.

10 The court imposed a fine of \$50,000 in the mistaken  
11 belief that the fine was mandatory. In fact, the law in effect  
12 at the time of the crime did not mandate a fine. Accordingly,  
13 the court will issue a separate judgment contemporaneously  
14 herewith vacating that portion of the sentence which required  
15 Zamora to pay a fine.

16 Petitioner Zamora alleged that his trial counsel was  
17 ineffective in failing to object to certain questions and  
18 comments by the prosecutor, including those to the effect that  
19 the confidential informant had previously met Zamora. The court  
20 finds that the questions and comments were not inappropriate, and  
21 thus, an objection would have been overruled. Furthermore, had  
22 the Supreme Court considered the merits of that ruling, the court  
23 would have affirmed because questions and comments were not  
24 objectionable and because, as noted in the order dismissing the  
25 appeal, the evidence of Zamora's guilt was overwhelming.

26 Petitioner next alleged that counsel was ineffective in

1 failing to discover that the informant was required to testify as  
2 part of a plea bargain. The court finds that there was no  
3 evidence presented showing that the informant was required to  
4 testify as part of a plea bargain. Thus, Zamora has failed to  
5 prove that further investigation would have revealed any  
6 additional evidence.

7           Petitioner also asserted that counsel was ineffective  
8 in not requesting an instruction to the effect that the testimony  
9 of an informant should be viewed with caution. In the order  
10 dismissing appeal, the Court held that the lack of such an  
11 instruction was harmless and would not have affected the outcome  
12 of the case. This court agrees with that ruling and finds that  
13 there is no likelihood that such an instruction would have  
14 altered the verdict, and thus, there can be no prejudice flowing  
15 from the failure of counsel to request the instruction.

16           The court notes that Dailey testified in the habeas  
17 corpus hearing that she was motivated to work as an informant by  
18 the promise of a police officer that she would receive probation.  
19 The court need not pass on the accuracy of that testimony because  
20 it does not alter the conclusion that the lack of an instruction  
21 concerning the credibility of an informant did not affect the  
22 outcome of the trial.

23           Petitioner alleged that counsel was ineffective in  
24 failing to investigate and find a witness named "Victor." The  
25 court notes that "Victor" was not presented at the habeas corpus  
26 hearing, and the court has heard no credible evidence

1 establishing that such a person existed, or that he would have  
2 provided any exculpatory evidence.

3           Petitioner alleged that he was not advised of his right  
4 to testify or the advantages or disadvantages of testifying at  
5 the trial. The court finds as a matter of fact that petitioner  
6 was fully advised of the right and made his own decision to  
7 refrain from testifying.

8           Petitioner also alleged that counsel was ineffective in  
9 failing to explain the possible advantages of providing  
10 substantial assistance to police. The advantage is found in NRS  
11 453.3405. On this subject the court heard from police officer  
12 Leya.<sup>1</sup> He testified credibly that when Zamora was arrested he  
13 fully explained the advantages of rendering substantial  
14 assistance, but that Zamora was adamant in his refusal to  
15 cooperate. The court finds that Zamora would not have changed  
16 his mind if only his attorney had provided the same type of  
17 information.

18           The court also notes the absence of evidence that  
19 Zamora was able to render substantial assistance. Even if he was  
20 willing, there is no evidence by which the court can conclude  
21 that he was able to meet the requirements of NRS 453.3405.

22           Petitioner also claimed that his counsel was  
23 ineffective at sentencing in not presenting additional mitigating  
24 evidence. Because Zamora received the minimum available

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26 <sup>1</sup>Attorney Giese did not testify at the habeas corpus hearing  
as he was unavailable due to poor health.

1 sentence, the court concludes that no additional mitigating  
2 evidence could have affected the outcome of the sentencing  
3 hearing.

4 Petitioner also claimed that appellate counsel was  
5 ineffective in failing to argue that the evidence of Zamora's  
6 guilt was insufficient to sustain the conviction. Given the  
7 finding by the Supreme Court that the evidence was  
8 "overwhelming," this court is persuaded that the Supreme Court  
9 would also have found the evidence to be sufficient.

10 One who claims ineffective assistance of counsel must  
11 bear the burden of demonstrating that counsel's performance fell  
12 below an objective standard of reasonableness and that, but for  
13 counsel's failings, the result would likely have been different.  
14 Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80  
15 L.Ed.2d 674 (1984); State v. Love, 109 Nev. 1136, 1139, 865 P.2d  
16 322, 323 (1993). A court may consider the two test elements in  
17 any order and need not consider both prongs if the defendant  
18 makes an insufficient showing on either one. Strickland, 466  
19 U.S. at 697, 104 S.Ct. at 2069. The court finds that petitioner  
20 Zamora has failed to meet his burden of proof and therefore,  
21 except as noted above pertaining to the fine, the petition for  
22 writ of habeas corpus is denied.

23 DATED this 18 day of January, 2000.

24  
25 Connie J. Steinheimer  
26 DISTRICT JUDGE