

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO JAVIER RECENDIZ-PEREZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36939

FILED

FEB 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
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.

On July 22, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of abuse or neglect of a child with substantial bodily harm, a violation of NRS 200.508. The district court sentenced appellant to serve a term of 80 months to 240 months in the Nevada State Prison. This court dismissed appellant's direct appeal. *Recendis-Perez v. State*, Docket No. 30821 (Order Dismissing Appeal, November 18, 1999).

On March 20, 2000, appellant filed a proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court elected to appoint counsel to represent appellant and to conduct an evidentiary hearing. On

October 9, 2000, the district court denied appellant's petition. This appeal followed.¹

In this appeal, appellant claims that his trial counsel rendered ineffective assistance by (1) failing to conduct proper pre-trial investigations, (2) failing to present at trial appellant's explanation of what occurred, and (3) failing to call witnesses at sentencing.

A claim of ineffective assistance of counsel is a mixed question of law and fact subject to independent review.² Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review so long as they are supported by substantial evidence and are not clearly wrong.³

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 that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁴ There is a presumption that counsel provided effective assistance unless petitioner demonstrates

¹We note that appellant is represented by counsel in this appeal.

²See *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

³See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁴See *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984).

circumstances to the contrary.⁵ Furthermore, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."⁶ Finally, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁷

Our review of the record reveals that the district court did not err in denying appellant's petition. The district court found that trial counsel spent 85-95 hours preparing for trial, spoke to two doctors and a pathologist about the child's injuries, and hired an investigator to investigate the circumstances of the child's injuries. Thus, a reasonable investigation was made in preparation for trial, and counsel's performance was not deficient.

The district court further found that trial counsel advised appellant not to take the witness stand, and that counsel sought to avoid putting appellant's character at issue because appellant's criminal history would do harm to his case. Counsel's advice to appellant not to testify was a tactical decision that is "virtually unchallengeable."⁸ We conclude that appellant has not demonstrated that counsel's performance was deficient.

⁵See Strickland, 466 U.S. at 689-91.

⁶Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

⁷Strickland, 466 U.S. at 697.

⁸See Howard, 106 Nev. at 722, 800 P.2d at 180.

Finally, the district court found that the sentencing court received thirty letters from appellant's friends and family attesting to appellant's good character, and that live witnesses, instead of the letters, would not have changed the sentence imposed. We conclude that appellant was unable to show that he was prejudiced by counsel's decision not to call live witnesses at sentencing and therefore, counsel did not render ineffective assistance of counsel.

Having reviewed the record and appellant's assignments of error, we conclude that the district court did not err, and we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Rose, J.
Rose

Becker, J.
Becker

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Marvel & Kump, Ltd.
Elko County Clerk