IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CESAR GARCIA-RODRIGUEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 76659-COA
CESAR GARCIA-RODRIGUEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 76780-COA

FILED
JUN 11 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a second amended judgment of conviction (Docket No. 76659) and a district court order denying a postconviction petition for a writ of habeas corpus (Docket No. 76780). Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Procedural history

Cesar Garcia-Rodriguez pleaded guilty to second-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle. He was sentenced to three consecutive prison terms totaling life with the possibility of parole after 22 years. And his judgment of conviction was affirmed on direct appeal. *Garcia-Rodriguez v. State*, Docket No. 61645 (Order of Affirmance, September 18, 2013).

Garcia-Rodriguez filed a postconviction petition for a writ of habeas corpus, counsel was appointed to assist him with his postconviction proceedings, and counsel filed a supplemental habeas petition. The State

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moved to dismiss the petition and supplemental petition, arguing the petitions were procedurally barred because they were not timely filed. The district court found good cause to overcome the petitions' procedural defect, and it denied the State's motion to dismiss without prejudice.

Garcia-Rodriguez subsequently filed a motion to amend his supplemental petition and, curiously, a supplemental opposition to the State's motion to dismiss. The State replied to the supplemental opposition and resubmitted its motion to dismiss for a decision. The district court denied the State's motion to dismiss without prejudice and it granted Garcia-Rodriguez' motion to amend his supplemental petition.

The State then filed a renewed motion to dismiss the petition, Garcia-Rodriguez opposed the motion to dismiss, and the district court set the petition for a hearing. The district court conducted an evidentiary hearing, determined that a new sentencing hearing was the appropriate remedy for Garcia-Rodriguez' presentence-investigation-report claims,[1] rejected Garcia-Rodriguez' ineffective-assistance-of-counsel claims, and implicitly denied the State's motion to dismiss by reaching the merits of Garcia-Rodriguez' claims.

Thereafter, the district court conducted a new sentencing hearing, resolved the alleged discrepancies in the presentence investigation report, and sentenced Garcia-Rodriguez to prison terms identical to those in the original judgment of conviction. The district court entered an amended judgment of conviction and an order denying Garcia-Rodriguez'

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[1]As neither party challenges the district court's decision to conduct a new sentencing hearing to resolve Garcia-Rodriguez's presentence-investigation-report claims, we express no opinion as to the propriety of this remedy.

postconviction habeas petition and supplemental petitions. These appeals follow.

Abuse of discretion at sentencing

Garcia-Rodriguez claims the district court abused its discretion at sentencing by relying upon suspect evidence to impose the same sentence that was imposed years earlier in the original judgment of conviction. He appears to argue he was prevented from telling the district court about his life since his incarceration, the district court believed he was a liar, and the district court believed he committed first-degree murder. And he asserts his sentence was "extreme" because his prison terms were imposed to run consecutive to one another.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The district court sentenced Garcia-Rodriguez to life with the possibility of parole for the murder, 96 to 240 months for the use of a deadly weapon, and 48 to 180 months for discharging a firearm from a vehicle. These prison terms fall within the parameters of the relevant statutes. *See* NRS 193.165(1); NRS 200.030(5)(a); NRS 202.287(1)(b). Garcia-Rodriguez has not demonstrated that the district court relied solely on impalpable or highly suspect evidence. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). And NRS 176.035(1) plainly gives the district court discretion to run subsequent prison terms consecutively. *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015).

Moreover, the record demonstrates Garcia-Rodriguez asked the district court to follow the parties' plea agreement and the district court imposed the sentence the parties stipulated to in their plea agreement. We conclude the district court did not abuse its discretion at sentencing.

Cruel and unusual punishment

Garcia-Rodriguez claims his sentence constitutes cruel and unusual punishment because it is greater than necessary to satisfy society's interests and it shocks the conscience because evidence demonstrates a total of twenty shots were fired but only four of these shots came from his gun.

Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Garcia-Rodriguez' sentence falls within the parameters of the relevant statutes, and he does not allege that any of these statutes are unconstitutional. *See* NRS 193.165(1); NRS 200.030(5)(a); NRS 202.287(1)(b). We note the record demonstrates that Garcia-Rodriguez fired four shots and one of his shots killed a man. And we conclude the sentence imposed is not so grossly disproportionate to his crimes so as to constitute cruel and unusual punishment.

Ineffective assistance of counsel

Garcia-Rodriguez claims the district court erred by denying his ineffective-assistance-of-counsel claims. He argues defense counsel was ineffective for failing to discuss the available defenses; explain the difference between first-degree murder, second-degree murder, and

manslaughter; litigate the motion to suppress he filed in the district court; and make a reasonable investigation in preparation for trial. He further asserts counsel's failure to investigate caused him to feel pressured into accepting the State's plea offer.[2] The State claims Garcia-Rodriguez' postconviction habeas petition was untimely filed and consequently it was procedurally barred.

Garcia-Rodriguez' petition was untimely because it was filed on November 3, 2014, more than one year after the remittitur on direct appeal was issued on October 14, 2013. *See* NRS 34.726(1). Consequently, Garcia-Rodriguez' petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* And the district court was required to apply the statutory procedural default rules to his postconviction habeas petition. *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

The district court erred by failing to properly apply the procedural bar to Garcia-Rodriguez' petition. However, as discussed below, we affirm the judgment of the district court because it reached the right result, albeit for the wrong reason. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Initially, we reject the notion that Garcia-Rodriguez demonstrated good cause to excuse the delay in filing his petition because he did not demonstrate an impediment external to the defense prevented him from complying with the procedural bars. *See Hathaway v. State*, 119

[2]To the extent Garcia-Rodriguez claims he did not understand the possible sentences he faced by entering his guilty plea, he did not raise this claim in the court below and we decline to consider it for the first time on appeal. *See Rimer v. State*, 131 Nev. 307, 328 n.3, 351 P.3d 697, 713 n.3 (2015).

Nev. 248, 252, 71 P.3d 503, 506 (2003). However, even assuming Garcia-Rodriguez had demonstrated cause for the delay in filing his petition, he was still required to show he would be unduly prejudiced by the dismissal of his petitions.

"A showing of undue prejudice necessarily implicates the merits of the . . . claim." *Rippo v. State*, 134 Nev., Adv. Op. 53, at *12-13, 423 P.3d 1084, 1097 (2018). To establish ineffective assistance of counsel, a petitioner who has been convicted pursuant to a guilty plea must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that there is a reasonable probability, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 997-88, 923 P.2d 1102, 1107 (1996). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the district court's factual findings if they are supported by substantial evidence and are not clearly wrong, but we review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Although the district court did not specifically address the procedural bar, the district court did address the merits of Garcia-Rodriguez' ineffective-assistance-of-counsel claims. The district court conducted an evidentiary hearing and made the following findings: Defense counsel adequately discussed all possible defenses with Garcia-Rodriguez. Counsel explained all the elements of first-degree murder and all lesser-included offenses of that crime to Garcia-Rodriguez, and Garcia-Rodriguez understood counsel's explanations. Counsel was not ineffective for failing

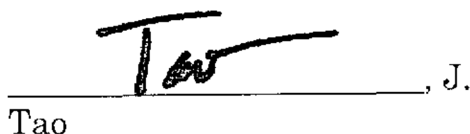
to litigate the motion to suppress because Garcia-Rodriguez wanted to take advantage of the State's plea offer of second-degree murder. And counsel went through all of the discovery with Garcia-Rodriguez and thoroughly discussed the discovery with Garcia-Rodriguez in relation to Garcia-Rodriguez' version of the events.

We conclude the district court's findings are supported by substantial evidence and are not clearly wrong, and Garcia-Rodriguez failed to demonstrate defense counsel was ineffective. *See Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance); *see also Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable). Because, as the district court found, Garcia-Rodriguez' ineffective-assistance-of-counsel claims lacked merit, he necessarily failed to establish undue prejudice to overcome the procedural bar. Accordingly, we affirm the district court's denial of his petition.

Having concluded Garcia-Rodriguez is not entitled to relief, we

ORDER the second amended judgment of conviction and the district court order denying Garcia-Rodriguez' postconviction petition for a writ of habeas corpus AFFIRMED.

_______________, C.J.
Gibbons



_______________, J.
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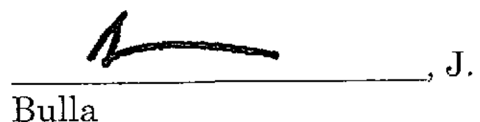

_______________, J.
Bulla

cc: Hon. Egan K. Walker, District Judge
Karla K. Butko
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Washoe County District Attorney
Washoe District Court Clerk