

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37127

FILED

MAR 07 2002

ORDER OF AFFIRMANCE

JAMETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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

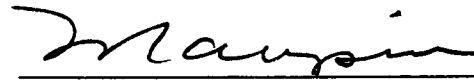
In the petition filed below, Hernandez presented claims of ineffective assistance of trial and appellate counsel. The district court found that his counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹ Hernandez has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Hernandez has not demonstrated that the district court erred as a matter of law.

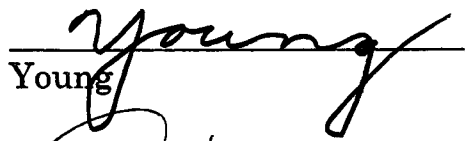
We have reviewed the record on appeal, and for the reasons set forth in the attached order of the district court, conclude that the

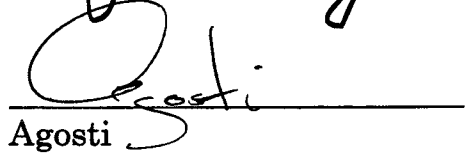
¹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

district court properly denied Hernandez' petition. Therefore, briefing and oral argument are unwarranted in this case.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Agosti

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Lazaro Hernandez
Clark County Clerk

²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

1 **ORDR**
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

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Nov 29 2 45 PM '00
Shirley E. Longman
CLERK

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
8 Plaintiff,

9 -vs-

10 LAZARO HERNANDEZ,
11 #0987319

12 Defendant.

Case No.. C138406
Dept. No. V
Docket H

14 FINDINGS OF FACT, CONCLUSIONS OF
15 LAW AND ORDER

16 DATE OF HEARING: 11-13-00
17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable JEFFREY SOBEL,
19 District Judge, on the 13th day of November, 2000, the Petitioner not being present, in proper
20 person, the Respondent being represented by STEWART L. BELL, District Attorney, by and
21 through MICHAEL SCHWARZ, Deputy District Attorney, and the Court having considered the
22 matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now
23 therefore, the Court makes the following findings of fact and conclusions of law:

24 FINDINGS OF FACT

25 1. On September 20, 1996, Defendant, was charged by way of Indictment with one
26 count of Murder of the First Degree With Use of a Deadly Weapon and one count of Attempt
27 Murder With Use of a Deadly Weapon. On May 30, 1997, Defendant filed a Motion in proper
28 person to Dismiss his Attorney. The court denied the motion. A jury trial began on July 9, 1997
29 wherein Defendant was ultimately found guilty of the crime of Murder of the First Degree With

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1 Use of a Deadly Weapon and not guilty of Attempt Murder With Use of a Deadly Weapon.

2 2. Defendant was sentenced to Life Without the Possibility of Parole as to First
3 Degree Murder and a consecutive term of Life Without the Possibility of Parole as to Use of a
4 Deadly Weapon and was given credit for time served. A Judgment of Conviction was filed on
5 September 25, 1997.

6 3. Defendant filed a timely appeal from his conviction raising a single contention that
7 the prosecutor committed misconduct during closing arguments in the penalty phase. The
8 Nevada State Supreme Court denied this appeal and issued a remittitur on November 9, 1999.

9 4. Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction)
10 on August 9, 2000, raising five issues: Claim I (Ineffective Assistance of Appellate Counsel);
11 Claim II (Error by the District Court for Denying a Motion to Dismiss Attorney); Claim III
12 (Ineffective Assistance of Trial Counsel); Claim IV (District Court Denied Defendant the Right
13 to Represent Himself at Trial); Claim V (Error by the District Court for Failing to Conduct a
14 Batson Inquiry).

15 5. Defendant's appellate counsel was not ineffective for failing to raise the issues in
16 Claims II, IV, and V because each of the issues would not have been meritorious had they been
17 raised.

18 6. Prior to trial, Defendant's Motion to Dismiss Attorney, filed in proper person, was
19 denied.

20 7. In response to Defendant's request to represent himself at trial, the district court
21 in this case conducted a complete canvass of Defendant to properly ascertain whether he was
22 knowingly and intelligently electing self-representation. The district court informed the
23 Defendant of some of the dangers, disadvantages and consequences of self-representation.

24 8. The court properly informed Defendant that self-representation is often unwise and
25 that a Defendant may conduct a defense to his own detriment; that Defendant is responsible for
26 knowing and complying with the same procedural rules as attorneys and may not seek help from
27 the court; that Defendant may not be allowed to complain on appeal about the competency or
28 effectiveness of his own representation; that the State will be represented by experienced

1 professional counsel who will have the advantage of skill, training, and ability; that Defendant
2 is not entitled to any special library privileges; that a Defendant who is unfamiliar with the legal
3 procedures may allow the prosecutor an advantage, may not make effective use of legal rights,
4 and may make tactical decisions that have unintended consequences; and that the effectiveness
5 of Defendant's defense may well be diminished by a dual role as attorney and accused.

6 9. The district court further questioned Defendant regarding his age, education,
7 literacy, background, and prior experience and training with legal proceedings; his health and
8 whether he was taking any medications or was under the influence of any alcohol or other drug;
9 his mental health history; whether he had ever been threatened or coerced in any way to waive
10 his right to an attorney. The Defendant responded that he "went up to high school" and had
11 "read a lot" and knew about law "because [he has] respected them and [he knew] about them."

12 10. In relation to the offense charged, the district court queried Defendant on whether
13 he understood what the State had to prove in a murder case and what the elements were for
14 murder and attempted murder and specifically if he understood what malice aforethought,
15 premeditated, and deliberate meant. Defendant's response was insufficient to demonstrate an
16 understanding of the elements of the offense and the court noted, "See, you don't know the
17 elements that the State has to prove." The court also asked Defendant if he understood the
18 possible lesser penalties that may be imposed and whether he understood that he could be found
19 guilty of the lesser crimes of second degree murder, or voluntary manslaughter. Defendant
20 shook his head and the court noted that was a problem.

21 11. Finally, the district court found Defendant was not competent to waive his
22 constitutional right to be represented by his attorney; that he was not competent to represent
23 himself, even though he may freely and voluntarily want to do it, and did not have a full
24 appreciation and understanding the waiver of his consequences.

25 12. Defendant raised a Batson challenge against the State's use of a peremptory
26 challenge of Ms. Dziadon. The court accepted the prima facie showing and turned to the State
27 for a race neutral explanation for the challenge. The prosecutor provided a race neutral
28 explanation that Ms. Dziadon indicated she spoke Spanish and "we didn't want anybody on the

1 jury speaking Spanish because we were going to have an interpreter throughout this trial and we
2 felt that might confuse [sic] with the interpreter's rendition [sic] what is said is different
3 somebody who's fluent in Spanish, there may be some problems." (Petition, Exh. E, pg. 215,
4 1-7).

5 13. Defendant asserted no specific deficiencies by his trial counsel, thus he has failed
6 to demonstrate his trial counsel was constitutionally ineffective.

7 CONCLUSIONS OF LAW

8 1. The United States Supreme Court has held that there is a constitutional right to
9 effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey,
10 469 U.S. 395, 397, 105 S.Ct. 830, 836-837 (1985); *see also* Burke v. State, 110 Nev. 1366, 1368,
11 887 P.2d 267, 268 (1994).

12 2. The federal courts have held that in order to claim ineffective assistance of
13 appellate counsel the defendant must satisfy the two-prong test of Strickland by demonstrating
14 that (1) counsel's representation fell below an objective standard of reasonableness, and (2) that
15 but for counsel's errors, there was a reasonable probability that the result of the proceedings
16 would have been different. *See* Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068;
17 Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d
18 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). 3 .

19 In order to prove that appellate counsel's alleged errors were prejudicial, the defendant
20 must show that the omitted issues would have had a reasonable probability of success on appeal.
21 *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

22 4. Defendant has failed to establish that the issues omitted by his appellate counsel
23 from his direct appeal would have had a reasonable probability of success on appeal. Therefore,
24 Defendant's appellate counsel was not constitutionally ineffective and this issue is dismissed.

25 5. Defendant's Claim II, alleging error by the District Court in denying Defendant's
26 motion to dismiss his attorney, is procedurally barred as it could have been, but was not raised
27 in Defendant's direct appeal. NRS 34.810(1)(b)(2). Despite Defendant's allegation of
28 ineffective assistance of appellate counsel for failing to raise the issue, I find no good cause for

1 the failure to present the grounds and I find no actual prejudice to Defendant. NRS
2 34.810(1)(b).

3 6. Furthermore, I find the underlying claim of error would have been meritless had
4 it been raised on appeal. "A defendant is not entitled to reject his court-appointed counsel and
5 request substitution of other counsel at public expense absent a showing of adequate cause for
6 such a change." Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674 (1978), quoting Junior v.
7 State, 91 Nev. 439, 441, 537 P.2d 1204 (1975).

8 7. The trial court has the discretion to determine whether a defendant has made an
9 adequate showing and this decision should not be disturbed on appeal in the absence of a clear
10 showing of abuse. Id. at 608, citing Good v. United States, 378 F.2d 934, 935 (9th Cir. 1967).

11 8. Failure to conduct an inquiry into an alleged conflict of interest between a
12 defendant and his attorney is not automatic grounds for reversal without a further showing of
13 prejudice. Barnes v. State, 98 Nev. 367, 369, 649 P.2d 1359 (1982).

14 9. Defendant's dissatisfaction with his counsel's advice to plead guilty is also not
15 sufficient cause for substitution of counsel. Thomas v. State, 94 Nev. at 608, citing People v.
16 Norman, 60 Cal. Rptr. 609, 626 (Cal.App. 1967).

17 10. In this case, I find Defendant has failed to demonstrate any abuse of discretion by
18 the court in the denial of his Motion to Dismiss Attorney. Finding no merit in the underlying
19 allegation, I find Defendant suffered no prejudice by his appellate counsel's decision not to
20 include this claim in the direct appeal. Thus, Defendant has failed to establish ineffective
21 assistance of counsel and this claim is dismissed.

22 11. In Nevada, this court has held that "claims of ineffective assistance of counsel
23 must be reviewed under the 'reasonably effective assistance' standard articulated by the [United
24 States Supreme] Court in Strickland, . . . which requires a defendant to show that counsel's
25 assistance was 'deficient' and that the deficiency prejudiced the defense." Bennett v. State, 111
26 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

27 12. "In meeting the 'prejudice' requirement, the defendant must show a reasonable
28 probability that, but for counsel's errors, the result of the trial would have been different. . . . 'A

1 reasonable probability is a probability sufficient to undermine confidence in the outcome.”
2 Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

3 13. Defendant’s allegations, consisting solely of claims of error by the district court
4 in failing to conduct a *voir dire* into an alleged conflict of interest between Defendant and his
5 counsel, are insufficient to establish deficient performance by Defendant’s trial counsel.
6 Without even an allegation of deficiency, an ineffective assistance of trial counsel claim has not
7 been supported. I find no deficient performance by trial counsel and no prejudice to Defendant.
8 Accordingly, this claim is dismissed.

9 14. Defendant’s Claim IV, alleging error by the District Court in denying his right to
10 represent himself at trial, is procedurally barred as it could have been, but was not, raised in
11 Defendant’s direct appeal. NRS 34.810(1)(b)(2). Despite Defendant’s allegation of ineffective
12 assistance of appellate counsel for failing to raise the issue, I find no good cause for the failure
13 to present the grounds and I find no actual prejudice to Defendant. NRS 34.810(1)(b).

14 15. Furthermore, I find the underlying claim of error would have been meritless had
15 it been raised on appeal. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562
16 (1975), the United States Supreme Court recognized a defendant’s Sixth Amendment right to
17 represent himself. Waiver of the right to counsel must be made “competently and intelligently.”
18 Id. at 835.

19 16. “The test of a valid waiver is not whether specific warning or advisements were
20 given but whether the record as a whole demonstrates that the defendant understood the
21 disadvantages of self-representation, including the risks and complexities of the particular case.”
22 Arajakis v. State, 108 Nev. 976, 980, 843 P.2d 800 (1992); quoting People v. Bloom, 774 P.2d
23 698 (Cal. 1989), *cert. denied*, 449 U.S. 1039 (1990).

24 17. I find the canvass of Defendant was extensive and proper and the decision of the
25 court to deny Defendant’s waiver of counsel supported by Defendant’s responses. I further find
26 Defendant was not sufficiently competent to understand and appreciate the nature of his waiver
27 decision. It is evident Defendant did not fully understand what he was doing, nor was his choice
28 made with a full understanding of the consequences, especially in light of the complex nature

1 of the charges against him. As such, I find no error in the district court's ruling.

2 18. Finding no error in this ruling, I also find that had this issue been raised on appeal,
3 it would not have been meritorious. As such, I conclude that Defendant suffered no prejudice
4 by the failure of his appellate counsel to raise this issue. Defendant has failed to establish
5 ineffective assistance of his appellate counsel. Therefore, this issue is dismissed.

6 19. Defendant's Claim V, alleging error by the District Court in failing to conduct a
7 Batson inquiry, is also procedurally barred as it could have been, but was not raised in
8 Defendant's direct appeal. NRS 34.810(1)(b)(2). Despite Defendant's allegation of ineffective
9 assistance of appellate counsel for failing to raise the issue, I find no good cause for the failure
10 to present the grounds and I find no actual prejudice to Defendant. NRS 34.810(1)(b).

11 20. Furthermore, I find the underlying claim of error would have been meritless had
12 it been raised on appeal. "The State's privilege to strike individual jurors through peremptory
13 challenges, is subject to the commands of the Equal Protection Clause." Batson v. Kentucky,
14 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). "The Equal Protection Clause
15 forbids the prosecutor to challenge potential jurors solely on account of their race. . ." Id.

16 21. Batson establishes a three part process for evaluating a claim that the prosecutor
17 has violated the Equal Protection Clause by use of a peremptory challenge. First, a defendant
18 must bear the burden and establish a prima facie case of purposeful discrimination. Id. at 93.
19 The prima facie case may be established solely on evidence concerning the prosecutor's use of
20 a peremptory challenge at trial. Id. at 96. Second, "[o]nce the defendant makes a prima facie
21 showing, the burden shifts to the State to come forward with a neutral explanation for
22 challenging black jurors," although the "prosecutor's explanation need not rise to the level of
23 justifying exercise of a challenge for cause. Id. at 97. Third, the trial court must determine if
24 the defendant has established purposeful discrimination. Id. at 98.

25 22. I find the court did not err in accepting the State's race neutral explanation for
26 challenging Ms. Dziadon as a potential juror and finding no purposeful discrimination. An
27 uncertainty that Spanish speaking jurors would be able to listen and follow the interpreter and
28 accept the interpreter as the final arbiter of what was said by each of the witnesses is a sufficient

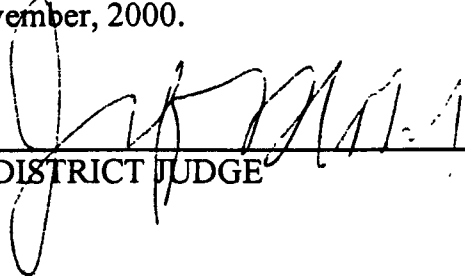
1 race-neutral explanation for the use of a peremptory challenge. Hernandez v. New York, 500
2 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

3 23. Finding no merit in the underlying claim, the Defendant has failed to demonstrate
4 any prejudice from his appellate counsel's decision not to raise this issue in the direct appeal.
5 Accordingly, Defendant's claim for ineffective assistance of appellate counsel is denied.

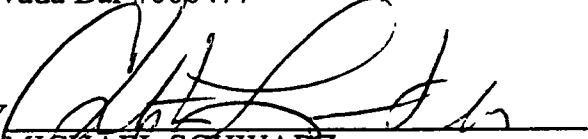
6 ORDER

7 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
8 shall be, and it is, hereby denied.

9 DATED this 2 day of November, 2000.

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12 _____
DISTRICT JUDGE

13 STEWART L. BELL
14 DISTRICT ATTORNEY
15 Nevada Bar #000477

16 BY 
17 MICHAEL SCHWARZ
18 Deputy District Attorney
19 Nevada Bar #005126
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