IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MAGDALENO RODRIGUEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38257

FILED

DEC 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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.

In the 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.[1] Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. 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, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

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

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(O)-4892

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Carmine J. Colucci & Associates
Clark County Clerk

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSE MAGDALENO RODRIQUEZ,
#1523594

Defendant.

Case No.. C158918
Dept. No. XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 5-23-01
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable SALLY LOEHRER, District Judge, on the 23rd day of May, 2001, the Petitioner not being present, represented by CARMINE COLUCCI, Esq., the Respondent being represented by STEWART L. BELL, District Attorney, by and through H. LEON SIMON, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The facts are undisputed that the Defendant, Jose Magdaleno Rodriquez, on March 1, 1999 had a gun in his possession, and that he fired the gun at a police officer in his patrol car six times. The officer's car had six bullet holes in it, and numerous shell casings were recovered from the scene. The police officer was responding to a call of shots fired, where the Defendant

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was shooting a firearm at a brick wall in an alleyway. As the officer approached in his patrol car, the Defendant raised the gun and fired several shots at the officer, which struck the officers car, one of which struck the officer in his upper body. In an attempt to save his own life, the officer accelerated, striking the Defendant. The Defendant landed on the hood of the patrol car and again raised the gun and began shooting through the windshield at the officer. One of the latter shots struck the officer in the thigh. The officer proceeded down the alleyway and struck a utility pole to knock the Defendant off his car. The officer then drove his car to a distance of relative safety. A second officer responding to the scene, upon seeing the Defendant lying on the ground with the gun still in his hand, parked his patrol car over the Defendant to avoid being shot himself.

2. The Defendant was convicted following a plea of guilty to two counts of Attempted Murder With Use of a Deadly Weapon. The Defendant was sentenced to seventy-two (72) to two hundred and forty (240) months in the Nevada Department of Prisons for each count to run consecutively. The Defendant was also sentenced to two equal and consecutive sentences for use of a deadly weapon. Judgment of Conviction was filed on August 26, 1999.

3. On June 21, 2000, the Defendant filed a Petition for Writ of Habeas Corpus. On August 17, 2000, the State filed an Opposition to Petition for Writ of Habeas Corpus. The parties stipulated and agreed to extend the briefing schedule and to reschedule argument several times, the last of which set the hearing date for March 28, 2001.

4. On January 16, 2001, the Defendant filed a Points and Authorities in Support of Petition for Writ of Habeas Corpus. On March 15, 2001, the State filed a Supplemental Brief in Support of State's Opposition to Defendant's Petition for Writ of Habeas Corpus.

5. On March 28, 2001, this matter came before the court, wherein defense counsel stated that he had received reports from a hospital in Guadalajara, Mexico and requested additional time. The matter was continued until May 23, 2001 when the Court heard oral argument.

6. Defendant's trial counsel was not ineffective.

7. The Defendant was competent to assist in his defense and understand the proceedings against him.

8. The Defendant was evaluated by three psychiatrists to determine his competence to proceed and was found to be competent at a competency hearing held on May 26, 1999.

9. From the competency hearing, and in the reports of the psychiatrists from their earlier evaluations, it is clear that the Defendant understood what he was doing when he committed the crime, could communicate that information to his attorney, and understood the legal system.

10. The Defendant was competent to waive his preliminary hearing and enter a knowing and voluntary plea. Since the Defendant was found to be competent at his May, 26, 1999 competency hearing, and he continued to see jail psychiatrist and take his medication, there is no indication that the Defendant was not competent to waive his preliminary hearing and negotiate a plea on June 14, 1999.

11. The plea the Defendant voluntarily entered into was proper. The Defendant was charged with six counts of Discharging a Weapon Where a Person Might be Endangered, six counts of Attempt Murder With Use of a Deadly Weapon, six counts of Discharging a Firearm at or into a Vehicle, and one count of Carrying a Concealed Weapon. The Defendant was facing a possible ninety-six to two hundred and fifty-three years in prison if he received the maximum and all sentences were run consecutively. The Defendant pleaded to two counts of Attempt Murder With the Use of a Deadly Weapon, for which he could have received only thirty-two to eighty years if he received the maximum and the sentences were run consecutively. Further, if the minimum sentences were imposed and run concurrently, the Defendant could have served only four years. Since the Defendant had no prior criminal history and Attempt Murder With Use of a Deadly Weapon is a probationable offense under 176A.100, it was possible for the court to suspend his sentence and give him probation.

12. Since the plea agreement negotiated by the defense attorney and freely, knowingly, and voluntarily entered into by the Defendant reduced the number of counts against him from nineteen to two, and substantially reduced the sentence the Defendant was facing, the plea agreement was reasonable and proper.

13. Given that the Defendant in this case was able to articulate the facts surrounding the commission of the crime, and not only had a good memory of the events but also understood his

own self-interest, counsel had no reason to conclude that insanity may have been a viable defense.

14. The fact that Defendant had been hospitalized in Mexico for nearly a year for mental problems approximately ten years prior to his competency hearing in the instant case would not have affected this Court's decision that he was competent to stand trial had it been disclosed to the Court at the competency hearing. The Court realized at the time of the hearing that Defendant had serious mental problems, but none the less found that he was legally competent to stand trial under the legal standards set forth below based on the evidence adduced at the hearing and the court's observations of the Defendant.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel, the Defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984); see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, Appellant must show first that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-88 & 694, 104 S.Ct. at 2065 & 2068.

2. In considering whether counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 847, 921 P.2d 278, 281 (1996); citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. Once this decision is made, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 847, 921 P.2d 281; citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 847, 921 P.2d 281; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

3. This court must begin with the presumption of effectiveness and then determine whether

or not Appellant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 108 Nev. 127, 141, 825 P.2d 600, 607 (1992); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551 F.2d at 1166. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

4. Defense counsel, who realized that Defendant had mental problems, performed above and beyond the effectiveness standard set forth in Strickland in that he caused Defendant to be examined by three experts, requested a competency hearing, and vigorously advocated on Defendant's behalf at the hearing.

5. The standard for ineffective assistance of counsel where the competency of the Defendant is in question is whether the defense attorney made a reasonable inquiry into the mental state of his client. Where there is substantial evidence that a client is suffering from a mental defect and such information is clearly relevant to the defense's theory of the case, counsel's failure to investigate the client's mental state constitutes deficient performance. Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995).

6. The standard for competency to stand trial is quite low. A defendant is competent to stand trial if he can communicate with counsel and understands the nature of the proceedings against him. See Iverson v. State, 107 Nev. 94, 807 P.2d 1372 (1991).

7. The Defendant has failed to meet the burden in Strickland to show that his attorney fell below the "reasonably effective" standard of an ordinary competent attorney. See Strickland,

466 U.S. at 686-87, 104 S.Ct. at 2063-64.

8. The Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to a charge, counsel cannot create one and may deserve the interests of his client by attempting a useless charade. See United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 2045 n.19 (1984). Indeed, an attorney is expected to adhere to at least the minimum professional standards in exercising his judgment over how to proceed with the case. The key to the above statement is the word "judgment." A defense attorney must make decisions over what avenues of defense to pursue. These decisions, in the absence of a clear derogation from professional standards will be respected. The Sixth Amendment does not require a defense attorney to pursue defenses that are not reasonably suggested by the apparent factual circumstances surrounding the crime charged or the subsequent demeanor and conduct of the client.

9. Nevada follows the M'Naughten test for criminal insanity. Ybarra v. State, 100 Nev.167, 172, 679 P.2d 797, 800 (1984). To establish insanity under that test, a defendant must prove by a preponderance of the evidence that he did not know the nature and quality of his acts or did not have the capacity to determine right from wrong. Clark v. State, 95 Nev. 24, 27-28, 588 P.2d 1027, 1029 (1979); Williams v. State, 85 Nev. 169, 451 P.2d 848 (1969); Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957); State v. Lewis, 20 Nev. 333, 22 P. 241 (1889). Briefly stated, this test provides:

> [I]f a man has capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and has the knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and should be held responsible for his acts . . .

Ford v. State, 102 Nev. 126, 136, 717 P.2d 27, 33 (1986).

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ORDER

Based upon the Findings of Fact and Conclusions of Law contained herein, it is hereby:

ORDERED, ADJUDGED, and DECREED that Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) is denied.

DATED this 11th day of July, 2001.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411