

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTURO TORRES OCHOA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38503

FILED

AUG 22 2002

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Arturo Torres Ochoa's post-conviction petition for a writ of habeas corpus.¹

Ochoa was convicted, pursuant to a jury verdict, of one count each of second degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. He was sentenced to serve terms totaling fifty years in the Nevada State Prison. This court affirmed Ochoa's judgment of conviction.² Ochoa filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Ochoa, and Ochoa filed a supplemental petition, which the State then opposed. The district court denied Ochoa's petition, and this appeal followed.

Ochoa's sole contention on appeal is that he received ineffective assistance from his trial counsel. Specifically, Ochoa contends that counsel failed to move for a mistrial, rather than a dismissal, when a

¹This appeal was previously consolidated with Docket No. 38294. Upon further review, we have discovered a jurisdictional defect in Docket No. 38294 and therefore elect to address these two appeals separately.

²Ochoa v. State, 115 Nev. 194, 981 P.2d 1201 (1999).

witness testified he had bought drugs from Ochoa, and that counsel then failed to request a cautionary instruction to the jury to reduce the potential prejudicial impact of that testimony.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 as to cause prejudice rendering the jury's verdict unreliable.⁴

In this case, Ochoa filed a pretrial motion to exclude testimony regarding the fact that he was a drug dealer. The district court excluded the testimony in part, but allowed a single witness named Harriman to testify about Ochoa's drug dealings. The district court reasoned that Harriman's testimony had particular relevance to the hostile interactions between Ochoa and the victim Luis Ortiz, leading up to Ochoa shooting Ortiz.⁵

At trial, however, when the State was cross-examining a defense witness named Peters, Peters stated that Ochoa "sold rocks," i.e., sold cocaine. Defense counsel's objection was sustained. Defense counsel moved to dismiss the case, alleging Peters's statement violated the pretrial ruling limiting testimony that Ochoa sold drugs. The district court observed that a motion for mistrial might have been a more

³Ochoa made other claims in his postconviction petition for a writ of habeas corpus before the district court, but he does not raise them on this appeal.

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

⁵Ochoa, 115 Nev. at 197, 981 P.2d at 1203.

appropriate request. The court proceeded to question the prosecutor about the incident out of the presence of the jury, and it determined Peters's statement about the drugs was inadvertent and not deliberately elicited by the prosecution. The district court then denied Ochoa's motion to dismiss and indicated it would give a cautionary instruction if defense counsel wished. Counsel did not request a cautionary instruction.

Ochoa claims that a mistrial would have been granted by the court if his counsel had requested it instead of a dismissal. Ochoa also claims that a cautionary instruction might have cured the problem, but counsel did not ask for it. This shows, according to Ochoa, that his counsel's performance fell below an objective standard of reasonableness. Ochoa also argues that he was prejudiced by the unsolicited testimony that Ochoa sold drugs because it weakened his defense to murder. Ochoa testified at trial that he was acting in self-defense against the attacks of Ortiz, a "crazed drug dealer" who was holding a baseball bat in a menacing manner. Therefore, he argues, he was prejudiced by counsel's deficient conduct. We disagree.

"Effective counsel does not mean errorless counsel, but rather counsel whose assistance is within the range of competence demanded of attorneys in criminal cases."⁶ We conclude that trial counsel acted reasonably in asking for a motion to dismiss rather than a mistrial. This court has held that a motion to dismiss for prosecutorial misconduct may be granted where the misconduct is clearly substantial and prejudicial.⁷ On direct appeal, this court considered Ochoa's claim of prosecutorial

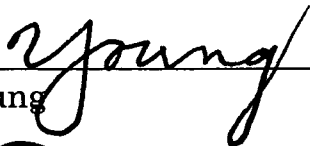
⁶Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quotation omitted).

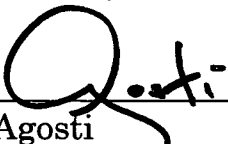
⁷Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996).


misconduct. Ochoa contended the prosecutor committed misconduct by eliciting Peters's statement. This court rejected that claim, concluding that the unsolicited drug reference was insubstantial and only slightly prejudicial.⁸ Therefore we conclude that Ochoa has met neither component of Strickland, and his claim of ineffective assistance of counsel must fail.

Having considered Ochoa's contention and concluded it lacks merit, we

ORDER the judgment of the district court affirmed.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Dempsey Roberts & Smith
William J. Taylor
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

⁸Ochoa, 115 Nev. at 201, 981 P.2d at 1206.