IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN MONTALVO MEDINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38719

FILED

JAN 0 7 2003

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 Adrian Medina's post-conviction petition for a writ of habeas corpus.

The district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit murder (Count I) and first-degree murder with the use of a deadly weapon (Count III). The district court sentenced appellant to a term of 24 to 72 months for Count I, to run concurrently with two consecutive terms of life imprisonment with the possibility of parole for Count III. This court dismissed appellant's appeal from his judgment of conviction.[1]

Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus in the district court. Retained counsel

[1]Medina v. State, Docket No. 32131 (Order Dismissing Appeal, December 20, 1995).

03-00299

filed a supplement, and the State filed an opposition. After hearing argument, the district court denied the petition. This appeal followed.

Appellant's sole contention on appeal is that his trial counsel was ineffective in failing to object to the following statement by the district court:

> Well, again, the law is that in . . . proving a conspiracy, you don't have to have express formal agreements, everything could be inferred, and certainly in this particular case, I'm going to deny [defense counsel's] objection and I'm going to allow the question. I think a conspiracy, at least for this purpose, has been established.

Appellant argues that in so responding to his trial counsel's objection, the district court improperly stated, in the presence of the jurors, its belief that a conspiracy had been established.

On direct appeal, appellant argued that "the district court committed plain error in stating that a conspiracy had been established for the purposes of the co-conspirator exception to the hearsay rule."[2] In rejecting this claim, we stated that, "particularly in its context," the statement did not give rise to plain error.[3] We did not consider, however, whether trial counsel's failure to object constituted ineffective assistance, and we will therefore reach the merits of appellant's instant claim.

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[2]Medina, Docket No. 32131 at 1 n.1

[3]Id.

Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.[4] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors prejudiced the defense.[5] To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.[6]

We conclude that appellant is not entitled to relief on his claim. First, trial counsel's failure to object to the district court's statement was not objectively unreasonable. It is clear from the context in which the district court made the statement that it related to the court's belief that sufficient evidence of a conspiracy existed for the limited purpose of admitting testimony under the "co-conspirator" exception to the hearsay rule.[7] The district court did not imply that a conspiracy had been

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[4]466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[5]Strickland, 466 U.S. at 687.

[6]Id. at 694.

[7]See NRS 51.035(3)(e) (defining as nonhearsay any statement offered to prove the truth of the matter asserted where such statement is offered against a party and was uttered by a co-conspirator of that party during the course and in furtherance of the conspiracy).

established for purposes of convicting appellant of that charge, and the State did not rely on any such implications but vigorously argued the existence of a conspiracy in its closing argument. Moreover, because the district court did not imply that a conspiracy had been proved against appellant sufficient to convict him of that charge and the State presented substantial evidence of a conspiracy, appellant cannot demonstrate that he was prejudiced. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Kirk T. Kennedy
Clark County Clerk