

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY ROY SALAZAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39591

FILED

JAN 28 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying appellant Anthony Ray Salazar's post-conviction petition for a writ of habeas corpus.

On February 26, 2001, Salazar was convicted, pursuant to a nolo contendere plea,¹ of one count of coercion. The district court sentenced Salazar to serve a prison term of 12 to 72 months. Salazar did not file a direct appeal.

On January 28, 2002, Salazar filed a proper person post-conviction petition for a writ of habeas corpus, alleging that his guilty plea was not knowing and voluntary and that his counsel was ineffective. The State opposed the petition, and Salazar filed a reply to the State's opposition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel or to conduct an evidentiary hearing. On

¹Salazar pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

March 22, 2002, the district court denied Salazar's petition. Salazar filed the instant appeal.

In the petition, Salazar raised numerous claims of ineffective assistance of trial counsel. In order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.² A petitioner must also demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.³

First, Salazar contended that his trial counsel was ineffective in advising Salazar to waive his preliminary hearing. In particular, Salazar contended that his trial counsel failed to inform him of the purpose, benefits and function of the preliminary hearing, and that if he

²Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

³Hill, 474 U.S. at 59.

had done so, Salazar would not have waived that proceeding.⁴ Salazar's claims are belied by the record.⁵

At the waiver of preliminary hearing, the justice's court specifically asked Salazar whether he understood what was taking place and wished to unconditionally waive his preliminary hearing. Salazar responded in the affirmative to both questions. Moreover, the record of the proceeding reveals that Salazar's waiver of the preliminary hearing was made pursuant to plea negotiations reached with the State. Accordingly, the district court did not err in rejecting Salazar's claim that his counsel was ineffective in advising him to waive his preliminary hearing.

Second, Salazar contended that his trial counsel was ineffective in advising him to plead guilty. In particular, Salazar contended that his odds of acquittal were quite favorable because there was no physical evidence of or witnesses to the sexual assault, the victim refused medical attention, and admitted that, initially, she was asleep during the assault and thought she was dreaming it. The district court did not err in rejecting Salazar's claim.

⁴In a related argument, Salazar contended that, if he had exercised his right to a preliminary hearing, the charges against him would have been dismissed because the victim failed to appear at the scheduled hearing. The district court did not err in rejecting Salazar's contention because the failure of a witness to appear to testify at the preliminary hearing is grounds for a continuance of the proceeding and, therefore, would not have likely resulted in the dismissal of the criminal charges. See NRS 171.196(2); Bustos v. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971).

⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

We conclude that trial counsel's recommendation that Salazar plead guilty was a reasonable tactical decision in light of the evidence against Salazar⁶ and the substantial benefit he received in exchange for his nolo contendere plea.⁷ Particularly, the State dropped the sexual assault count, a crime punishable by up to a life prison term,⁸ and allowed Salazar to plead guilty to coercion, a crime punishable by up to six years in prison.⁹ At the sentencing hearing, trial counsel admitted that Salazar's case "was certainly a case that could go to trial" but explained "the risk was so heavy if [Salazar] were found guilty of the charge that [Salazar] chose to accept the State's offer of negotiation." Accordingly, the district court did not err in finding that trial counsel's recommendation that Salazar plead nolo contendere was a sound tactical decision.

⁶The State's case against Salazar consisted mainly of the victim's testimony, that Salazar, a man whom she did not know, had assaulted her while she was asleep in the seat next to him on a Greyhound bus. Specifically, the victim reported that she awoke and realized that Salazar had his hand up her dress and his finger in her vagina; she pushed his hand away and, once the bus arrived at its destination, informed the bus driver about the assault. The victim was employed as a social worker, and there is no indication that she had reason to fabricate the charges against Salazar. Salazar, on the other hand, had a prior criminal history.

⁷See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)) (stating that a strategy decision is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances"); see also Hurd v. State, 114 Nev. 182, 187-88, 953 P.2d 270, 273-74 (1998).

⁸See NRS 200.366

⁹See NRS 207.190.

Third, Salazar contended that his nolo contendere plea was invalid because his trial counsel and the district court coerced him into pleading nolo contendere. Salazar's claim is belied by the record.¹⁰ In the plea agreement, Salazar represented that he was satisfied with the legal services rendered by his counsel, and that he had not been made any promises or coerced into pleading nolo contendere. Likewise, at the plea canvass, Salazar informed the district court that his plea was freely and voluntarily made, and that he believed it was in his best interest. Thereafter, when Salazar expressed reluctance to plead guilty, the district court informed Salazar that entering a plea was a "serious matter" and continued the arraignment so that Salazar could reconsider his decision and discuss it with trial counsel.¹¹ Two days later, at the continued plea canvass, Salazar entered a nolo contendere plea, reiterating to the district court that he had discussed the case with trial counsel and understood what he was doing. Accordingly, the district court did not err in rejecting Salazar's claim that his trial counsel and the district court coerced him into pleading guilty.

Fourth, Salazar contended that his "plea was the ultimate product of counsel's negligent failure to investigate or to develop possible

¹⁰See Hargrove v. State, 100 Nev. at 502-03, 686 P.2d at 225.

¹¹Salazar also claimed the district court erred in failing to order a preliminary hearing pursuant to NRS 171.208 after Salazar expressed his actual innocence. We conclude that Salazar's contention lacks merit. Salazar unconditionally waived his right to a preliminary hearing and never asserted good cause for a remand for preliminary examination as required by NRS 171.208. Therefore, NRS 171.208 is inapplicable.

defenses to the charges against [Salazar].” Salazar’s claim fails for lack of specificity and is belied by the record.¹² Salazar failed to describe the exculpatory evidence trial counsel could have uncovered with further investigation. Additionally, in the signed plea agreement, Salazar represented that he discussed possible defenses and defense strategies with his counsel. Accordingly, the district court did not err in rejecting Salazar’s claim involving trial counsel’s failure to investigate.

Fifth, Salazar contended that his nolo contendere plea should be set aside because there was no factual basis for the plea. In particular, Salazar claimed that he was innocent of the crime, and that the State failed to produce any evidence from which the court could conclude Salazar was guilty. Salazar’s claim is belied by the record.¹³

At the plea canvass, the district court established a factual basis for the plea and resolved the conflict between Salazar’s entry of a nolo contendere plea and claim of actual innocence.¹⁴ In particular, the district court inquired:

I will accept the plea if you want to plead guilty under North Carolina versus Alford which says to the Court this, “I know how serious sexual assault is. I know [the victim] could come in and say that

¹²See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

¹³See id.

¹⁴Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982) (citing Alford, 400 U.S. at 38 n.10) (In accepting a nolo contendere plea, a district court “must determine that there is a factual basis for the plea, and . . . must further inquire into and seek to resolve the conflict between the waiver of trial and the claim of innocence.”).


'I was digitally penetrated.' I know that . . . there's a strong probability of conviction. And I don't want to go to trial on a very serious charge that could carry many more times a heavy punishment. But I want to plead guilty. I know what I'm doing, but I don't want admit that I did that." Is that the way you want to treat this?


Salazar responded in the affirmative. Additionally, in the signed plea agreement, Salazar admitted that the State could prove the facts supporting the elements of coercion. Accordingly, the district court did not err in finding that Salazar had entered a valid nolo contendere plea.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Salazar is not entitled to relief and that briefing and oral argument are not warranted.¹⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁶


Shearing, J.


Leavitt, J.


Becker, J.

¹⁵See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁶We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Jackie Glass, District Judge
Anthony Roy Salazar
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk