IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO SMITH PARRA A/K/A JULIO SMITH PARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40294

FILED

MAR 0 3 2003

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Julio Smith Parra's post-conviction petition for a writ of habeas corpus.

In the petition, Parra presented claims of ineffective assistance of counsel. The district court found that Parra's contentions were unsubstantiated and belied by the record, and that counsel was not ineffective.[1] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[2] Parra has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.

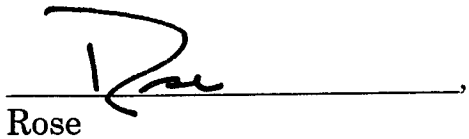
[1]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that petitioner not entitled to evidentiary hearing where factual allegations are belied or repelled by the record); see also NRS 34.770(1) (district court shall determine necessity of an evidentiary hearing).

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

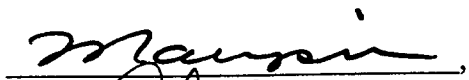
Moreover, Parra has not demonstrated that the district court erred as a matter of law.[3]

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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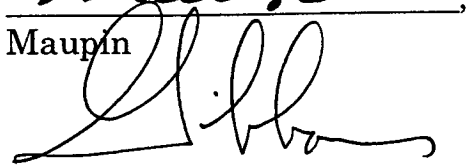

_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Hinds & Morey
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[3]See id.

ORIGINAL

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JULIO SMITH PARRA,
#1213170

Defendant.

Case No.. C160060
Dept. No. XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 07-22-02
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable SALLY LOEHRER, District Judge, on the 22nd day of July, 2002, the Petitioner not being present, represented by CRISTINA HINDS, ESQ., the Respondent being represented by STEWART L. BELL, District Attorney, by and through SANDRA K. DIGIACOMO, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts and documents on file herein, now therefore, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Julio Parra, hereinafter Defendant, was charged by way of Information with Possession of Stolen Vehicle (Count 1); Possession of Firearm by Ex-Felon (Count 2); Possession of Controlled Substance (Count 3); Burglary (Count 4); Robbery with use of a Deadly Weapon (Count 5); Burglary while in Possession of a Firearm (Count 6); Robbery with use of a Deadly Weapon (Count 7); Burglary while in possession of Firearm; and Attempt

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Robbery with use of a Deadly Weapon (Count 9). The Defendant's trial by jury commenced on November 29, 1999. On December 3, 1999, the Defendant was found guilty on all counts.

2. On February 9, 2000, the Defendant was sentenced as follows: on COUNT I a MINIMUM of SIXTEEN (16) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS and pay $2095.00 in RESTITUTION; Count II, to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of FORTY EIGHT (48) MONTHS, CONCURRENT WITH COUNT I; Count III, to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of FORTY EIGHT (48) MONTHS, CONCURRENT WITH COUNT II; Count IV, to a MINIMUM of SIXTEEN (16) and a MAXIMUM of SEVENTY TWO (72) MONTHS and pay $440.00 RESTITUTION, CONCURRENT TO COUNT III; Count V, to a MINIMUM of TWENTY SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS plus an equal and consecutive term of TWENTY SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon and pay $250.00 RESTITUTION, CONCURRENT TO COUNT IV; Count VI, to TWENTY SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS, CONCURRENT TO COUNT V; Count VII, to a MINIMUM of TWENTY SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS, plus an equal and consecutive TWENTY SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS, for the Use of a Deadly Weapon, CONSECUTIVE TO COUNTS I-VI; Count VIII, to a MINIMUM of TWENTY SIX (26) and a MAXIMUM of ONE HUNDRED TWENTY (120), CONCURRENT WITH COUNT VII, Count IX, to a MINIMUM of SIXTEEN (16) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS, plus an equal and consecutive SIXTEEN (16) MONTHS and SEVENTY TWO (72) MONTHS, for the Use of a Deadly Weapon, CONCURRENT TO COUNT VIII. The Defendant to received 241 days credit for time served. A Judgment of Conviction was filed on March 3, 2000.

3. On February 17, 2000, the Defendant filed a proper person Notice of Appeal. An order dismissing the Defendant's appeal because it was procedurally defective was filed on April 27, 2000. The Nevada Supreme Court issued its remittitur on May 23, 2000. The Defendant

subsequently filed a Fast Track Statement with the assistance of counsel. The Nevada Supreme Court ordered a full briefing on the issues raised in the Fast Track Statement. An order affirming the Defendant's conviction was filed on June 12, 2001 and the Nevada Supreme Court issued remittitur on July 10, 2001.

4. The Defendant filed a petition for writ of habeas corpus (post-conviction) on May 31, 2001. The Defendant filed the instant Second Petition for Writ of Habeas Corpus (Post-Conviction) on May 10, 2002.

5. The Defendant's Trial Counsel was effective, and the Defendant's claims in his petition are bare allegations that are insufficient to satisfy the Defendant's burden of establishing ineffective assistance of counsel.

6. The Defendant argued that counsel was ineffective by failing to properly raise the issue of Defendant's intoxication in the motion to suppress on February 23, 2000. However, this is belied by the record. A second hearing was conducted on April 7, 2000 in which Defense counsel effectively argued the issue of intoxication. Defendant fails to show how his counsel's representation fell below an objective standard of reasonableness. In addition, Defendant does not demonstrate that but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. Rather, Defendant asserted that his counsel's performance was deficient and that the result of the proceedings would have been different without providing any supporting argument.

7. In the evidentiary hearing conducted on April 7, 2000, defense counsel argued that the confession given by the Defendant was not free and voluntary. Detective Moniot testified that the Defendant understood his Miranda rights, voluntarily signed a waiver and coherently responded in a manner consistent with the questions asked. [Evidentiary Hearing Transcript, April 7, 2000 pp. 7] Defense counsel specifically addressed the issue of intoxication of the Defendant during cross-examination and extensively questioned several witnesses about whether the Defendant appeared to be under the influence of narcotics. Defense counsel effectively challenged Detective Moniot and Officer Bachman regarding their conclusion that he did not appear to be under the influence of narcotics. [Evidentiary Hearing Transcript, April 7, 2000 pp.

18-19, 23, 82-84] The Defendant also testified at the hearing and was questioned during direct examination about whether he was under the influence of narcotics. [Evidentiary Hearing Transcript, April 7, 2000 pp. 39-40] The court also heard oral argument from Defense counsel that the Defendant was intoxicated but ruled that the confession was freely, voluntarily and knowingly entered into. [Evidentiary Hearing Transcript, April 7, 2000 pp. 67, 89]

8. The Defendant alleged in his petition that pursuant to Article 36(1)(b) of the Vienna Convention on Consular Relations (VCCR), the Defendant, a Cuban national, was entitled to be informed of the VCCR and have the Cuban Consulate notified of his arrest. The Defendant further alleged that defense counsel was ineffective for failing to raise the alleged violation of the VCCR as grounds for suppressing the Defendant's post-arrest statement.

9. The Defendant made no specific allegations that he triggered obligations under the VCCR or that he even knew of his rights pursuant to the treaty. The Defendant's statements could not have been excluded even if he were not informed of his right to consular notification. The Defendant cannot therefore show that the failure to raise issues pursuant to Article 36(1)(b) prejudiced the Defendant and was reasonably likely to alter the outcome at trial.

10. The Defendant's claims are bare naked allegations. There is no Cuban Consulate within the United States and therefore the consulate could not be notified. In addition, even if the consulate could be notified it would not change the outcome of the Defendant's case.

11. The Defendant's Appellate Counsel was effective.

12. Since there is no likelihood that the Supreme Court of Nevada would have reversed the District Court's denial of Defendant's motion to suppress on either the ground of intoxication or the failure to notify the Cuban Counsel, Defendant has failed to show that Appellate counsel's performance prejudiced him per Strickland.

13. No evidentiary hearing was necessary because Defendant's allegations are belied by the record.

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CONCLUSIONS OF LAW

1. In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257, n.4 (1996). 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, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); see, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, 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 687-688 & 694, 104 S.Ct. at 2065 & 2068.

2. In considering whether trial 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, 846, 921 P.2d 278, 280 (1996); citing, Strickland, 466 U.S. at 690-691, 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 846, 921 P.2d at 280; citing, Strickland, 466 U.S. at 690-691, 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 846, 921 P.2d at 280; 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. Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996); 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).

4. 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 (9th Cir. 1977). 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.

5. A lawyer must make a tactical determination of how to run each trial. Jones v. State, 110 Nev. 730, 738, 877 P.2d 1052, 1057 (1994). Trial counsel might very well feel that there was little benefit in further challenging the Detective's summation of the Defendant's state of sobriety. See United States v. Bari, 750 F.2d 1169, 1182 (2d Cir.1984), cert. denied, 472 U.S. 1019, 105 S.Ct. 3482 (1985). Cross-examination is clearly a matter of strategy and in Nevada, strategy decisions are virtually unchallengeable absent extraordinary circumstances. Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996) reh. denied. Given Doleman's and Strickland's strong presumption of competence and given the strategic nature of cross examination, counsel's cross-examination strategy should not be second guessed.

6. The Supreme Court of Nevada in Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983), held that a defendant is only entitled to an evidentiary hearing on an allegation of ineffective assistance of counsel if the defendant 1) presents an affidavit, 2) which presents factual allegations of the attorney's misconduct, and 3) which is outside of the record and thus not reviewable by this Court on appeal. Pursuant to the VCCR, Article 36(1)(b) provides that the sending consular shall be contacted, "if he so requests." "[D]omestic law enforcement authorities thus have no obligation to the foreign consulate unless the foreign national himself triggers one." United States v. Lombera-Camolinga, 206 F.3d 885 (2000). The Nevada Supreme Court in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), held that to

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the extent that a defendant advances merely "naked" allegations, he is not entitled to an evidentiary hearing.

7. United States v. Lombera-Camorlinga, 170 F.3d 1241 (1999) was withdrawn by the Ninth Circuit Court of Appeals. The court reviewed their prior ruling en banc to determine whether the suppression of evidence is an appropriate remedy for violation of the Vienna Convention. The court concluded that it is not a violation of the requirement under the Vienna Convention on Consular Relations that foreign nationals who have been arrested must be informed of their right to notification of their consulates does not require suppression of subsequently obtained evidence in a criminal proceeding against arrested foreign national. United States v. Lombera-Comorlinga, 206 F.3d 882 (2000).

8. In addition, once the decision on how to proceed to trial 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 846, 921 P.2d at 280; *citing*, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *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.

9. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836-837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *See* Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

10. Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme Court, although not yet affirming the decision of the federal courts, has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

11. The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753, 103 S.Ct. at 3313. The Court has therefore held that for "judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754, 103 S.Ct. at 3314.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's second Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

DATED this 8th day of August, 2002.

DISTRICT JUDGE

for SALLY LOEHRER

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
SANDRA K. DIGIACOMO
Deputy District Attorney
Nevada Bar #006204

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