

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCELO ANTONIO PARTIDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40691

FILED

APR 21 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Marcelo Antonio Partida's post-conviction petition for a writ of habeas corpus.

On January 3, 2001, Partida was convicted, pursuant to a guilty plea, of attempted murder with the use of a deadly weapon (count I) and battery with a deadly weapon (count II). The district court sentenced Partida to serve two consecutive prison terms of 72 to 240 months for count I and a consecutive prison term of 32 to 120 months for count II. Partida appealed, and this court affirmed his conviction.¹

On April 5, 2002, Partida, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. On May 24, 2002, the State filed a motion for partial dismissal of the petition. On July 12, 2002, the district court granted the State's motion, dismissing four of Partida's claims. After conducting an evidentiary hearing on Partida's remaining claims, the district court denied the petition. Partida filed the instant appeal.

¹Partida v. State, Docket No. 37370 (Order of Affirmance, May 8, 2001).

In the petition, Partida raised claims of ineffective assistance of trial counsel at the sentencing proceeding.² To state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.³

Partida first contends that his trial counsel was ineffective at the sentencing proceeding because he requested an illegal sentence. In particular, Partida notes that his trial counsel, Theodore Gamboa, requested that the deadly weapon enhancement be run concurrently even though the deadly weapon enhancement is required to run consecutively as a matter of law.⁴ The district court rejected Partida's claim, finding that he was not prejudiced by Gamboa's request because the district court was aware of the correct sentencing parameters, and trial counsel's

²The petition also raised claims of ineffective assistance of counsel involving events occurring prior to the entry of Partida's guilty plea that were summarily dismissed by the district court. We note, however, that Partida's fast track statement does not appear to challenge the district court's order dismissing those claims. To the extent that Partida seeks to challenge the district court's order dismissing those claims, we conclude that the district court did not err. Partida's claims occurring prior to the entry of Partida's plea were properly dismissed because in the petition and at the evidentiary hearing Partida expressly stated that he was not requesting that his guilty plea be set aside, only that he be given a new sentencing hearing.

³Strickland v. Washington, 466 U.S. 668 (1984); Weaver v. Warden, 107 Nev. 856, 822 P.2d 112 (1991).

⁴See NRS 193.165(1).

request for an illegal sentence did not affect the sentence imposed. That finding is supported by substantial evidence.⁵

In particular, at the sentencing hearing, the prosecutor corrected defense counsel and informed the court that the deadly weapon enhancement must run consecutively. Thereafter, the district court imposed consecutive sentences, noting that it could not “run Count One concurrent as requested by Mr. Gamboa. The law doesn’t permit that. And were I to run Count Two concurrent, it would essentially be ignoring the injuries and the assault on the [second victim]. I can’t do that either.” Accordingly, Partida failed to show he was prejudiced by trial counsel’s improper request for concurrent sentencing on the deadly weapon enhancement.

Partida next contends that his trial counsel was ineffective at the sentencing proceeding because he failed to adequately investigate his case and present mitigating evidence. In particular, Partida contends that his trial counsel should have presented mitigating evidence, including: (1) evidence that Partida was a drug addict and was amenable to drug and alcohol treatment; (2) psychological reports indicating that Partida could be rehabilitated; (3) testimony or letters from Partida’s supportive family and friends; and (4) evidence that Partida did not intend to kill the victims and shot them from far away. The district court found that Partida was not prejudiced by Gamboa’s failure to present that mitigating evidence because it would not have affected the sentence imposed. The district court’s finding is supported by substantial evidence.⁶

⁵See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁶See id.

In particular, at the sentencing hearing, the district court set forth its justification for imposing a harsh sentence, explaining that it had considered “the importance the sentence has on deterrence, the message to the community, the need to isolate the defendant from the community, and prevent further risk to the community because of the behavior.” Before imposing sentence, the district court also noted that Partida had a substantial juvenile criminal history, that he was a danger to society, and that it felt it needed to “send a message” with the sentence.

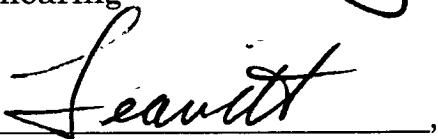
In the post-conviction proceeding, after conducting an evidentiary hearing and reviewing the mitigating evidence that Partida alleged trial counsel should have presented at sentencing, the district court found that the evidence would not have affected the sentence it imposed. Specifically, the district court explained that Partida failed to show his crimes resulted from a substance abuse problem and concluded that the psychological evaluations he submitted on his amenability to treatment and rehabilitation lacked credibility. Additionally, the record of the sentencing hearing indicates that the district court was aware, prior to imposition of sentence, both that Partida’s family was supportive and that the victims were shot from a distance. Accordingly, Partida failed to show that he was prejudiced by trial counsel’s conduct at the sentencing proceeding.⁷

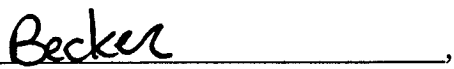
⁷In the fast track statement, Partida alleges, for the first time on appeal, that his appellate counsel was ineffective because he failed to cite legal authority or make legal argument in support of Partida’s appeal. We decline to consider this allegation because it was not raised in the post-conviction petition or considered by the district court. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

Having considered Partida's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. James W. Hardesty, District Judge
Laub & Laub
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk