

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL MENESES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40733

FILED

JUN 06 2003

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 Daniel Meneses' post-conviction petition for a writ of habeas corpus.

On October 25, 2000, Meneses was convicted, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon. The district court sentenced Meneses to serve a prison term of 48-120 months. The judgment of conviction was affirmed by this court on direct appeal.<sup>1</sup>

On November 9, 2001, Meneses filed a proper person post-conviction petition for a writ of habeas corpus in the district court. A supplemental petition for a writ of habeas corpus was subsequently filed by appointed counsel on February 28, 2002. On March 20, 2002, the State filed a motion to dismiss Meneses' petition, and Meneses opposed the motion. The district court granted the State's motion to dismiss in part, but ordered an evidentiary hearing on Meneses' remaining claims.<sup>2</sup> On November 20, 2002, after conducting an evidentiary hearing, the district court denied Meneses' petition. This timely appeal followed.

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<sup>1</sup>See Meneses v. State, Docket No. 37088 (Order of Affirmance, March 27, 2001).

<sup>2</sup>On appeal, Meneses does not challenge the district court's dismissal of those claims that were rejected without an evidentiary hearing.

Meneses contends that the district court erred in finding that he did not receive ineffective assistance of counsel at trial and sentencing. 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 that there was a reasonable probability that the outcome would have been different.<sup>3</sup> The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.<sup>4</sup> A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.<sup>5</sup> Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."<sup>6</sup>

Meneses contends the district court erred in finding that counsel was not ineffective at trial in failing to adequately investigate, cross-examine, and impeach the State's main witness – his ex-girlfriend, the victim. As a result of defense counsel's alleged ineffectiveness, Meneses argues that the jury was misled about facts directly relating to the victim's credibility. We disagree.

The victim testified at trial on direct examination that she moved out of the apartment she shared with Meneses, after his arrest,

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<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Strickland, 466 U.S. at 697.

<sup>5</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>6</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

because of his numerous, harassing telephone calls. Meneses was pressuring the victim to inquire into the penalties for filing a false police report so that she could recant her damaging allegation that he committed battery against her. The victim wrote to Meneses in prison, informing him that she did inquire, but "it was just for him to leave me alone and quit bugging me about it." When the harassing telephone calls failed to cease, the victim moved.

During the habeas proceeding, Meneses presented evidence and alleged that the victim was behind in rent, and that she moved out of their apartment not because of his harassment but rather because she was about to be evicted. Meneses claims that if counsel had discovered this information and effectively cross-examined the victim, her credibility would have been tarnished; instead, the jury was "left with the mistaken impression that Mr. Meneses was a heartless individual who was purportedly badgering his victim."

The district court found that counsel's omission did not amount to ineffective assistance. And our review of the record reveals that the district court's factual findings are supported by the record and are not clearly wrong. Counsel interviewed the victim before trial, and neither she nor Meneses informed counsel about any possible eviction proceeding. Moreover, Meneses failed to prove that the victim even knew about the eviction proceeding. The district court found that, even had counsel been able to impeach the victim with evidence regarding the eviction proceeding, and considering the overwhelming evidence of Meneses' guilt, including his statement that "[s]he deserved every hit she got," any possible impeachment would have been insignificant. We therefore conclude that no reasonable probability of a different outcome existed at trial, and that Meneses' contention is without merit.

Finally, Meneses contends the district court erred in finding that counsel was not ineffective during the sentencing proceeding in failing to investigate and adequately present mitigating evidence on his behalf. Meneses argues that there was a reasonable probability of a more lenient sentence had counsel presented: (1) evidence of his successful completion of a substance abuse program (HISTEP); and (2) the live testimony of the victim's mother. We disagree.

First, Meneses completed the HISTEP program after his conviction in an earlier, unrelated case. He committed the instant offense merely three weeks after the program's "successful" completion. At the evidentiary hearing, the district court stated that even if counsel had presented this information at sentencing, and considering Meneses' criminal history and seeming lack of remorse, "there would not have been a reasonable probability of a different outcome." In fact, the district court stated:

And I agree with [the State] as to the defendant's participation in the [substance abuse] program. I think, in a way, that's an aggravating not a mitigating circumstance. If the defendant had been given the opportunity of probation and he'd been given the opportunity of a [substance abuse] program and he still committed this offense very shortly after receiving probation in an earlier case, then a longer prison sentence was justified.

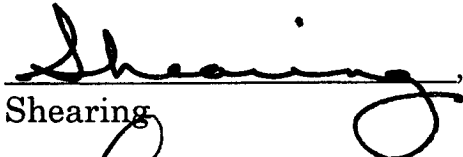
Therefore, we conclude the district court did not err in finding that counsel was not ineffective in failing to present evidence of Meneses' completion of the HISTEP program at sentencing.

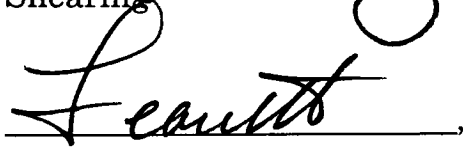
Second, although she did not testify in person, defense counsel did present a letter written by the victim's mother as mitigating evidence during the sentencing hearing. Meneses contends that if counsel had investigated and presented the mother's live testimony at sentencing, she


would have offered additional mitigating evidence, as she did at the evidentiary hearing. Meneses claims there was a reasonable probability that he would have received a more lenient sentence because the victim's mother would have testified that he was "a loving and caring individual. . . . [A]nd a loving and caring father to his children." At the evidentiary hearing, however, the victim's mother also testified that Meneses was using drugs at the time of the battery, and the district court found that she "revealed matters, previously unknown to the court, which would have, to a reasonable certainty, undermined or negated her positive and constructive contributions." The district court found that counsel's decision to avoid subjecting the victim's mother to cross-examination was reasonable, and that had she testified, Meneses' sentence would not have been more lenient. We conclude that the district court did not err, and that Meneses did not receive ineffective assistance of counsel.

Having considered Meneses' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Brent T. Adams, District Judge  
Nathalie Huynh  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk