

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUDIBERTO GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41023

FILED

MAR 23 2004

ORDER OF AFFIRMANCE

JANETIE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On March 30, 1998, the district court convicted Rudiberto, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, and one count of conspiracy to commit murder. The district court sentenced Rudiberto to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole in twenty years, plus a concurrent term of twenty-four to seventy-two months. This court affirmed Rudiberto's conviction on direct appeal.¹ The remittitur issued on December 26, 2001.

On August 28, 2002, Rudiberto filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Rudiberto. On February 13, 2003, the district court conducted an evidentiary hearing on Rudiberto's

¹Guerrero v. State, Docket No. 32242 (Order of Affirmance, November 19, 2001).

petition, where it heard testimony from Rudiberto and his trial counsel, Joseph Sciscento. On March 12, 2003, and March 28, 2003, the district court issued orders denying Rudiberto's petition. This appeal followed.²

In his petition, Rudiberto raised numerous allegations of ineffective assistance of trial counsel. A claim of ineffective assistance of trial counsel is reviewed under the two-part reasonably effective assistance of counsel test.³ First, a petitioner must show that his trial counsel's performance fell below an objective standard of reasonableness.⁴ Second, a petitioner must demonstrate that, but for his trial counsel's errors, the results of the proceedings would have been different.⁵ Both parts of the test do not need to be considered if the petitioner makes an insufficient showing on either one.⁶

First, Rudiberto contended that the trial counsel of his son and co-defendant, Alberto Guerrero, was ineffective for conceding Alberto's guilt during the closing arguments of Rudiberto and Alberto's joint trial. Rudiberto, however, did not allege that his trial counsel, Joseph Sciscento, was ineffective by the allegation. Rather, this allegation only involved the conduct of Alberto's trial counsel, Kirk Kennedy. There is no authority

²In the interests of judicial economy, this court utilized the record on appeal filed in Docket No. 41024, which was that of Rudiberto's co-defendant.

³See Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

⁴See Strickland, 466 U.S. at 687.

⁵See id.

⁶See id. at 697.

that would allow a claim of ineffective assistance of counsel to be extended to the performance of a co-defendant's counsel during a joint trial. Therefore, the district court did not err by denying Rudiberto relief on this allegation.

Second, Rudiberto contended that his trial counsel was ineffective for failing to conduct a meaningful pre-trial investigation into the following issues: whether the victim, Manuel Monpie, was a violent gang member who had many enemies; whether Monpie physically abused his girlfriend, Elsa Dacosta; whether Monpie carried a handgun and returned gunfire on the night he was killed; and whether Dacosta hid Monpie's handgun from the police.

Trial counsel has an obligation to conduct a reasonable pre-trial investigation into facts that may support a theory of defense, or make "a reasonable decision not to investigate."⁷ However, Rudiberto failed to support these allegations with any specific facts showing that he was entitled to relief.⁸ Sciscento testified at the evidentiary hearing held on Rudiberto's petition that he, along with a hired private investigator, investigated the facts surrounding this case and discovered no information indicating that Monpie's death was connected to gang involvement. Sciscento also testified that he could not locate any witnesses to corroborate Rudiberto's allegation that Monpie had a gun on the night he

⁷Kirksey v. State, 112 Nev. 980, 992-93, 923 P.2d 1102, 1110 (1996); see also Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996).

⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

was killed. The record also reveals that Sciscento cross-examined Dacosta during trial regarding Monpie's propensity for violence.⁹

Additionally, Rudiberto never claimed that he shot Monpie in self-defense, and there was no evidence presented to the jury during the entire trial suggesting that Monpie was carrying a handgun on the night he was killed. Rudiberto failed to show how a more thorough investigation of these issues by Sciscento would have revealed any information so convincing that it would have been reasonably likely to alter the jury's verdict. Therefore, the district court did not err by denying Rudiberto relief on this allegation.

Third, Rudiberto contended that his trial counsel was ineffective for failing to investigate whether Monpie was shot by a person in a white car as part of a drive-by shooting. Sciscento testified at the evidentiary hearing on Rudiberto's petition that he did investigate this allegation. The record reveals that a witness was called to testify on behalf of the defense during the trial that he observed a suspicious gray vehicle with two occupants in Monpie's neighborhood just after he heard gunshots on the night Monpie was killed. Rudiberto failed to support this allegation with any specific facts showing that a more thorough investigation of this issue would have been reasonably likely to reveal any information or additional witnesses that would have altered the outcome of his trial.¹⁰ Therefore, the district court did not err by denying Rudiberto relief on this allegation.

⁹See *id.* at 503, 686 P.2d at 225.

¹⁰See *id.* at 502, 686 P.2d at 225.

Fourth, Rudiberto contended that his trial counsel was ineffective for failing to properly cross-examine various State witnesses regarding the following issues: whether Monpie was affiliated with a gang, whether Monpie carried a handgun, and whether Monpie had a propensity for violence. The record reveals that twenty witnesses were called by the State to testify during trial. Sixteen of these witnesses were cross-examined by Sciscento. As previously discussed, there was no testimony linking Monpie to a gang or showing that he was in possession of a gun on the night that he was killed. Rather, all six of the witnesses who were at the crime scene on the night Monpie was killed testified that they observed no weapons in Monpie's possession. Rudiberto failed to specify how any additional cross-examination of the State's witnesses would have altered the outcome of his trial in any way.¹¹ Moreover, and contrary to the allegation in his petition, Rudiberto actually conceded to the district court during the evidentiary hearing on his petition that Sciscento's performance in this regard was "alright." Therefore, the district court did not err in denying Rudiberto relief on this allegation.

Fifth, Rudiberto contended that his trial counsel was ineffective for failing to suppress the testimony of an eyewitness to the crime. Specifically, Rudiberto contended that the eyewitness committed perjury by giving conflicting versions of what transpired on the night Monpie was killed. Rudiberto, however, failed to name this witness in his petition or provide specific facts showing that this witness' testimony constituted perjury.¹² The transcript of the evidentiary hearing on

¹¹See id.

¹²See id.; NRS 199.145.

Rudiberto's petition indicates that Rudiberto may have been referring to the testimony of Maria Maldonado, Dacosta's daughter, in this allegation. Even if true, any conflicting testimony by Maldonado did not establish that Sciscento's performance was ineffective. Moreover, the weight and credibility to give witness testimony, even when that testimony is conflicting, is an issue for the jury to decide.¹³ Sciscento cross-examined Maldonado during trial. Rudiberto failed to show that this cross-examination was ineffective in any way. Therefore, the district court did not err in denying Rudiberto relief on this allegation.

Sixth, Rudiberto contended that his trial counsel was ineffective for failing to contact and interview various witnesses and offer an alternative theory of defense. Rudiberto, however, failed to provide any specific facts to support these allegations.¹⁴ Specifically, Rudiberto failed to name these witnesses, proffer what information they possessed that would have aided his defense, or state what alternative theory of defense Sciscento should have presented. Therefore, the district court did not err in denying Rudiberto relief on this allegation.

Seventh, Rudiberto contended that his trial counsel was ineffective for preventing him from testifying in his own defense. The record reveals, however, that the district court advised Rudiberto outside the presence of the jury on his right to remain silent and not testify. The district court also questioned Rudiberto to ensure that he understood the consequences of any decision he made regarding this issue. Rudiberto indicated that he understood his rights. There was no indication from the

¹³See Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

¹⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

record that Rudiberto was improperly prevented from testifying in his own defense,¹⁵ or that any advice that may have been given by Sciscento on this issue was unreasonable. Therefore, the district court did not err by denying Rudiberto relief on this allegation.

Eighth, Rudiberto contended that his trial counsel was ineffective for failing to present a meaningful defense on his behalf, pursue the truth, and prevent an innocent man—Rudiberto—from being convicted. Such generalized allegations, unsupported by any specific facts, do not give rise to a cognizable claim of ineffective assistance of trial counsel.¹⁶ Therefore, the district court did not err in denying Rudiberto relief on these allegations.

Finally, Rudiberto contended that the district court improperly silenced Alberto during closing arguments. Rudiberto did not contend in this allegation that either his trial or appellate counsel were ineffective. As such, this allegation fell outside the scope of permissible claims that may be raised by Rudiberto in his petition.¹⁷ Therefore, the district court did not err by denying Rudiberto relief on this allegation.

In sum, the district court found that Rudiberto failed to show that Sciscento's "performance was deficient or that any deficiency actually prejudiced the defense." For the reasons set forth above, we conclude that

¹⁵See id. at 503, 686 P.2d at 225.

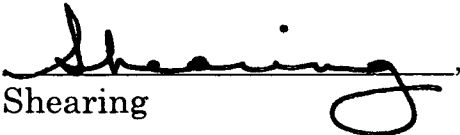
¹⁶See id. at 502, 686 P.2d at 225.

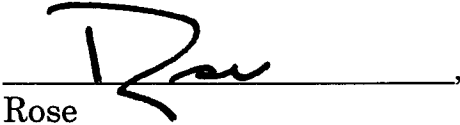
¹⁷See NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

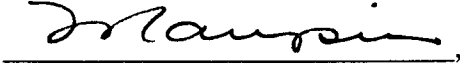
the district court's factual findings were supported by substantial evidence and were not clearly wrong.¹⁸

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Rudiberto is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing, C.J.


Rose, J.


Maupin, J.

cc: Hon. Donald M. Mosley, District Judge
Rudiberto Guerrero
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁸See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).