

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 41024

FILED

MAR 25 2004

ORDER OF AFFIRMANCE

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

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

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

On August 28, 2002, Alberto 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 Alberto. On February 20, 2003,

¹Guerrero v. State, Docket No. 32173 (Order of Affirmance, November 19, 2001).

the district court conducted an evidentiary hearing on Alberto's petition, where it heard testimony from Alberto and his trial counsel, Kirk Kennedy. On March 28, 2003, the district court issued an order denying Alberto's petition. This appeal followed.

In his petition, Alberto 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.² First, a petitioner must show that his trial counsel's performance fell below an objective standard of reasonableness.³ Second, a petitioner must demonstrate that, but for his trial counsel's errors, the results of the proceedings would have been different.⁴ Both parts of the test do not need to be considered if the petitioner makes an insufficient showing on either one.⁵

First, Alberto contended that his trial counsel was ineffective for conceding his guilt during closing arguments. Alberto's trial counsel, Kirk Kennedy, testified at the evidentiary hearing on Alberto's petition that he did recall conceding to the jury during closing arguments that there may have been "some measure of culpability" on the part of Alberto in the death of the victim, Manuel Monpie. Kennedy explained that he made this concession as part of a shift in trial strategy with the hope that the jury would only find Alberto guilty of the lesser charge of attempted

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

³See Strickland, 466 U.S. at 687.

⁴See id.

⁵See id. at 697.

murder, instead of murder in the first-degree. The record does not reveal that Kennedy made any express remarks conceding Alberto's guilt. Rather, during closing arguments, Kennedy repeatedly emphasized to the jury that the State failed to meet its burden of proof to convict Alberto of first-degree murder. Given the abundant and persuasive evidence of Alberto's guilt that had been presented by the State during the course of the trial, Kennedy's shift in tactical decisions was not unreasonable.⁶ Therefore, the district court did not err in denying Alberto relief on this allegation.

Second, Alberto 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, Alberto failed to support these allegations with any specific facts showing that he was entitled to relief.⁸ Moreover, Kennedy testified at the evidentiary hearing held on Alberto's petition that he did not have any information that

⁶See *id.* at 689.

⁷*Kirksey 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, 280-81 (1996).

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

Monpie was a gang member who had many enemies, or was ever in possession of a gun on the night that he was killed. Kennedy also testified that he did not believe that it was a good trial strategy to present bad character evidence of a victim in a criminal case. Alberto failed to show that Kennedy's tactical decision was unreasonable.⁹ Given that Rudiberto's trial counsel, Joseph Sciscento, cross-examined Dacosta regarding Monpie's propensity for violence, the jury nonetheless heard this evidence and Alberto cannot show any prejudice by any failure in his trial counsel's performance with respect to this issue.

Additionally, Alberto 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 gun on the night he was killed. Alberto failed to show how a more thorough investigation of these issues by Kennedy 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 in denying Alberto relief on these allegations.

Third, Alberto contended that his trial counsel was ineffective for failing to investigate whether Monpie was killed by a person in a white car as part of a drive-by shooting. The record reveals that a witness was called to testify on behalf of the defense by Rudiberto's trial counsel, Sciscento. This witness testified 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. Alberto failed to support this

⁹See Kirksey, 112 Nev. at 992-93, 923 P.2d at 1110; Strickland, 466 U.S. at 689.

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 Alberto relief on this allegation.

Fourth, Alberto 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. Fourteen of these witnesses were cross-examined by Kennedy. 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. Alberto 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 Therefore, the district court did not err in denying Alberto relief on this allegation.

Fifth, Alberto contended that his trial counsel was ineffective for failing to suppress the testimony of an eyewitness to the crime. Specifically, Alberto contended that the eyewitness committed perjury by giving conflicting versions of what transpired on the night Monpie was killed. Alberto, however, failed to name this witness in his petition or

¹⁰See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹¹See id.

provide specific facts showing that this witness' testimony constituted perjury.¹² The transcript of the evidentiary hearing held on Alberto's petition indicates that Alberto 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 Kennedy'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 Kennedy cross-examined Maldonado during trial. Alberto failed to show that this cross-examination was ineffective in any way. Therefore, the district court did not err by denying Alberto relief on this allegation.

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

Seventh, Alberto 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 Alberto outside the presence of the jury on his right to remain silent and not testify. The

¹²See id.; NRS 199.145.

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.

district court also questioned Alberto to ensure that he understood the consequences of any decision he made regarding this issue. Alberto indicated that he understood his rights. There was no indication from the record that Alberto was improperly prevented from testifying in his own defense.¹⁵ Kennedy did testify at the evidentiary hearing held on Alberto's petition that he advised Alberto not to testify in his own defense. Alberto failed to show that this advice was unreasonable. Therefore, the district court did not err by denying Alberto relief on this allegation.

Eighth, Alberto 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—Alberto—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 Alberto relief on these allegations.

Finally, Alberto contended that the district court improperly silenced him during closing arguments. Alberto 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 Alberto in his petition.¹⁷ Therefore, the district court did not err by denying Alberto relief on this allegation.

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).


In sum, the district court found that Alberto failed to show that Kennedy's "performance was deficient or that any deficiency actually prejudiced the defense." For the reasons set forth above, we conclude that 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 Alberto is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Alberto 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).