

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEOVANNY TORRES A/K/A
GEOVANNY TORRES HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42541

FILED

MAR 24 2005

ORDER OF AFFIRMANCE

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Geovanny Torres' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On October 10, 2001, the district court convicted Torres, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and conspiracy to commit a crime. Torres moved for a new trial based on newly discovered evidence. The district court denied the motion. The district court sentenced Torres to serve terms totaling life in the Nevada State Prison with the possibility of parole after forty years. This court affirmed Torres' judgment of conviction and the denial of his motion for a new trial.¹ The remittitur issued on April 11, 2003.

¹Torres v. State, Docket No. 38724 (Order of Affirmance, March 17, 2003).

On August 21, 2003, Torres 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 and 34.770, the district court declined to appoint counsel to represent Torres or to conduct an evidentiary hearing. On November 5, 2003, the district court denied Torres' petition. This appeal followed.

In his petition, Torres first raised a claim of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.² A petitioner must further establish there is a reasonable probability that the results of the proceedings would have been different if counsel had not erred.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

Torres contended that his trial counsel was ineffective for failing to request a judgment of acquittal concerning Torres' conspiracy conviction.⁵ Torres claimed that his conviction for conspiracy violated the

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

³Id.

⁴Strickland, 466 U.S. at 697.

⁵See NRS 175.381(2).

rule of consistency because the person with whom he allegedly conspired was not convicted.⁶

We conclude that Torres is not entitled to relief on this claim. First, there is no authority for the proposition that Nevada has adopted the rule of consistency. Second, to the extent that the rule of consistency has been adopted in other jurisdictions, its application is restricted to situations in which the alleged co-conspirator is actually acquitted of the conspiracy charge.⁷ Here, Torres' alleged co-conspirator was not acquitted of the charge; rather, the State dismissed the charges against him without prejudice. For these reasons, Torres did not establish that his trial counsel acted unreasonably in failing to move for a judgment of acquittal on his conspiracy conviction, and we affirm the order of the district court with respect to this claim.

Next, Torres raised a claim of ineffective assistance of appellate counsel. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance

⁶To the extent that Torres raised this claim independently from his ineffective assistance of counsel claim, we conclude that it is outside the scope of a post-conviction petition for a writ of habeas corpus and should have been raised on direct appeal. See NRS 34.810(1)(b)(2). Moreover, as discussed below, this claim is meritless.

⁷See, e.g., United States v. Parker, 839 F.2d 1473 (11th Cir. 1988); United States v. Valles-Valencia, 823 F.2d 381 (9th Cir. 1987); United States v. Gaviria, 740 F.2d 174 (2d Cir. 1984).

prejudiced the defense.⁸ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁰

Torres claimed that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence to uphold his conspiracy conviction. Conspiracy is an agreement between two or more persons to commit a criminal or unlawful act, and is generally established by inference from the conduct of the parties.¹¹ Our review of the record reveals sufficient evidence from which a rational jury could find Torres guilty of conspiracy to commit a crime beyond a reasonable doubt.¹² Evidence was introduced at trial that Torres' alleged co-conspirator shot the victims multiple times from a car that Torres was driving. After the shooting, Torres drove the vehicle away from the scene. We conclude that Torres failed to establish that insufficient evidence was introduced at trial to support his conspiracy conviction, such that his appellate counsel was

⁸See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹¹Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998).

¹²See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

ineffective for failing to appeal the issue. As such, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Torres is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴

Becker, C.J.
Becker

Rose, J.
Rose

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have reviewed all documents that Torres has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Torres has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. John S. McGroarty, District Judge
Geovanny Torres
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk