

IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No. 83690

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Elizabeth A. Brown
Clerk of Supreme Court

OSCAR GOMEZ,
Petitioner-Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Appeal from an Order Denying Post-Conviction Relief
Eighth Judicial District Court, Clark County
The Honorable Cristina Silva, District Judge

APPELLANT’S OPENING BRIEF

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ARGUMENT

As discussed in the Opening Brief [“AOB”] Oscar Gomez’ lawyer failed to correctly explain his sentencing structure. He did not understand that his sentence would run consecutively with the sentence enhancement, causing him to accept a plea offer he would otherwise have rejected. This failure to adequately explain the sentence structure was ineffective assistance of counsel under the Nevada and federal constitutions, and along with the other issues detailed in the Opening Brief merits reversal by this Court. In its Answering Brief [“Answer”] the State responds to these arguments. However, the State is incorrect about several important points of law and as detailed below, its arguments do not defeat the conclusion that this Court should grant relief.

The State’s most serious error is upfront at the beginning of its argument. Namely, the State asserts that this Court reviews the denial of a post-conviction petition under the “abuse of discretion” standard. Answer 10. The State cites to *Rubio v. State* in support of this conclusion. *Id.*, citing 194 P.3d 1224, 1234 (Nev. 2008). Throughout the Answer, the State repeatedly frames its argument in terms of whether the district court abused its discretion. Answer 10, 23, 27 (section headings explicitly using this language). This is an incorrect statement of law.

Post-conviction petitions are reviewed by this Court de novo as a mixed question of law and fact, with purely factual findings by the lower court entitled to

deference if they are supported by the record. The State’s Answer recognizes as much (Answer 10), as does the Opening Brief (AOB 4). *Rubio* also recites the standard on the same page that the State cites. 194 P.3d at 1234. While *Rubio* does in fact mention the abuse of discretion standard, it does so in the context of a post-conviction motion to withdraw a guilty plea. There was never a post-conviction petition even filed in *Rubio*; the appeal was of the denial of a motion to withdraw the plea.¹ *Id.*

This is an entirely different procedural context from a post-conviction habeas petition. A motion to withdraw a guilty plea can typically only be brought in-between the plea and sentencing; if a motion is brought after sentencing then it can only be granted if there is a “manifest injustice.” NRS 176.165. *Rubio* invokes the abuse of discretion standard in this explicit context – “this court will not overturn the district court’s determination on manifest injustice absent a clear showing of an abuse of discretion.” 194 P.3d at 1234. There is no language in *Rubio* stating that the Court should apply that standard to a post-conviction petition.

¹ The *Rubio* Court held that ineffective assistance can be grounds for granting a motion to withdraw a plea, and remanded for the district court to decide whether ineffective assistance had actually happened. *Id.*

The precise language here matters because the abuse of discretion standard is far more deferential to the lower court's holding, whereas a de novo standard of review properly asks this Court to review the legal situation itself instead of deferring to the district court's opinion. It is settled law that claims of ineffective assistance in a post-conviction petition are reviewed by this Court de novo as a mixed question of law and fact. This Court should not depart from that standard.

In terms of its substantive argument, the State points to a number of lines of evidence which it asserts support its contention that trial counsel effectively explained Mr. Gomez' sentencing structure to him. Answer 16-20. However, some of these lines of evidence do not actually support the State's position. The State quotes Mr. Gomez' family members at some length, talking about their understanding of the weapon enhancement as an "added sentence" to the underlying murder charge, or saying that they understood the enhancement as "an additional" amount of time, or expressing the understanding that there were two separate sentences. Answer 18-19. But none of this actually supports the State's reading that his family thought he would be serving consecutive sentences. One sentence can be added on top of another separate sentence and still be concurrent. This part of the State's argument holds no water.

The State also points to the plea agreement and the court's canvass, both of which explicitly stated a bottom end of more than ten years for the sentence, as

well as to trial counsel's testimony at the evidentiary hearing that she had explained the situation to Mr. Gomez a large number of times. Answer 16-18. This argument is for the most part addressed in the Opening Brief – Mr. Gomez did not have time to actually read the plea agreement² and the fact that trial counsel felt she had to repeatedly explain the sentence structure was prima facie evidence that Mr. Gomez did not understand it. Ultimately, as Mr. Gomez stated at the evidentiary hearing, he was “confused” and “didn’t really know what was going on” during the plea – despite the judge’s best efforts to ensure he understood, he still did not because his lawyer had not adequately prepared him. This point ultimately supports this Court’s reversal of the lower court’s holding.

A final error in the State’s Answer relates to its misinterpretation of *Bolden v. State*. Under *Bolden*, if a claim could be brought on direct appeal, it may not be brought in a post-conviction petition. 99 Nev. 181 (1983). The State argues that one of Mr. Gomez’ claims (ineffective assistance of counsel based on the failure to investigate) was properly denied by the district court on that ground. Answer 23.

² The State misrepresents a facet of the Opening Brief’s argument. The State sets up a strawman argument that “Appellant argues he only had 15 minutes to review and understand the offer” but that this is “belied by the record.” Answer 20-22. This was not the Opening Brief’s argument; the Opening Brief carefully points out that trial counsel and Mr. Gomez had previously discussed the offer and that he only had 15 minutes to review the written version. AOB 5. The State provides nothing to dispute that point.

This is an incorrect reading of *Bolden*. As *Bolden* explicitly noted, a claim for ineffective assistance of counsel “could not have been raised and determined on direct appeal” and therefore “the district court erred by determining that appellant had waived the claim.” 99 Nev. at 183. *Bolden* is not a bar to relief in Mr. Gomez’ case, and the Court should therefore judge his remaining claims on the merits as discussed in the Opening Brief.

CONCLUSION

As discussed in the Opening Brief, Oscar Gomez’ plea was involuntary due to ineffective assistance of counsel. He therefore respectfully asks the Court to vacate his conviction and remand for further proceedings.

Dated this 7th day of July, 2022.

/s/ Jim Hoffman

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **Times New Roman 14**.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **1652** words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of July, 2022

/s/ Jim Hoffman

Jim Hoffman, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy of the foregoing Opening Brief to all persons registered for Electronic Filing, on the 7th day of July, 2022

/s/ Jim Hoffman

Jim Hoffman, Esq.