

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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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned certifies that Oscar Gomez is the true name of a natural person, and that no corporation is involved in this litigation. Mr. Gomez was represented by Monti Levy at trial, and later by Terrence Jackson on direct appeal. Mr. Gomez was initially pro se in the district court post-conviction proceedings before the undersigned was appointed to represent him.

/s Jim Hoffman
Attorney for Oscar Gomez

ROUTING/JURISDICTIONAL STATEMENT

This is an appeal from a final order denying Mr. Gomez' petition for post-conviction relief, and so the appellate courts have jurisdiction under NRS 34.575. This is a post-conviction petition involving an A felony, and as such is not presumptively assigned to either the Supreme Court or the Court of Appeals under NRAP 17.

STATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective in failing to adequately explain Mr. Gomez' sentencing exposure, resulting in a constitutionally invalid involuntary plea.
2. Whether trial counsel was ineffective in failing to investigate and obtain pretrial evidentiary rulings.

3. Whether trial counsel was ineffective in failing to file a motion to withdraw Mr. Gomez' guilty plea.

STATEMENT OF THE FACTS

The instant case involves the death by shooting of Shawn Manymules in Las Vegas in 2016. Manymules and a friend were drinking and using drugs, while separately at the same time Gomez and a friend were drinking and using drugs. PCR 29-33.¹ They encountered each other at a convenience store and Gomez' friend began to fight with Manymules. After Manymules won the fight, he was shot and later died. *Id.*

Gomez was charged with murder with a deadly weapon as a result of the affray. PCR 1. In 2018, he pled guilty to second degree murder with a deadly weapon and in the course of doing so stated that he had shot Manymules. PCR 24-26. He was adjudged guilty and sentenced to 10 to life, with a consecutive 8-20 year sentence for the deadly weapon enhancement. PCR 47.

Gomez filed a timely direct appeal of his conviction, which was affirmed by the Court of Appeals. PCR 51. He then filed a timely petition for post-conviction relief (and subsequently two others). PCR 55. The district court ordered an evidentiary hearing on one of the claims, namely the issue of whether trial counsel

¹ References to the appellate appendix are denominated as "PCR ##".

failed to properly explain the sentencing structure. PCR 158. After the evidentiary hearing, the district court denied all claims. PCR 273. This appeal timely follows.

SUMMARY OF THE ARGUMENT

During the course of Oscar Gomez’ pretrial proceedings, his trial counsel developed personal conflicts with members of his family. These conflicts led her to perform deficiently, most notably by failing to adequately explain the sentence structure that Mr. Gomez would face if he pled. This error, in conjunction with the hasty circumstances of the plea hearing, constituted ineffective assistance of counsel under the Sixth and Fourteenth Amendments.

ARGUMENT

I. Trial Counsel Was Ineffective in Failing to Adequately Explain Mr. Gomez’ Sentence Structure.

A. Legal Background

The Sixth Amendment provides the right to effective counsel. The test for whether counsel was effective has two parts. First, effective counsel operates at or above an “objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. State*, 103 Nev. 227, 229 (1987). This standard is determined with reference to prevailing professional norms. *Strickland*, 466 U.S. at 688. If counsel’s actions fall within the realm of “sound trial strategy,”

then a court should be “highly deferential” in reviewing them. *Id.* at 689.

However, actions which are not strategic choices (or are choices, made unreasonably) constitute error which does not merit such deference. *Id.* at 690-91.

The second part of the test is prejudice. Counsel’s error must create a “reasonable probability” of a different result. *Id.* at 694-95. The right to effective assistance of counsel extends to the plea bargaining process. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

“Because an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, counsel have a duty to supply criminal defendants with necessary and accurate information.” An inaccurate prediction is not ineffective assistance on its own, but can be when mixed with erroneous advice on the possible consequences of going to trial. *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (internal citations and quotations omitted). Failure to review a guilty plea with a client to ensure they understand it constitutes ineffective assistance of counsel. *Rubio v. State*, 194 P.3d 1224 (Nev. 2008).

Claims of ineffective assistance of counsel present a mixed question of law and fact, which this Court reviews independently. *Foster v. State*, 111 P.3d 1083, 1086 (2005).

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B. Factual Background

In 2018, Oscar Gomez was a twenty-two year old who had dropped out of ninth grade (and then reenrolled and dropped out again in eleventh grade without attending class regularly). He had no criminal history except for a misdemeanor for marijuana possession. PCR 242-43. In the time leading up to his plea agreement, he met with his trial counsel, who conveyed to him the State's unwritten offer of second degree murder with a deadly weapon. Specifically, she told him that he was facing a sentence of 10 to life and 8-20 on the deadly weapon enhancement "together." PCR 109. Oscar's mother reported similarly, that trial counsel had told her that Oscar would receive a sentence of 10 to life and would be eligible for parole in ten years. PCR 115, 248-249. Oscar's sister testified that trial counsel also did not explain to the family that Oscar's sentences would run consecutively instead of concurrently. PCR 253.

The plea was not reduced to writing until the calendar call when Mr. Gomez actually pled guilty. Due to scheduling issues, the only way the district court was willing to accept the plea that day was if the prosecutor physically typed up a copy and printed it within 15 minutes, which he did. PCR 14-17. Oscar's trial counsel handed him the copy, told him to read it, and walked away. He flipped through it but did not understand the consecutive nature of the sentences. PCR 109-110. He pled guilty on the belief that his sentences would be "together" and that his front

end sentence would thus only be 10 years. *Id.* He felt that he was being rushed into accepting the plea. *Id.*

At the plea canvass, trial counsel noted that Oscar seemed “unsure” and “shaky” about the plea deal. Nevertheless, when the district court canvassed him about the plea he indicated his assent, including to the court’s specific statement that “the very least amount of time I could give you on the bottom end is 11 years.” PCR 19-27. When asked about the canvass, Oscar testified that “I didn’t really know what was going on. I mean, I was a bit confused that day, everything happened so fast. She [trial counsel] told me in court to make my mind up, you know, this is my last chance. And that if I didn’t decide then, that, you know, I could spend the rest of my life in prison and I got scared and I guess that’s it. I was confused about what was going on during the rest of the proceeding.” He also stated that he felt pressured and that he was believing what trial counsel had told him about the sentence being ten years. PCR 246.

At the evidentiary hearing, trial counsel stated that she had gone through all of the various permutations of a sentence and conviction that Mr. Gomez could get, multiple times and even to the point of quizzing him about specific aspects of his sentencing exposure or how good time credits worked. PCR 222, 225. Oscar’s testimony at the hearing largely tracked with this account. However, he reiterated that trial counsel “never really discussed the concurrent or the consecutive to me

that well. I didn't understand it." PCR 241-42. When asked to describe the specific explanation trial counsel did give, Oscar expressed his understanding as "She told me that I was young and that I would be out in my early 30s and that I'll just do 10 and be eligible to go out on the streets." PCR 242. He also disputed that trial counsel had gone so far as to quiz him, saying that she had never quizzed him once. PCR 243.

There was also evidence of personality conflicts between trial counsel and Oscar's family. For instance, his sister reported that trial counsel appeared "surprised yet disgusted" by her pregnancy at a young age; she felt belittled and believed that this was symptomatic of the lack of consistency and communication displayed by trial counsel. PCR 118. Oscar's mother also described conflict in the relationship. PCR 249-250. At the evidentiary hearing, trial counsel stated that she did not have a positive relationship with Oscar's family "because they called and yelled at me all of the time." PCR 235-36.

C. Analysis

Both Oscar and his lawyer agreed for the most part on the content of their interactions. She visited him a number of times and gave an exhaustive list of potential sentences he might receive. Additionally it was uncontested that he only had a very short amount of time to actually read the written plea agreement. The

disagreement between the two accounts is narrow, but in this context quite legally relevant.

Oscar has repeatedly and consistently maintained that he did not understand that his sentences would run consecutively instead of concurrently. In his account of the discussions, he stated that his trial counsel told him his sentences would run “together.” This is a natural word for a lawyer to use in this context (after all there is no separation between two consecutive sentences – they do in fact run together), but it is also a natural word for a non-lawyer to misunderstand given the technical way in which it is being used here.

At the time of the plea, Oscar was 22 years old, with a limited education and no experience with the legal system outside of a misdemeanor marijuana conviction. It was reasonably foreseeable that he would have trouble understanding a technical aspect of his situation. This is especially true in the context of trial counsel’s discussions, which were not limited solely to this particular issue but included many different permutations of possible sentences and thus added to the technical complexity. Trial counsel herself realized that Oscar was having trouble understanding it, which is why she specifically noted making multiple attempts to try and explain the situation. But despite this, she never adequately made sure that Oscar did in fact understand his situation.

Failure to ensure that Oscar understood what he was pleading to was ineffective assistance of counsel. It was error because counsel had a duty to make sure he understood, and it was prejudicial because if not for this mistake, Oscar would have gone to trial. Oscar's Sixth Amendment right was violated as a result.

II. Trial Counsel Was Ineffective in Failing to Investigate and Obtain Pretrial Evidentiary Hearings.

As discussed above, ineffective assistance has two parts under *Strickland*; deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984). "Counsel has a duty to make reasonable investigations." *Id.* at 691. A reasonable investigation must be thorough. Just because an attorney has "some information," they cannot reasonably "make a tactical choice not to present a mitigation defense." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Courts have found a lack of investigation to constitute an unreasonable choice, undeserving of deference, in a number of circumstances. In *Bemore v. Chappell*, the Ninth Circuit found that counsel's decision to fully and adequately investigate one line of defense was not a justification for their decision to inadequately investigate a second line of defense. 788 F.3d 1151, 1174 (9th Cir. 2015). Another case (discussed above in a different context) is *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1998). Caro's trial counsel was found ineffective due to a

failure to adequately investigate the possibility that repeated exposure to toxic pesticides could reduce culpability. *Id.* at 1226.

In *State v. Love*, this Court found ineffective assistance of counsel due to a failure to interview a number of willing potential witnesses, and disagreed with the State's characterization of this failure as a "tactical decision." 109 Nev. 1136, 1137-38, 1140 (1993). This tracks with the U.S. Supreme Court's finding of ineffective assistance of counsel in *Williams v. Taylor*, 529 U.S. 362 (2000). The *Taylor* Court found that failure to investigate was deficient performance even though the uninvestigated information contained information that was damaging to the defendant's case as well as helpful. *Id.* at 396. Failure to investigate alternate suspects can also constitute ineffective assistance of counsel. *Jones v. Wood*, 207 F.3d 557 (9th Cir. 2000).

Failure to challenge a suggestive line-up can constitute ineffective assistance of counsel. *Thomas v. Varner*, 428 F.3d 491 (3rd Cir. 2005). Admission of irrelevant weapons into evidence is reversible error under *United States v. Green*, 648 F.2d 587 (9th Cir. 1981), which logically implies that the allowance of this admission is ineffective assistance of counsel. Denial of post-conviction relief presents a mixed question of law and fact, which this Court reviews independently. *Foster v. State*, 111 P.3d 1083, 1086 (2005).

Trial counsel failed to investigate two specific factual issues which Mr. Gomez identified and wanted her to investigate.² First, in the video obtained at the time of the shooting, it was not immediately clear whether Mr. Gomez was the shooter and another person was present and walking away from the scene of the crime at the same time. PCR 76-77, 108. Additionally, Oscar identified an eyewitness to the shooting who stated that the shooter was wearing different clothing from what Oscar was wearing that night. Even though that person gave a voluntary statement to the police, trial counsel failed to interview the witness. PCR 79-81, 108.

Trial counsel also failed to file two pretrial evidentiary motions that Mr. Gomez requested. First, the photo line-up was impermissibly suggestive, as it contained Oscar's photo alongside dissimilar individuals. PCR 77-78, 108. Additionally, when the police searched Mr. Gomez' house they found a shell casing which was impounded as "evidence" even though there was no shell casing

² The undersigned notes that in the district court case, he was not appointed until after Judge Adair had announced her denial of the claims in Sections II and III. When the undersigned was appointed, Judge Silva expressed that she was adopting Judge Adair's conclusion and would also deny the claims. Thus, the undersigned was unable to further develop the factual record and supplement Mr. Gomez' pro se argument on these issues. If the Court grants remand the undersigned would welcome the opportunity to do so.

found at the scene of the shooting and the bullet was unavailable. Trial counsel also failed to file a motion to exclude this bullet as irrelevant. PCR 78-79, 108.

Failure to investigate these issues and file these motions was error. The investigations would not have been difficult or onerous, and counsel already had the voluntary statement of the witness in front of her. The failure to investigate deprived Oscar and his counsel of a full, adequate picture, vitiating the voluntariness of the plea. In addition, counsel's failure to investigate and to litigate the evidentiary issues pretrial led to him feeling pressured and coerced into taking the plea. This was prejudicial error in violation of the Sixth Amendment.

III. Trial Counsel's Failure to File a Motion to Withdraw the Guilty Plea Was Ineffective Assistance of Counsel.

As discussed above, under *Strickland* counsel is ineffective when their actions constitute prejudicial error. Nevada statute provides that a plea may be withdrawn before sentencing, or at the court's discretion to correct a manifest injustice after sentencing. NRS 176.165.

After feeling pressured into pleading guilty, Oscar reconsidered his decision and wrote a letter, asking for a motion to withdraw the plea to be filed. PCR 98-100, 119-120. Failure to file a motion to withdraw the guilty plea at this point was prejudicial error in violation of Oscar's Sixth Amendment right.

CONCLUSION

Oscar Gomez did not want to plead guilty and did not sufficiently understand his sentencing structure. This rendered his plea involuntary and constituted ineffective assistance of counsel in violation of his rights under the US and Nevada Constitutions. Given this, he respectfully asks the Court to vacate his conviction and remand for further proceedings.

Dated this 9th day of May, 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 **3228** 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 9th day of May, 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 9th day of May, 2022

/s/ Jim Hoffman

Jim Hoffman, Esq.