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Cosio-Nava v. State Respondent's Brief Dckt. 43389

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MIGUEL COSIO-NAVA,)
) No. 43389
 Petitioner-Appellant,)
) Jerome Co. Case No.
 v.) CV-2014-1043
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME**

HONORABLE JOHN K. BUTLER
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Miguel Cosio-Nava appeals from the denial, after an evidentiary hearing, of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Cosio-Nava filed a petition for post-conviction relief, challenging his felony conviction for domestic violence. (R., pp. 4-6.) Cosio-Nava asserted his trial counsel was ineffective for inadequately advising him of the “immigration consequences of his plea.” (Id.) The case proceeded to an evidentiary hearing. (R., pp. 47-50.)

At the hearing, Cosio-Nava testified that his attorney “never mentioned” that he would lose his lawful permanent resident status or “anything about immigration, deportation ... [or] citizenship.” (Tr., p. 10, L. 24 – p. 11, L. 3; p. 11, Ls. 14-18.) Trial counsel testified that he told Cosio-Nava that his “understanding” was that Cosio-Nava “would lose his right to be in the United States.” (Tr., p. 17, L. 15 – p. 18, L. 13.) Cosio-Nava introduced documents showing he was deported because he was convicted of a crime that met the definitions of “domestic violence,” 8 U.S.C. § 1227(a)(2)(E)(i) and “aggravated felony,” 8 U.S.C. § 1227(a)(2)(A)(iii). (Exhibits, pp. 4, 8-9.)

Finding the testimony of trial counsel more credible, the district court found Cosio-Nava had not proved deficient performance. (R., pp. 60-64.) The district court also found Cosio-Nava had presented no evidence of prejudice. (R., pp. 64-66.) Cosio-Nava timely appealed from entry of judgment. (R., pp. 68-73.)

ISSUE

Cosio-Nava states the issue on appeal as:

The court erred in denying the Appellant's petition by not finding his attorney's representation to be deficient with respect to the impact his plea and sentence would have on the Appellant's immigration status as a lawful permanent resident.

(Appellant's brief, p. 3.¹)

The state rephrases the issue as:

Has Cosio-Nava failed to show either clear error in the district court's factual findings or error in the application of the law to the facts?

¹ The pages of the Appellant's brief are not numbered. All page numbers cited herein are approximate.

ARGUMENT

Cosio-Nava Has Failed To Show Either Clear Error In The District Court's Factual Findings Or Error In The Application Of The Law To The Facts

A. Introduction

The district court found Cosio-Nava had failed to prove deficient performance or prejudice. (R., pp. 60-64.) On appeal Cosio-Nava argues that the district court should have given “more weight” to trial counsel’s statements at the plea hearing, and thus rejected his trial testimony and found deficient performance. (Appellant’s brief, p. 6.) He also argues that the district court should have found prejudice because trial counsel failed to obtain a withheld judgment at sentencing. (Appellant’s brief, pp. 7-10.) Cosio-Nava’s argument does not withstand analysis.

B. Standard Of Review

“Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence.” McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). A trial court’s decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d

964, 965 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Cosio-Nava Has Shown No Error In The District Court's Finding Of No Deficient Performance, Which Was Based On A Credibility Determination

Where the petitioner alleges entitlement to relief based upon ineffective assistance of counsel, he must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To show deficient performance, the petitioner must "overcome the strong presumption that counsel's performance was adequate by demonstrating 'that counsel's representation did not meet objective standards of competence.'" Vick v. State, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct. App. 1998) (quoting Roman v. State, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994)). Appellate courts "will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." State v. Chapman, 120 Idaho 466, 469-470, 816 P.2d 1023, 1026-27 (Ct. App. 1991) (citations omitted). In cases where "the deportation consequence" of a guilty plea "is truly clear," an attorney has an equally clear "duty to give correct advice." Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

Trial counsel testified that he told Cosio-Nava that his “understanding” was that, by accepting the state’s plea agreement and pleading guilty to the crime of domestic violence, Cosio-Nava “would lose his right to be in the United States.” (Tr., p. 17, L. 15 – p. 18, L. 13.) The district court found this testimony credible, and found that this was the advice given by counsel. (R., pp. 60-64.) This was certainly correct legal advice.

The Immigration and Naturalization Act (“INA”) provides that an alien convicted of an “aggravated felony” is “deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii). Under the INA an “aggravated felony” includes any “crime of violence” for which “the term of imprisonment [is] at least one year.” 8 U.S.C. § 1101(a)(43)(F). A “crime of violence” is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). Cosio-Nava was convicted of domestic violence for battering a household member causing a traumatic injury, a felony punishable by up to ten years. I.C. § 19-918(2). Cosio-Nava was thus deportable for having committed an “aggravated felony.”

The INA also provides that an alien convicted of “a crime of domestic violence” is “deportable.” 8 U.S.C. § 1227(a)(2)(E)(i). A crime of domestic violence is defined as a “crime of violence” against a person with whom the alien has a domestic relationship. *Id.* A “crime of violence” is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). Cosio-Nava was thus also deportable for having committed a “crime of domestic violence.” In

fact, both of these bases were ultimately listed as reasons for Cosio-Nava's deportation. (Exhibits, pp. 4, 8-9.)

On appeal Cosio-Nava argues that the district court should have found that trial counsel's advice was limited to what counsel put on the record at the guilty plea hearing. (Appellant's brief, pp. 4-7.) The flaw in this argument is that it assumes that trial counsel put on the record at the guilty plea hearing all the advice he gave his client. Counsel explained in his testimony that his "answer to the Court wasn't full. If I would have explained more, it would have been what I testified today." (Tr., p. 29, Ls. 16-18.) The district court was well within its exclusive province to find this testimony credible. Cosio-Nava has failed to show error in the district court's conclusion that he failed to prove deficient performance.

D. Cosio-Nava Has Shown No Error In The District Court's Finding He Presented No Evidence Of Prejudice

Cosio-Nava had the "burden of showing how trial counsel's allegedly deficient performance caused prejudice." Kuehl v. State, 145 Idaho 607, 611, 181 P.3d 533, 537 (Ct. App. 2008). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have

been rational under the circumstances.” Padilla, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

The district court rejected Cosio-Nava’s allegation of prejudice as follows:

The petitioner never testified as to what his decision would have been in view of the immigration consequences. Simply, there is no evidence in the record as to the decision that the Petitioner would have made in light of the immigration consequences or whether such a decision would have “been rational under the circumstances.”

(R., p. 65.) Review of the transcript shows that Cosio-Nava presented no evidence that he would have rejected the state’s plea offer and gone to trial had he known of the potential immigration consequences of his guilty plea. (Tr., p. 10, L. 6 – p. 12, L. 12.) Cosio-Nava’s claim of prejudice necessarily fails because he presented no evidence that he was prejudiced by the advice counsel actually gave him. See Icanovic v. State, 159 Idaho 524, ___, 363 P.3d 365, 372 (2015) (prejudice claim fails where based on a “false assertion” of what counsel advised).

On appeal Cosio-Nava argues that he was prejudiced by trial counsel’s failure to obtain a withheld judgment. (Appellant’s brief, pp. 7-11.) Even accepting what the state considers the dubious legal merit of such an argument,² this legal theory is still without any basis in the evidence. There is simply no

² The entire argument appears to be based on *dicta* from a Ninth Circuit case that the court will look to the actual sentence imposed instead of the potential sentence, and extrapolates that a withheld judgment results in a sentence of less than a year and therefore there was no “aggravated felony.” (Appellant’s brief, p. 9, n. 19 (citing United States v. Pimentel-Flores, 339 F.3d 959, 962 (9th Cir. 2003).) The INA, however, seems to specifically negate the defense that a withheld judgement prevents deportation. 8 U.S.C. § 1101(a)(48)(A). The state further notes that Cosio-Nava’s argument fails to address the alternate grounds for his deportation—that he committed a crime of domestic violence.

evidence that any deficiency in advising Cosio-Nava regarding the immigration consequences of pleading guilty caused the specific prejudice of failure to obtain a withheld judgment. Cosio-Nava's argument is meritless.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment denying post-conviction relief.

DATED this 16th day of February, 2016.

/s/Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of February, 2016, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

KENT D. JENSEN
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/s/Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd