

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

1-1-2004

Summary of Lara v. State, 120 Nev. Adv. Op. No. 20

Hilary Barrett Muckleroy
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Muckleroy, Hilary Barrett, "Summary of Lara v. State, 120 Nev. Adv. Op. No. 20" (2004). *Nevada Supreme Court Summaries*. 682.

<https://scholars.law.unlv.edu/nvscs/682>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Lara v. State, 120 Nev. Adv. Op. No. 20, 87 P.3d 528 (2004)¹

**CRIMINAL PROCEDURE – POST-CONVICTION RELIEF – HABEAS
CORPUS**

Summary

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.²

Disposition/Outcome

Affirmed. A petition for habeas corpus relief is appropriately denied when defendant's attorneys provided effective assistance at all stages of trial.

Factual and Procedural History

On April 10, 1997, the State charged appellant Jerry Lara with use of a deadly weapon (open murder) and discharging a firearm into a vehicle, stemming from an October 26, 1996 incident. The State alleged that Lara fired several shots at the rear of Eduardo Sonera's 1976 Cadillac and that one of the bullets hit and killed Alex Arroyo, a child passenger. At trial, the State theorized that eyewitnesses' inconsistent statements were related to Lara's alleged membership in the "18th Street Gang."

A jury found Lara guilty on all charges. Lara subsequently filed a motion for a new trial, which the district court denied. Lara received a life sentence with the possibility of parole after a minimum 20 years on the murder conviction, an equal and consecutive sentence for the deadly weapon enhancement, and a concurrent 16 to 72 month sentence for discharge of a firearm. Lara was also ordered to pay \$3,843.55 in restitution and received credit for 353 days served in local custody. The supreme court dismissed his direct appeal.

Lara then filed a post-conviction petition for a writ of habeas corpus. Lara claimed prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. The district court properly denied the prosecutorial misconduct claim for procedural reasons.³

Lara appealed the order, arguing that the district court erred in denying the ineffective counsel claims. Lara claimed that trial counsel failed to object to evidence of, and examine witnesses concerning Lara's alleged gang involvement; failed to object to or address evidence that witnesses gave inaccurate information for fear of retaliation; presenting gang evidence as part of the defense case; giving inadequate advice on whether Lara should testify; and failing to

¹ By Hilary Barrett Muckleroy

² See NEV. REV. STAT. 34.575(1) (2004).

³ This claim should have been raised on direct appeal. See NEV. REV. STAT. 34.810(1)(b) (2004).

properly examine Lara. Lara further claimed that appellate counsel failed to raise claims of error in connection with the admission of evidence of gang membership and fear of retaliation at trial.

Discussion

Ineffective Assistance of Trial Counsel

The question of whether a defendant has received ineffective counsel is a mixed question of both fact and law and is, therefore, subject to appellate review.⁴ The district court's factual findings are entitled to deference upon review.⁵

Using the *Strickland v. Washington*⁶ factors, a defendant must establish two factors to prevail on a claim of ineffective counsel at trial. First, the counsel must have provided deficient performance. Second, the deficient performance must have prejudiced the defense. To establish deficient performance, the defendant must show that the counsel's performance fell below and objective standard of reasonableness. To establish prejudice, the defendant must show a reasonable probability that the outcome of the trial would have been different, but for the counsel's errors. Trial counsel's strategy and tactics are "virtually unchallengeable absent extraordinary circumstances."⁷

Lara first contended that his trial attorney was ineffective because he failed to object to gang-affiliation evidence, inadequately cross-examined State witnesses, and called a defense witness who revealed Lara was in a gang.

Gang affiliation evidence may be relevant and is not substantially outweighed by unfair prejudice when it proves motive.⁸ The State properly offered evidence of gang affiliation as a motive for the shooting and to explain the bias or fear of witnesses. Defense counsel also had to reveal Lara's gang affiliation to impeach State witnesses and support Lara's alibi defense. During the post-conviction hearing, Lara's trial counsel stated that he questioned the jury regarding gang-related issues because the jury would know of Lara's gang affiliation due to his tattoos and the nature of the case. Further, trial counsel testified that he had to reveal Lara's gang affiliation to exploit inconsistencies and deficiencies in the State's evidence.

The supreme court concluded that the gang-related evidence was probative as to motive. The court also concluded that it was reasonable for trial counsel to conclude that disclosure of Lara's gang affiliation was critical to establish the alibi and impeach State witnesses. Because trial counsel could not properly defend the case without addressing the gang issue, Lara did not establish that his counsel was ineffective at trial. Therefore, Lara did not satisfy the first prong of the *Strickland* test.⁹

⁴ State v. Love, 109 Nev. 1136, 1138 (1993).

⁵ Riley v. State, 110 Nev. 638, 647 (1994).

⁶ 466 U.S. 668 (1984). See also Kirksey v. State, 112 Nev. 980, 987 (1996).

⁷ Doleman v. State, 112 Nev. 843, 848 (1996).

⁸ Lay v. State, 110 Nev. 1189, 1195-96 (1994); see also NEV. REV. STAT. 48.045(2) (2004).

⁹ The supreme court also held that Lara failed to satisfy the second prong of the *Strickland* test. For that, it deferred to the finding of the district court. The district court found "even if trial counsel made some strategic errors, [Lara] was not prejudiced because of compelling evidence of his guilt including his identification by four eyewitnesses,

Further to Lara's contention that his trial counsel was ineffective because counsel advised Lara to testify at trial, the supreme court concluded that counsel properly advised Lara of his right to testify or not testify. An accused makes the fundamental decisions regarding the case, including the decision whether to testify.¹⁰

Lara also contended that his trial counsel was ineffective because he failed to object to the introduction of evidence that witnesses gave inconsistent statements out of fear of retaliation.¹¹ Because trial counsel objected to some of this testimony, and later impeached witnesses on cross-examination, the failure to object did not constitute ineffective assistance. Trial counsel used tactical and strategic decisions during the examinations of witnesses. Therefore, neither *Strickland* factor was satisfied.

Ineffective Assistance of Appellate Counsel

Lara next argued that he received ineffective assistance from appellate counsel because counsel failed to argue prosecutorial misconduct and that the district court erred in not screening the gang-related evidence in a *Petrocelli* hearing.

The right the effective counsel extends to a direct appeal.¹² The *Strickland* test is also used to review a claim of ineffective appellate counsel. "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."¹³

Lara's appellate counsel had prosecuted more than 100 criminal appeals, and after a full assessment of the case, chose to focus on the denial of Lara's motion for a new trial. Appellate counsel need not raise every non-frivolous issue to provide effective assistance. Since the district court properly admitted the gang-related evidence, any appeal of those issues would have been fruitless.

Conclusion

Counsel can differ as to the best strategical and tactical decisions in defending a criminal defendant without providing ineffective assistance.

two of whom were neutral to the parties involved in the incident."

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

¹¹ The State introduced this evidence based on *Lay v. State*, 110 Nev. 1189, 1193-94 (1994). In that case, the Nevada Supreme Court held that fright or general concern for one's safety could provide an explanation as to why the witness made inconsistent statements.

¹² Kirksey, 112 Nev. at 998.

¹³ *Id.*