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Summary of Molina v. State, 120 Nev. Adv. Rep. 21

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CRIMINAL PROCEDURE

Summary

This case involves an appeal of a conviction entered on guilty pleas negotiated with the state. The defendant, Molina, alleged that he plead guilty because his lawyer's inadequate assistance did not allow him to make an informed decision to plead guilty. He also contended that his attorney violated the attorney-client privilege by divulging communications between him and his attorney.

Disposition/Outcome

Affirmed. The Nevada Supreme Court ruled that Molina had failed to show ineffective assistance from counsel because he did not demonstrate that but for his counsel's mistakes, he would not have pled guilty. Molina also failed to show a violation of the attorney-client privilege because the attorney divulged privileged communications to defend himself against the accusation of inadequate assistance.

Factual and Procedural History

Molina was charged with three counts of sexual assault with a minor fourteen years of age, two counts of lewdness with a child under fourteen years of age, and one count of annoying a minor. Molina was initially represented by the public defender. Subsequently, Molina fired the public defender and hired private counsel. Molina's private counsel was under the impression that he was hired to negotiate a better plea agreement than what the public defender had previously done. After reviewing the evidence against Molina and having discussions with the public defender that initially handled the case, Molina's counsel advised him that the present plea agreement was probably the best he could do. Molina then decided to accept the offer and plead guilty to one count of sexual assault and one count of lewdness with a minor. The trial court canvassed Molina at which time he admitted to the allegations set forth in the plea. The trial court concluded that he freely and voluntarily pled guilty the allegations.

Molina then moved to withdraw his guilty plea before he was sentenced. Molina claimed that he did not enter into the plea agreement knowingly and willingly because of ineffective assistance by his counsel. He argued that his counsel had met with him only once, advised him that he had to accept the agreement, and did not explore all possible options concerning his case with him. Molina's counsel argued that he met with him twice, had six telephonic conversations with him, discussed the evidence against him, and discussed what the state would need to prove in the case. Counsel also informed Molina that because he lacked a defense to the allegations, the State's plea offer was the best he could do. The trial court denied Molina's motion to withdraw his guilty plea and his claim of ineffective assistance of counsel.

¹ By Jeff Hall

Discussion

The court began its discussion by citing the two-part test for ineffective assistance of counsel set forth in *Strickland v. Washington*.² *Strickland* states that a defendant must show that counsel's performance fell below the objective standard of reasonableness and that the defense was prejudiced by such action.³ The court also noted at the outset that there is a strong presumption that counsel's performance falls within the reasonable objective standard.⁴ The court will examine the totality of the circumstances to determine whether a defendant entered his plea freely and voluntarily.⁵

The court found that Molina failed to prove his claim of ineffective assistance of counsel because he could not show that his counsel's performance was deficient under *Strickland*. Molina's counsel testified that he discussed the plea agreement and the evidence with him. Molina and his counsel clearly understood the evidence and the ramifications of the decision to plead guilty. While Molina complained that his attorney did not make trial preparations, the court held that counsel is not required to exhaust all available public or private resources to render effective assistance. Molina was aware of the evidence against him and he also understood what his plea entailed. Based on the totality of the circumstances, the trial court did not abuse its discretion by denying Molina's motion to withdraw his plea.

Molina also argued that the trial court erred by allowing his counsel to divulge privileged communications. Molina's counsel testified that Molina told him, in front of Mrs. Molina, that he had committed the acts he was charged with. Molina argued that he did not waive the privilege by filing his motion to withdraw the guilty pleas. The court recognized that attorney-client communications are confidential unless waived, but states that a waiver of the privilege occurs when the attorney must respond to claims concerning representation of the client.⁶ Further, statute provides that a post-conviction petition that claims ineffective assistance of counsel effectively waives the attorney-client privilege.⁷ While Molina's petition was presentence, the court finds that the same rule should apply. The discussions between the client and attorney are always relevant in determining whether the attorney's assistance met the objective reasonable standard. The court

² 466 U.S. 668 (1984).

³ *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996) (applying the *Strickland* test in Nevada).

⁴ *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (Nev. 1992).

⁵ *Crawford v. State*, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (Nev. 2001).

⁶ See NEV. REV. STAT. 49.055 (2004). This statute states that "a communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in the furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."; See also NEV. SUP. CT. R. 156(3)(b). This rule states that

"a lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

⁷ See NEV. REV. STAT. 34.735 (2004).

further stated that holding the opposite would allow a defendant to use insufficient communication as a “sword” to claim ineffective assistance of counsel.⁸

Conclusion

A claim of ineffective assistance of counsel must satisfy the two-part test in Strickland. Molina failed to show that his attorney’s performance was not that of a reasonable attorney in the same position. An attorney is not required to use every possible resource to meet this standard.

Additionally, the attorney-client privilege is waived when a defendant claims ineffective assistance by counsel. The communications between the client and attorney are crucial to the claim. Therefore, Molina waived the privilege when he made the claim in his motion to withdraw his guilty pleas.

⁸ Molina v. State, 120 Nev. Adv. Rep. 21, 18, 87 P.3d 533, 539 (Nev. 2004).