

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

4-4-2024

**Ortiz (Ramel) vs. State [State of Nevada], 140 Nev. Adv. Op. 23
(Apr. 04, 2024)**

Makai Zuniga

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

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.

Ortiz (Ramel) vs. State [State of Nevada], 140 Nev. Adv. Op. 23 (Apr. 04, 2024)¹

COUNSEL’S FAILURE TO CHALLENGE THE SUFFICIENCY OF EVIDENCE IN
MULTIPLE SEXUAL ASSAULT CONVICTIONS MAY RESULT IN INEFFECTIVE-
ASSISTANCE CLAIMS.

Summary

This opinion regards Ramel Ortiz, who was convicted of sexual assault, after he broke into the victim’s home and forced them to engage in multiple sexual acts. Four of these sexual assault counts resulted from an incident where Ortiz subjected the victim to intercourse in different sexual positions. Nevada caselaw provides that a change in position alone is insufficient to show that the resulting sexual acts constitute more than one sexual assault offense. However, Ortiz’s counsel failed to challenge the sufficiency of evidence to support the multiple sexual assault convictions. Further, Ortiz filed a postconviction writ of habeas corpus with respect to an ineffective-assistance claim. As a result, the Court reversed in part and remanded the lower court to vacate three of Ortiz’s sexual assault convictions.

Background

In March 2017, Ramel Ortiz entered a female’s home with a firearm and ordered her to engage in various sexual acts with him. The victim was told she would not be harmed if she complied with his demands. Ortiz would then force her to engage in vaginal intercourse with him in multiple sexual positions during the assault. A jury found Ortiz guilty of several crimes, including kidnapping, robbery, and sexual assault. He was sentenced to twenty-five years to life in prison. After losing an appeal on his convictions, Ortiz subsequently filed a postconviction writ of habeas corpus alleging multiple instances of ineffective assistance of counsel. His postconviction counsel filed a supplemental brief and waived an evidentiary hearing, and following argument, the district court denied the petition.

Discussion

Ineffective assistance of counsel

In order to demonstrate ineffective assistance of counsel, a petitioner must show that counsel’s performance fell below an objective standard of reasonableness and that the prejudice from the deficient performance created a reasonable probability that there would have been a different outcome absent counsel’s errors.² This test comes from *Strickland* and the Court stated that for purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions.³ The Court also stated that “with respect to the prejudice prong, [a] reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁴ Lastly, the Court stated its deference to the district court’s factual findings are supported by substantial evidence and not clearly wrong. Instead, the Court reviewed Ortiz’s application of the law to those facts de novo.⁵

¹ By Makai Zuniga.

² See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)

³ *Id.* at 690.

⁴ *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (alteration in original) (quoting *Strickland*, 466 U.S. at 694).

⁵ *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Appellate counsel provided ineffective assistance by failing to challenge the sufficiency of the evidence to support multiple counts of sexual assault arising from a single encounter

Ortiz argued that his appellate counsel should have challenged the sufficiency of the evidence to support some of his sexual assault convictions. Specifically, Ortiz asserted that the sexual acts charged in these counts, all of which pertained to the conduct in M.P.'s bedroom, occurred during a single sexual encounter, and M.P.'s testimony was insufficient to support a finding of guilt as to more than one count of sexual assault. According to Ortiz, had appellate counsel raised this issue on direct appeal, three of the sexual assault convictions would have been reversed.

Nevada law provides that a person commits sexual assault when the person "[s]ubjects another penetration... against the will of the victim."⁶ Further, "[S]eparate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions 'even though the acts were the result of a single encounter and all occurred within a relatively short time.'"⁷ However, when the acts of a sexual assault occur during a single encounter and involve the same type of penetration, the acts support only one sexual assault conviction absent an interruption and subsequent reinitiation of activity. Therefore, the Court's precedent makes clear that multiple acts of the same type of penetration, even when performed in multiple sexual positions, are not separate and distinct sexual assaults when the encounter is continuous and there is no break or interruption between the acts.

In Ortiz's case, the Court held that appellate counsel's omission of the sufficiency challenge fell below an objective standard of reasonableness. Therefore, the determination of whether appellate counsel's deficient performance prejudiced Ortiz or not depended on the likelihood that the omitted sufficiency challenge would have succeeded on appeal. The question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁸ The Court found that the victim's testimony struggled to provide particularity about the incident and that even viewing the evidence in the light most favorable to the State, its review of the record revealed that no rational trier of fact could have found beyond a reasonable doubt that each sexual position amounted to a separate and distinct sexual act. Therefore, the Court concluded that Ortiz demonstrated that but for appellate counsel's omission, there was a reasonable probability that the result on direct appeal would have been different.

The remaining claims of ineffective assistance of counsel lack merit

Ortiz had a number of other ineffective-assistance-of-counsel claims he raised before the Court, and the Court concluded that each and every one of them lacked merit.

⁶ NRS 200.366(1)(a).

⁷ *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (quoting *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)).

⁸ *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Conclusion

The Court held that without additional details, only eliciting testimony that established one type of sexual penetration on and near the victim's bed was not enough evidence from which a rational juror could have found four separate and distinct acts of sexual assault. Further, because appellate counsel identified the possibility of error relating to Ortiz's multiple convictions, but failed to challenge the sufficiency of the evidence supporting them on direct appeal, the Court concluded that counsel's performance fell below an objective standard of reasonableness and prejudiced Ortiz. Therefore, the Court affirmed in part, reversed in part, and remanded with instructions to grant the petition in part and to vacate the convictions of sexual assault imposed in counts 5-7.