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District Court of Arapahoe County Honorable William Blair Sylvester, Judge Case No. 98CR3336	▲ COURT USE ONLY ▲
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant, v. JESUS MANUEL MACIAS, Defendant-Appellant.	Case No.: 05CA2108
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PEOPLE'S ANSWER BRIEF

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STATEMENT OF THE CASE

Jesus Manuel Macias ("the defendant") appeals the district court's order summarily denying his Crim. P. 35(c) motion.

On December 26, 1998, the defendant shot and killed his 17-year-old girlfriend, MM, with a .45-caliber semiautomatic pistol (v. 5, pp. 190, 201). MM was holding their infant daughter, but the infant was not injured (v. 10, p. 155).

On December 30, 1998, the People charged the defendant with first-degree murder and the crime of violence sentence enhancer (v. 1, pp. 48-53).

The defendant's theory of defense was that the shooting was an accident and that he "had forgotten" that the gun was loaded. Accordingly, the trial court instructed the jury on the lesser-included offenses of second-degree murder, reckless manslaughter, and criminally negligent homicide (v. 1, pp. 151, 168-71).

On May 26, 2000, the jury convicted the defendant of second-degree murder, § 18-3-103(1), C.R.S. (2006), a class two felony, and also found him guilty of the crime of violence charge (v. 1, pp. 176-77, 236).

On April 4, 2001, the trial court sentenced him to forty years at the Department of Corrections (v. 3, 4/5/01, p. 36).

The defendant appealed, asserting that the trial court abused its discretion when it: failed to grant his requests for a mistrial; admitted testimony from a

jailhouse informant; and permitted a deputy sheriff, sworn as a bailiff, to demonstrate firearm safety to the jury during deliberations.

In People v. Jesus Manuel Macias, 05CA2108 (Colo. App. Apr. 17, 2003) (Not Published Pursuant to C.A.R. 35(f)), a division of this Court affirmed the judgment of conviction. On August 10, 2004, the mandate issued (v. 1, p. 343).

On July 6, 2005, the defendant filed a pro se motion for free transcripts and the appointment of counsel to assist him in preparing a Crim. P. 35(c) motion (v. 1, pp. 361-70).

On July 13, 2005, the district court construed the motion as sounding in Crim. P. 35(c), and ordered the defendant to re-file the motion within 45 days to comply with the new formal filing requirements or forfeit his postconviction rights under Crim. P. 35(c) (v. 1, p. 371).

On August 11, 2005, the defendant complied with the district court's order and filed a Crim. P. 35(c) motion (v. 1, pp. 375-94). On August 23, 2005, the district court summarily denied the motion (v. 1, pp. 372-73).

This appeal followed.

STATEMENT OF THE FACTS

On December 26, 1998, at about 1:00 p.m., Officer David Johnson responded to a 911 dispatch that a man had called and claimed that he had shot his girlfriend (v. 5, p. 179). Officer Johnson arrived at the defendant's trailer home to observe him leaving in his car (v. 5, p. 185). When he saw the officer, the defendant parked his car, motioned the officer over to him, and stated, "Hey, bro, I did it. I shot my girlfriend." (v. 5, pp. 188-89). He later claimed that he was bringing his infant to his mother's house, but Officer Johnson testified that the defendant did not have the infant outside the trailer (v. 5, p. 227; v. 10, p. 156).

At trial, the defendant testified that on Christmas Day, a "road rage" driver followed him home, so he put a "clip" in his .45-caliber pistol and "chambered a round" (v. 10, p. 144). He later put the weapon away, with the round still in the chamber, and the "hammer was back," such that it was still "cocked" (v. 10, pp. 144-45, 175, 182-83). When his wife MM returned that evening from a holiday family gathering, they argued, tore up clothing, and threw dishes (v. 10, pp. 146-49, 186). He slept on the sofa that night (v. 10, p. 184).

The next morning, MM awakened the defendant by throwing condoms in his face, and yelling, "Here, these are for your girlfriend . . . I'm going to kill you, liar" (v. 10, pp. 149-50). The defendant went for his .45, but MM hit him in the

back of the head with an "Indian pipe," and they had a scuffle in which he bit her twice (v. 10, pp. 150-52). He then retrieved the .45 from an overhead cabinet, removed and hid the "clip," and put the .45 in his pocket (v. 10, p. 152). He threatened to shoot MM in the foot if she did not hand over the infant (v. 10, p. 152). When MM stated, "You better kill me, because I'm going to kill this baby if you leave us," he stood about five feet away, pulled the .45 from his pocket, and pointed it at her "to scare her" into handing over the infant (v. 10, pp. 153-54, 157; v. 11, p. 57). He "did not remember" that a bullet was already in the chamber, but he "must have" pulled the trigger because the gun "went off" (v. 10, pp. 154, 206; v. 11, pp. 41-42). He then called family members and 911 to tell them that he had shot MM (v. 10, p. 153).

At trial, the couple's family members testified to specific acts of domestic violence between the defendant and MM throughout their two-year relationship (v. 5, pp. 34, 240; v. 6, pp. 83, 210, 233, 270). The defendant admitted to these acts in his testimony, and blamed MM's anger and aggressive actions on unjustified fits of jealousy (v. 10, pp. 165-68). Nonetheless, during the presentence investigation, the defendant admitted to infidelities, and he admitted that MM had started the argument that morning because a woman had called MM claiming to be pregnant

with the defendant's child (Env. #1, Mental Health Evaluation, pp. 1-2). He did not reveal any of this at trial (v. 10, pp. 192-94).

The family members also testified that the night before the shooting, they overheard the couple argue on the telephone, at which time the defendant threatened to kill MM (v. 4, pp. 42-45). A jailhouse informant testified that the defendant had told him the details of a murder that had a different factual basis than the shooting of MM (v. 11, pp. 76-142). This testimony was admitted to show absence of accident because the story seemed to be a disguised version of MM's murder (v. 10, p. 230).

A CBI firearms expert testified on direct that only a certain amount of pressure applied to the trigger would allow it to fire, such that it would not fire accidentally (v. 8, pp. 38-86). However, he also testified that the gun had three safety features: a grip safety, a thumb safety, and a firing pin lock for when the "hammer is cocked" (v. 8, pp. 39-40). On cross-examination, defense counsel elicited that the firing pin lock safety only worked 43% of the time if the gun was in the "half-cocked" position (v. 8, pp. 93-95).

Additional pertinent facts are presented in the argument sections below.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that the defendant is not entitled to appointed counsel or an evidentiary hearing on his postconviction motion because the record shows he is not entitled to relief.

The defendant's conflict of interest claim fails on procedural grounds because the defendant waived his speedy trial rights, which is the underlying basis for his conflict of interest claim, by failing to assert those rights before trial.

The defendant's conflict of interest claim fails on the legal merits because the defendant expressly waived his speedy trial rights at trial.

The district court did not err in summarily denying the defendant's ineffective assistance of counsel claim. The defendant's claim fails on Strickland's prejudice prong because the evidence in this case was overwhelming. In addition, the allegations fail for individual reasons.

The district court did not err by denying the defendant's claim that the trial court sua sponte gave an erroneous modified-*Allen* instruction "off the record" because the record refutes it.

ARGUMENT

I. The district court correctly concluded that the defendant is not entitled to appointed counsel or an evidentiary hearing on his postconviction motion because the record shows that he is not entitled to relief.

The crux of the defendant's claim on appeal is that the district court erred by denying his Crim. P. 35(c) motion without appointing counsel and conducting an evidentiary hearing on the legal merits of his claims (Opening Brief, pp. 13, 27).

Standard of Review

Where the ruling of a postconviction court involves mixed questions of law and fact, a reviewing court defers to the postconviction court's findings of fact when they are supported by sufficient evidence in the record and subjects the postconviction court's legal conclusions to de novo review. People v. Kyler, 991 P.2d 810, 818 (Colo. 1999).

Law and Analysis

The district court may summarily deny a 35(c) motion if the claims are bare and conclusory, without supporting allegations, People v. Moore, 485 P.2d 114, 115 (Colo. 1971), if the allegations, even if true, do not provide a basis for relief, White v. District Court, 766 P.2d 632, 634-35 (Colo. 1988), if the claims raise only an issue of law, People v. Velarde, 616 P.2d 104 (Colo. 1980), or if the claims are

facially valid but are plainly refuted by the record. See People v. Blehm, 983 P.2d 779 (Colo. 1999).

Here, the district court denied the defendant's Crim. P. 35(c) motion because it found, based on the record, that he was not entitled to relief (v. 2, pp. 372-373; Appellee's App. A, pp. 1-2). As argued below, the district court's conclusion was correct, and thus it properly declined to hold an evidentiary hearing on the postconviction motion.

Likewise, the district court properly declined to appoint counsel. Duran v. Price, 868 P.2d 375, 379 (Colo. 1994) (a court may decline to exercise authority to appoint postconviction counsel where asserted claim is wholly unfounded).

Accordingly, the district court correctly concluded that the defendant is not entitled to appointed counsel or an evidentiary hearing on his postconviction motion.

II. The defendant's conflict of interest claim fails on procedural grounds because the defendant waived his speedy trial claim, which is the underlying basis of his conflict of interest claim, by failing to assert the claim before trial.

The defendant first contends that his counsel operated under a conflict of interest in advising him to waive his speedy trial rights to obtain a continuance of the trial (Opening Brief, p. 13).

As a threshold matter, the defendant waived his speedy trial claim on appeal because he asserted it for the first time after his conviction, whereas statutory and constitutional speedy trial rights must be asserted before trial, or the claim is waived. See Keller v. People, 387 P.2d 421, 425 (Colo. 1963) (constitutional speedy trial waived); § 18-1-405(5), C.R.S. (2007) (to be entitled to a dismissal under statutory speedy provision, the defendant must move for dismissal prior to the commencement of his trial). It is the defendant's burden to establish that his speedy trial rights were violated. Casias v. People, 415 P.2d 344 (Colo. 1966).

The defendant was well aware, pretrial, that the prosecution had added new evidence and new witnesses because, as he concedes, he was granted another continuance for the sole purpose of rebutting that additional evidence (v. 2, p. 383). As such, the defendant was required to assert at that time that his speedy trial

waiver was not valid, yet he failed to do so. See People v. Marquez, 739 P.2d 917, 919 (Colo. App. 1987) (a defendant's failure to demand dismissal prior to trial normally waives any speedy trial objection).

Accordingly, the defendant's conflict of interest claim fails because the defendant waived his speedy trial claim on appeal when he failed to assert it before trial.

III. The defendant's conflict of interest claim fails on the legal merits because the defendant expressly waived his speedy trial rights at trial.

The defendant contends that the district court erred by failing to address his conflict of interest claim based on the defendant's pretrial express waiver of his speedy trial rights (Opening Brief, p. 20).

Relevant Facts

On July 30, 1999, defense counsel filed a written motion to continue the trial (v. 1, pp. 82-83; Appellee's App. B, pp. 1-2). The motion alleged that he would be unable to act as counsel for the defendant at trial because he would be suspended from the practice of law for 30 days, commencing two days before the scheduled trial (id.). The motion also alleged in paragraphs 3 and 4 the following:

> 3. Counsel has informed counsel [sic] of counsel's suspension and subsequent inability to act as his attorney in this matter and the Defendant does not wish to proceed to trial without the undersigned counsel. While there is co-counsel on the case, Evans Garcia, the undersigned counsel is the lead attorney on the case and Defendant does not feel comfortable with only Mr. Garcia as his attorney. The Defendant wishes that this matter be postponed until such time as the undersigned counsel can again act as counsel.
>
> 4. The Defendant understands that he will be waiving his right to a speedy trial if a continuance is granted in this matter.

(v. 1, p. 82; Appellee's App. B, p. 1).

On August 13, 1999, the defendant signed a written waiver of his speedy trial rights (v. 1, p. 87; Appellee's App. C). Also on August 13, 1999, the trial court held a hearing on the motion to continue in which the defendant affirmed that he read and signed the waiver of speedy trial, and that he understood the waiver to mean that the trial would be continued for six months (v. 3, pp. 2-4).

Law and Analysis

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

A waiver of the statutory speedy trial right need only be voluntary to be valid. See People v. Franco, 74 P.3d 357, 359 (Colo. App. 2002) (where defendant agreed not to oppose continuance and to execute a speedy trial waiver to gain

prosecution's acquiescence to his bond reduction request, he did not demonstrate that his waiver was involuntary).

A waiver of the constitutional speedy trial right must be voluntary, knowing, and intelligent, and such a determination depends, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. See Zerbst, 304 U.S. at 464.

Here, the motion to continue alleged that the defendant, knowing that Mr. Lucero could not conduct the trial as scheduled because of the suspension of his license to practice law, wished to waive his speedy trial rights and continue the trial rather proceed without Mr. Lucero. At no time did the defendant dispute this fact, and thus the record shows that the defendant's waiver of his speedy trial rights was valid under both standards.

Nonetheless, the defendant argues that his express waiver was invalid because he did not confer with conflict-free counsel before executing the waiver. That is, he alleges that defense counsel had an actual conflict of interest because of his "financial interest" in getting paid for trial, which in turn caused him to fail to advise the defendant that the prosecution could greatly strengthen its case during the continuance period (Opening Brief, pp. 20-22).

However, the defendant's allegations do not establish that there was any actual conflict of interest in this case.

Where, as here, there is no objection at trial, a defendant alleging that a conflict of interest constituted ineffective assistance must demonstrate that his counsel (a) actively represented conflicting interests, and (b) the conflict adversely affected his representation. People v. Wood, 884 P.2d 1299, 1301 (Colo. App. 1992). To satisfy this burden, the defendant must point to specific instances in the record indicating that the conflict impaired counsel's representation of the defendant. People v. Kenny, 30 P.3d 734 (Colo. App. 2004).

While the phrase "actual conflict" has been used to describe any situation that appears to present a division of loyalties, it has also been used as a shorthand for a conflict that adversely affected counsel's performance. Mickens v. Taylor, 535 U.S. 162, 171-72 (2002). The difference is important because prejudice is presumed only when "actual conflict" is defined as a conflict that has adversely affected the representation. Id.

This means that the defendant was required "to identify something that counsel chose to do or not, as to which he had conflicting duties, and [to] show that the course taken was influenced by that conflict." Kenny, 30 P.3d at 745, citing United States v. Khoury, 901 F.2d 948 (11th Cir. 1990) and quoting Vance v.

Lehman, 64 F.3d 119, 124 (3rd Cir. 1995) (internal quotations omitted); see also Cuyler v. Sullivan, 446 U.S. 335 (1980) (for an actual conflict, the conduct of the trial must have been affected).

"Actual conflict" does not include consideration of personal or financial interests. Mickens, 535 U.S. at 175 ("The language of Cuyler does not clearly establish or even support an expansive application of conflict to."); Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995) (no conflict found where counsel's "ongoing financial motive" was to profit from a prospective literary rights agreement because "[t]he fact that an attorney undertakes the representation of a client because of a desire to profit does not by itself create the type of direct 'actual' conflict of interest required by Cuyler.").

Here, since nothing in the record indicates that defense counsel did not act in the defendant's best interest, this Court presumes that he did so. See Keller, 387 P.2d 421, 425 (Colo. 1963) (where the defendant accused seasoned criminal law lawyers of being incompetent for not objecting to continuances on speedy trial grounds, reviewing court would not speculate as to why they chose not to object because, in the absence of anything in the record to the contrary, this Court must presume that such counsel acted in the best interests of the defendant).

Further, there is no requirement that defense counsel, before obtaining a speedy trial waiver from the defendant (1) look into the future and predict whether the prosecution's case will either strengthen or weaken, and (2) advise the defendant of the possibility that the prosecution's case may strengthen. See Strickland, infra. (court will not judge counsel's performance in hindsight).

As such, defense counsel's motives are irrelevant.

Accordingly, the defendant has failed to allege facts supporting his claim of an actual conflict of interest.

Nonetheless, the defendant argued in his postconviction motion that but for defense counsel's conflicted advice, the prosecution would never had "expanded" its case against him (v. 2, p. 380).

But even if, *arguendo*, the defendant was prejudiced by the additional evidence the prosecution was able to present, it was not the type of prejudice that speedy trial rights are designed to prevent. The types of prejudice that the constitutional speedy trial right is designed to prevent are (1) oppressive pretrial incarceration; (2) concern and anxiety to the defendant; (3) the possibility that the defense will be impaired. United States v. Zapata, 245 F. Supp.2d 1165, 1171 (D. Colo. 2003). "Of these forms of prejudice, the most serious is the last, because the

inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id., citing Doggett v. United States, 505 U.S. 647, 652 (1992).

Here, the defendant does not allege that his defense was impaired by the extra time allowed by the continuance. As noted above, the defendant was well aware, pretrial, that the prosecution had added new evidence and new witnesses, and thus, he had plenty of time to prepare a defense against the additional evidence (v. 2, p. 383).

Accordingly, the defendant's conflict of interest claim fails on the legal merits because the defendant expressly waived his speedy trial rights.

IV. The district court did not err in summarily denying the defendant's ineffective assistance of counsel claim.

In his Crim. P. 35(c) motion, the defendant alleged multiple instances of ineffective assistance of counsel (v. 2, pp. 375-87). Each of those claims is addressed on the legal merits below.

A. Standard of Review

To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must prove both elements by a preponderance of the evidence. People v. Naranjo, 840 P.2d 319 (Colo. 1992).

To show deficient performance, he must demonstrate that counsel's acts or omissions fell outside the range of professionally competent assistance, and overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id. at 689-90. Mere disagreement as to strategy is not ineffectiveness. Davis v. People, 871 P.2d 769, 773 (Colo. 1994).

To show prejudice, the defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

An appellate court defers to the district court's findings of fact when the record supports them, and reviews the legal conclusions *de novo*. People v. Kyler, 991 P.2d 810, 818 (Colo. 1999) ; see also People v. Robbins, 87 P.3d 120, 123 (Colo. App. 2003), *aff'd*, 107 P.3d 384 (Colo. 2005) (weight and credibility of witness testimony is within the trial court's province). If the defendant fails to prove prejudice from counsel's performance, the court need not consider whether that performance was deficient. People v. Robles, 74 P.3d 437 (Colo. App. 2003).

B. The defendant's ineffective assistance claims fail on the legal merits.

First, all of the defendant's claims fail on Strickland's prejudice prong because the evidence in this case, including the defendant's own testimony, showed two years of domestic violence between MM and the defendant, which culminated in the defendant pointing a pistol at MM and shooting and killing her after a heated argument while she held their infant daughter. Since the evidence was overwhelming, the defendant suffered no prejudice from any of defense counsel's actions. See Bartley v. People, 817 P.2d 1029, 1034 (Colo. 1991) (when the evidence properly received against a defendant is overwhelming, an error of constitutional dimension was harmless beyond a reasonable doubt).

Second, each of his eleven claims fail on an individual basis as follows.

Claim One

The defendant contends that defense counsel failed to advise him of the pending attorney disciplinary proceedings in time for him to seek different counsel who could be prepared for trial within the speedy trial deadline (v. 2, p. 388). He alleges that the motivation for this failure to advise was to keep the defendant as a "paying customer." (id.).

As argued above, defense counsel's financial motives are not relevant to the defendant's waiver of speedy trial. In addition, the defendant points to no authority, outside of the Strickland standard, requiring that an attorney notify his client of confidential disciplinary proceedings while they are still pending. He also does not allege that defense counsel would testify at a hearing that the disciplinary sanctions were imposed "in time" to find a new attorney that could be prepared for trial on the scheduled date.

Claim Two

The defendant contends that defense counsel failed to hire a gun expert to prove that the gun had a "broken safety," and only argued that defense after the prosecution's expert found the "broken safety" (v. 2, p. 388).

This claim fails because the defendant has failed to allege any prejudice. When defense counsel became aware of CBI's findings, it was unnecessary to hire another expert. Rather, counsel came to trial well-prepared to thoroughly cross-examine the expert, including his opinion about the "half-cocked" safety malfunction (v. 8, pp. 90-98, 100-102). In addition, he argued in closing argument that the expert was a "knowledgeable man" who had opined that the gun could fire without the magazine and how easy the "clip" comes out; then he argued:

> One thing [the gun expert] could not tell you is anything about trajectory. He could not tell you anything to say that this was not an accident. The last thing that I'll leave you with about [the gun expert] is that he testified about the half cocked safety that doesn't work. It's enough to make you think.

(v. 16, pp. 63-64). This was sufficient under either prong of Strickland; see also People v. Chambers, 900 P.2d 1249, 1252 (Colo. App. 1994) (claims of failure to investigate must show what information would be obtained with investigation, and whether, assuming the evidence was admissible, it would have produced a different result). As such, there would not have been a different result because hiring a gun expert would have produced the same discovery of the "broken safety."

Claim Three

The defendant contends that defense counsel failed to call witnesses for the defense that would have changed the outcome of the trial, and he names three witnesses: "Hide," "Hoover," and Ramon Macias (v. 2, p. 388).

This claim fails because he does not allege what the content of these witnesses' testimony would be, or *how* that testimony would have changed the outcome of the trial. See United States v. Harden, 846 F.2d 1229, 1231-1232 (9th Cir. 1988) (must allege how witnesses would have testified).

Claim Four

The defendant contends that defense counsel failed to "preserve on the record" an outburst made by prosecution witness Josephine Guiterrez that the defendant was a drug dealer, which the trial court struck from the record (v. 2, p. 388). This claim fails because the record refutes it. See Blehm, 983 P.2d at 779.

During direct examination, the prosecutor asked Josephine Guiterrez ("Aunt Josie") if she had ever threatened to report the defendant to the police because of his violent acts toward MM (v. 6, p. 275). Aunt Josie stated that she had told the defendant it was not a threat, it was a promise that she "would call the cops, *and then he made a remark about him selling drugs* and I told him I wouldn't--" (id.) (emphasis added). Defense counsel objected and asked that the remark be stricken, and the trial court instructed the jury to disregard the last part of the testimony because, "it has no place in this trial" (v. 6, p. 276). At a bench conference, the prosecutor explained that he had no idea where the remark came from, and the defense then requested a mistrial (id.). The court denied the request, and ruled that the jury was focused more on the situation between the two parties, and it did not want to highlight it anymore by giving another instruction, unless requested (v. 6, p. 276). Defense counsel replied, "No, that's fine." (id.).

Since defense counsel objected and requested a mistrial, he properly preserved the claim for the record. See McElvain v Lewis, 283 F. Supp.2d 1104,

1125 (C.D. Cal. 2003) (no ineffectiveness for failure to object when record shows objection). Further, this issue was fully litigated by this Court on direct appeal, See People v. Jesus Manuel Macias, supra, slip op. at 3-5, and thus it is successive. See Crim. P. 35(c)(3)(VI).

Claim Five

The defendant contends that defense counsel "failed to bring forward police note [sic]" that witnesses' stated they had not seen him hit MM, when at trial they testified that they did see him hit MM (v. 2, p. 389). This claim fails because the defendant does not identify the source of the "note," e.g., a particular officer's report, does not specify which witnesses made the statements, or under which theory the statements would be admissible, and if such evidence would have changed the outcome of the trial. See Moore, 485 P.2d at 114.

Claim Six

The defendant contends that defense counsel failed to file a motion to suppress his confession to police when he "clearly stated" in the interview that he wanted an attorney, and he also alleges that his confession was not voluntary (v. 2, pp. 388-89). This claim fails because the record refutes it. See Blehm, 983 P.2d at 779.

The defendant did not at anytime during the interview ask for a lawyer (People's Exhibit 1). Rather, when the detective was explaining to the defendant his *Miranda* rights, the defendant asked, "Well, what if I want to just bring someone present, to defend me and then talk because. . ." (id. at 3). The detective then explained that if he wanted a lawyer, there would be no interview, and the defendant affirmed that he understood, and he then signed his initials to the *Miranda* warning form (People's Exhibit 1, pp. 3-4). Thereafter, the detective informed the defendant again that at anytime he could request a lawyer, and one would be provided, and the defendant stated that he understood (id. at 5-6). The interview began, and the defendant answered the detective's questions, and never asked for a lawyer (id. at 6-80). As such, the claim fails because the defendant has failed to allege any facts showing that a motion to suppress would have been successful. See Smith v. Sullivan, 1 F. Supp.2d 206 (W.D. N.Y. 1998) (not ineffective for failure to file motion to suppress where evidence showed confession was voluntary).

Claim Seven

The defendant contends that defense counsel failed to object to the admission of "so called key evidence," a gray t-shirt, at the preliminary hearing that supported the probable cause determination and its admission at trial when the

t-shirt "had nothing to do with the case" (v. 2, p. 389). The first claim fails because it is belied by the record. See Blehm, supra. The evidence supporting probable cause was overwhelming in this case, and the court merely denied *bond review* until the t-shirt was returned from CBI (v. 1, p. 5). The second claim fails because the defendant has not alleged how he was prejudiced by evidence that "had nothing to do with the case."

Claim Eight

The defendant contends that defense counsel failed to object to one of the alternate jurors replacing a sick juror, in violation of Crim. P. 24(e)'s requirement to "replace ill jurors in the order they were seated" (v. 2, p. 389). However, the defendant has not alleged with specificity when the replacement juror "was called." See Crim. P. 24(e) (alternate jurors *in the order in which they were called* shall replace jurors who become unable or disqualified to perform their duties) (emphasis added). Thus, this claim fails because it lacks specificity. See Moore, 485 P.2d at 114.

In addition, the defendant failed to allege how he was prejudiced by counsel's failure to object, i.e., he fails to allege why the juror was "objectionable." See Phyle v. Leapley, 66 F.3d 154, 159 (8th Cir. 1995) (recognizing the "virtually unchallengeable" broad subjective factors that lawyers take into account as they

make repeated, instantaneous judgments as to whether to object); Landry v. Lynaugh, 844 F.2d 1117, 1120 (5th Cir. 1988) (must allege why objection would have produced a different result).

Claim Nine

The defendant contends that defense counsel failed to hire a domestic violence expert for the defense (v. 2, p. 389). He does not identify any particular domestic violence expert, or the content of such expert's testimony, or how such testimony would have changed the outcome of the trial. See Moore, 485 P.2d at 114; Chambers, 900 P.2d at 1252.

Claim Ten

The defendant contends that defense counsel failed to object to the trial court's giving of a sua sponte "time-fuse" instruction (v. 2, p. 389). As argued in section V below, the record refutes the defendant's "time-fuse" instruction claim. See Blehm, supra.

Claim Eleven

The defendant contends that defense counsel improperly argued to the jury that the defendant may have lied to the jailhouse informant "to be cool in jail" (v. 2, p. 389). This claim fails because it was within defense counsel's strategic

choice to describe the defendant's jailhouse confession as a "lie," and thus is not challengeable on appeal. See Davis, 871 P.2d at 773.

Further, the defendant's claim fails because he does not identify any other possible defense to the confession evidence, or show that it would have been successful. See James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) (no ineffectiveness where defendant does not identify other defense or evidence supporting it). In addition, since the jury acquitted the defendant of first-degree murder, defense counsel's strategy was apparently successful. See Turner v. Calderon, 281 F.3d 851, 877 (9th Cir. 2002) (relevant inquiry is not what counsel should have pursued but whether his choice was reasonable).

Accordingly, the defendant's ineffective assistance of counsel claims fail on the legal merits.

V. The district court did not err by denying the defendant's claim that the trial court sua sponte gave an erroneous modified-*Allen* instruction off the record.

The defendant also contends that the trial court gave the prohibited "time-fuse" type of modified-*Allen* instruction, but since the instruction was given off the record, it was not part of the record on appeal, and thus the issue was not raised on

direct appeal (Opening Brief, pp. 27-32). He requests a hearing to reconstruct the record as to that instruction (id).

On May 26, 2000, the trial court gave Jury Instruction 19 to the jury when they arrived at 9:15 a.m.:

> Please do not commence deliberations this morning (May 26, 2000) until instructed to do so. Said instruction will be provided to you as soon as possible.

(v. 1, p. 174; v. 6, 5/26/00, pp. 2, 7). At 9:20 a.m., the trial court gave Jury Instruction 20 to the jury, which was an admonition instruction pertaining to the bailiff's unauthorized communication with the jury on the first day of trial while he was demonstrating the action of the .45 pistol (v. 1, p. 175; v. 6, 5/26/00, p. 10).[1] The demonstration was done in answer to a jury request to see for themselves "how much pressure it takes to pull the trigger and see the action" (v. 1, p. 141).

At 1:15 p.m., the jury informed the trial court that it had reached a verdict (v. 6, 5/26/00, p. 11). The trial court specifically noted, "I would note for the record that there were no questions from the jury after I gave them the admonition instruction this morning at about 9:15" (id.). Although the jury submitted three questions on the first day of deliberations, May 24, 2000, they did not initiate any communications with the trial court thereafter (v. 1, p. 141).

In the defendant's Crim. P. 35(c) motion, he alleged that on May 26, 2000, the last day of trial, the trial court gave a coercive modified-*Allen* instruction "off the record" (v. 2, p. 384). He alleges that prior to the modified-*Allen* instruction, the trial court instructed the jury to "disregard a prior deliberation and start a new [sic]" (id). He admits that there was no communication from the jury to indicate that they were deadlocked, or otherwise at an impasse (id.).

As the transcript shows, the record belies the defendant's claim. In essence, the defendant is claiming that the trial court, without any communication from the jury, sua sponte gave a modified-*Allen* instruction off the record, and without defense counsel making any record of any objection thereto. There is no indication by the court reporter that any proceedings were had off the record on May 26, 2000. The defendant has apparently confused Instructions 19 and 20 for a modified-*Allen* instruction.

Accordingly, the record belies the defendant's modified-*Allen* claim.

[1] The propriety of this instruction was fully litigated on direct appeal.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm the district court's order denying the defendant's Crim. P. 35(c) motion.

JOHN W. SUTHERS
Attorney General

CHRISTINE C. BRADY, 24779*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

AG ALPHA: DARR QCTF
AG File: p:\ap\apbradcc\abfy08\macias2.doc

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon SHANN JEFFERY, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 31 day of August 2007.

APPELLEE'S APPENDIX A

DISTRICT COURT ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff(s): People of the State of Colorado v. **Defendant(s):** Jesus Manuel Macias	▲ COURT USE ONLY ▲
	Case No. 98-CR-3336 Courtroom: 408

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO CRIM.P. 35(C)

THIS MATTER comes before the court on Defendant's Pro-Se Motion dated 8/11/05 for Post-Conviction Relief under Crim.P.Rule 35 (c). The Court has reviewed all of the filings and has also considered each of the following:

1. The offense committed by the Defendant.
2. The circumstances of the Defendant as presented at the sentencing hearing.
3. The sentence imposed 5/26/00 pursuant to a finding of guilty, and affirmed in appeals case 01-CA-934 on 4/17/03.
4. The matters contained in the Defendant's motion, and any matters submitted on the Defendant's behalf.
5. The Court notes that the Defendant filed his motion seeking post-conviction relief on 8/11/05, timely pursuant to *People v. Hampton*, 857 P.2d 441 (Colo.App.1992), which states that "if an appeal is pursued, then the conviction is not final until the appellate process is exhausted."
6. The Court has reviewed all of the arguments and applicable law and has determined that a hearing in this matter is unnecessary.
7. Defendant's constitutional claims in his motion for post conviction relief under Crim.P.Rule 35(c) have been litigated in both the trial and appellate court. A defendant may not use a proceeding under this rule to relitigate issues that were fully and finally resolved in an earlier appeal. *People v. Johnson*, 638 P.2d 61 (Colo.1981).
8. The Court finds that the defendant's claim regarding speedy trial is in fact an argument of ineffective assistance of counsel, as the motivation for making a knowing and voluntary waiver of speedy trial is irrelevant. The defendant knew he had a right to speedy trial, and he voluntarily gave up that right.

RIA

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Ineffective Assistance of Counsel

The defendant asserts that he is entitled to relief under Crim.P. Rule 35(c) on the grounds of ineffective assistance of counsel. In order to obtain relief based on a claim of ineffective assistance of counsel, a defendant must affirmatively prove both that his counsels performance fell below the standard of professional reasonableness and that such performance prejudiced him, i.e., that there is reasonable probability that, but for such deficient performance, the outcome at trial would have been different. *People v. Palmer*, 888 P.2d 348 (Colo. App.1994).

The defendant has the burden to show inadequate representation, and a conviction will not be set aside unless, based on the record as a whole, there was a denial of fundamental fairness. *People v. Geis*, 738 P.2d 398 (Colo.1987). A motion for post conviction relief under Crim.P. Rule 35(c) shall be denied when the defendant fails to establish that he had suffered prejudice due to patently deficient performance of the attorney in handling the criminal appeal. *People v. Valdez*, 789 P.2d 406 (Colo.1990).

The Court thus examines the first prong of the *Palmer* analysis in asking whether or not counsel's performance fell below the standard of professional reasonableness. The defendant asserts that his counsel lied to him about the waiver of speedy trial. The defendant alleges that his attorney was suspended from the practice of law for thirty days two days before the trial. The defendant alleges the attorney coerced him into the waiver of speedy trial so that the attorney could still represent him at trial. This Court finds that this conduct, if in fact true, may fall below the standard of professional reasonableness for counsel.

The Court does not find that the alleged deficiency prejudiced the defendant to a level so high as to change the outcome of the case. The defendant argues that the waiver of speedy trial allotted extra time to the prosecution to prepare for trial. This is pure speculation, and even if true is not the type of prejudice contemplated by *Palmer*. The Court does not believe that the outcome of the case was at all affected by this extra time. Further, the defendant has failed to provide this Court with any affirmative evidence to the contrary. Therefore, the Court finds that the assistance of counsel was not ineffective.

ACCORDINGLY, the Defendant's Motion for Post-Conviction relief is hereby DENIED in its entirety.

Done this 23 day of April 2005.

BY THE COURT:

William Blair Sylvester
District Court Judge

(2)

APPELLEE'S APPENDIX B

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO
Case No. 98 CR 3336 Division 6

MOTION TO CONTINUE

THE PEOPLE OF THE STATE OF COLORADO. Plaintiff,

vs.

JESUS MANUEL MACIAS,

Defendant.

THE DEFENDANT by and through counsel, hereby moves this court for a continuance of the trial in this matter.

As grounds therefore, Defendant states al follows:

1. Defendant is scheduled for a jury trial in this matter on August 23, 1999. The trial is scheduled to last one week. The case is also set for a trial status hearing on August 13, 1999.

2. The undersigned counsel for the Defendant will be unable to act as counsel for the defendant during this trial as he has been suspended from the practice of law. Counsel has been suspended for a period of thirty days, commencing on August 21, 1999. Counsel will be able to resume the practice of law again on September 21, 1999.. A copy of the Supreme Court Order is attached hereto and incorporated herein.

3. Counsel has informed counsel of counsel's suspension and subsequent inability to act as his attorney in this matter and the Defendant does not wish to proceed to trial without the undersigned counsel. While there is co-counsel on the case, Evans Garcia, the undersigned counsel is the lead attorney on the case and Defendant does not feel comfortable with only Mr. Garcia as his attorney. The Defendant wishes that this matter be postponed until such time as the undersigned counsel can again act as counsel.

4. The Defendant understands that he will be waiving his right to a speedy trial if a continuance is granted in this matter.

Wherefore, Defendant Requests this court to grant a continuance in this matter upon the grounds above stated.

(1) 082

Respectfully submitted,

R. Antonio Lucero #9829
Lucero And Associates
3030 W. 38th Ave.
Denver, CO 80211
303-455-7699
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of July, 1999, a true and correct copy of the above Motion to Continue was placed in the US Mail, postage prepaid, addressed to :

Philip M. Smith
Deputy Distinct Attorney
7325 S. Potomac St.
Englewood, CO 80112

Sandra Lucero

(2)

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APPELLEE'S APPENDIX C

DISTRICT COURT
COUNTY OF ARAPAHOE
STATE OF COLORADO

CRIMINAL ACTION DIVISION 6

CASE NO. 98CR3336

THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF

vs.

Jesus Manuel MACIAS., DEFENDANT

WAIVER OF SPEEDY TRIAL

THE ABOVE NAMED defendant, having been advised that he or she has a right to a speedy trial under the Constitutions of the United States and the State of Colorado, and that, pursuant to rule 48(b) of the Colorado Rules of Criminal Procedure, he or she as the right to a trial within six months after the trial court receives a plea of not guilty from the defendant, and further, that, pursuant to the Colorado Criminal Code, SECTION 18-1-405, C.R.S. he or she has a right to a trial within six months after entering a plea of not guilty, the defendant hereby knowingly, voluntarily, and intelligently waives said rights to a speedy trial and voluntarily consents to having the trial of this case continued for a period of six months from today's date. Such additional six month period is to commence this :

13th day of August, 1999.

8/13/99
DATE

Jesus Manuel M.
DEFENDANT

8/13/99.
DATE

DEFENDANT'S ATTORNEY
atty. reg. no. 9825

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