People v. Macias, J

COLORADO COURT OF APPEALS

Court of Appeals No.: 05CA2108
Arapahoe County District Court No. 98CR3336
Honorable William B. Sylvester, Judge
Honorable Gerald J. Rafferty, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jesus Manuel Macias,

Defendant-Appellant.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by: JUDGE HAWTHORNE
Taubman and Loeb, JJ., concur

Opinion Modified and
Petitions for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: March 6, 2008

John W. Suthers, Attorney General, Christine C. Brady, Assistant Attorney General, Alexander C. Reinhardt, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Shann Jeffery, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

The following sentence is inserted at page 11, line 17:

If the trial court determines that defendant received ineffective assistance of counsel because of counsel's conflict of interest, the trial court should consider what remedy, if any, defendant is entitled to under these circumstances.

Defendant, Jesus Manuel Macias, appeals from the trial court's order denying his Crim. P. 35(c) motion for postconviction relief. We affirm in part, reverse in part, and remand for further proceedings.

I. Background

In December 1998, defendant was charged with one count of first degree murder – after deliberation and one count of the mandatory sentence enhancer for a crime of violence involving a deadly weapon, after admitting to shooting and killing his girlfriend, M.M. Defendant hired R. Antonio Lucero to represent him.

Defendant's trial was initially scheduled for August 23, 1999. Lucero was involved in a disciplinary proceeding, and as a result, his license to practice law was ordered suspended for thirty days beginning August 21, 1999. On July 30, 1999, Lucero filed a motion for continuance of the trial date, stating that he had informed defendant of the suspension and that "[d]efendant does not wish to proceed to trial without the undersigned counsel." The motion further stated, "The [d]efendant understands that he will be waiving his right to a speedy trial if a continuance is granted in this matter."

At a hearing on the motion, the trial court inquired of defendant regarding the waiver of speedy trial presented to the court:

> COURT: Mr. Macias, did you read and sign the waiver of speedy trial document?
>
> DEFENDANT: Yes, sir.
> . . . .
>
> COURT: Do you understand what you did by signing this waiver document?
>
> DEFENDANT: Yes, I understand.

The trial court found that defendant validly waived his right to speedy trial, granted the motion for a continuance, and rescheduled the trial for January 7, 2000. In December 1999, defendant again moved for a continuance of the trial date, this time in order for counsel to prepare rebuttal evidence to additional witnesses endorsed by the prosecution, as well as to the prosecution's hearsay and other acts evidence against defendant. The trial court granted the motion and set the trial for May 15, 2000.

Defendant was found guilty by a jury on the lesser charge of second degree murder, as well as on the crime of violence charge. Defendant was sentenced to forty years in the Department of

Corrections. On direct appeal, the judgments of conviction were upheld. *People v. Macias*, (Colo. App. No. 01CA0934, Apr. 17, 2003) (not published pursuant to C.A.R. 35(f)).

On July 6, 2005, defendant filed a motion "for leave and permission to file motion for post-conviction relief . . . and for alternative relief for the appointment of counsel . . . and for transcripts at state expense or in the alternative on loan to the Colorado Department of Corrections under their supervision." The trial court construed the motion as one seeking postconviction relief under Crim. P. 35(c) and ordered that defendant file an amended Crim. P. 35(c) motion complying with formal filing requirements within forty-five days. It did not rule on defendant's requests for appointment of counsel and transcripts.

Defendant filed his amended motion on August 11, 2005, arguing that trial counsel labored under a conflict of interest and that defendant had received ineffective assistance of counsel. The trial court denied defendant's motion without holding a hearing. This appeal followed.

II. Denial of Crim. P. 35(c) Motion

Defendant contends that the trial court erred in denying his

motion for postconviction relief without holding a hearing. We agree in part.

Crim. P. 35(c)(3)(IV) provides, "If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion." *See also People v. Kenny*, 30 P.3d 734, 745-46 (Colo. App. 2000) (citing *White v. Denver Dist. Court*, 766 P.2d 632 (Colo. 1988)) (trial court may summarily deny a motion for postconviction relief under Crim. P. 35(c) if "the motion, files, and record of the case clearly establish that the defendant's claims are without merit").

To warrant a hearing, a defendant need only allege facts that, if proved true, entitle him or her to relief. *People v. Simpson*, 69 P.3d 79, 81 (Colo. 2003). We review the summary denial of a Crim. P. 35(c) motion de novo. *People v. Trujillo*, 169 P.3d 235, 237 (Colo. App. 2007).

A. Ineffective Assistance of Counsel

Defendant first contends that he was deprived of a fair trial based on ineffective assistance of counsel.

Whether an attorney rendered ineffective assistance is a mixed

question of fact and law. *People v. Garcia*, 815 P.2d 937, 940-41 (Colo. 1991). Where the evidence presented to the trial court supports its findings and judgment, we will not disturb that judgment on review. *See Kailey v. Colo. State Dep't of Corr.*, 807 P.2d 563, 567 (Colo. 1991) (quoting *Lamb v. People*, 174 Colo. 441, 446, 484 P.2d 798, 800 (1971)).

Ineffective assistance of counsel claims are analyzed according to the two-prong test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Davis v. People*, 871 P.2d 769, 772 (Colo. 1994).

In order to prevail on his or her claim, a defendant must show that "(1) counsel's performance fell below the level of reasonably competent assistance demanded of attorneys in criminal cases; and (2) the deficient performance prejudiced the defense." *People v. Dunlap*, 124 P.3d 780, 795 (Colo. App. 2004). The defendant bears the burden of proving both elements by a preponderance of the evidence. *Id.*

Prejudice is established by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *See Davis*, 871 P.2d

at 772; *Dunlap*, 124 P.3d at 795.

If a defendant fails to establish prejudice, a court may resolve the ineffective assistance claim on that basis alone. *Dunlap*, 124 P.3d at 795. Likewise, if we determine that plea counsel's performance was not constitutionally deficient, we need not consider the prejudice prong of the *Strickland* test. *See People v. Sparks*, 914 P.2d 544, 547 (Colo. App. 1996).

Summary denial of a Crim. P. 35(c) motion arguing ineffective assistance of counsel is justified only if the existing record establishes that the defendant's allegations, even if proved true, would fail to establish one or the other prong of the *Strickland* test. *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003). As our supreme court has stated,

> If a criminal defendant has alleged acts or omissions by counsel that, if true, could undermine confidence in the defendant's conviction or sentence, and the motion, files, and record in the case do not clearly establish that those acts or omissions were reasonable strategic choices or otherwise within the range of reasonably effective assistance, the defendant must be given an opportunity to prove they were not.

Id.

1. Conflict of Interest

Defendant argues that he received ineffective assistance of counsel, because Lucero suffered from a conflict of interest at the time he advised defendant to waive his right to speedy trial, and thus, his waiver of that right was invalid. We conclude that defendant's allegations on this issue warrant an evidentiary hearing.

As a threshold matter, defendant argues that his conflict of interest claim is not limited to consideration as an ineffective assistance of counsel claim. However, the sole allegation underlying the conflict of interest claim is that as a result of counsel's conflicted advice, defendant's waiver of his right to speedy trial was not knowing and voluntary, and his right to speedy trial was therefore violated. Claims of violation of the right to speedy trial will not be addressed when raised for the first time on appeal. *See People v. Scialabba*, 55 P.3d 207, 209-10 (Colo. App. 2002) (constitutional speedy trial claim); *People v. Marquez*, 739 P.2d 917, 919 (Colo. App. 1987) (statutory speedy trial claim). Therefore, we limit our consideration of this allegation as part of defendant's ineffective assistance of counsel claim, as did the trial court.

Defendants have a constitutional right to conflict-free assistance of counsel. *Kenny*, 30 P.3d at 745. However, though a defendant may assert that he or she received ineffective assistance of counsel when counsel has been found to have a conflict of interest, ineffective assistance will not be found if the defendant waived the right to conflict-free representation and that waiver was made with full knowledge of the actual conflict. *Id.*

A conflict of interest exists "if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Colorado Rule of Professional Conduct 1.7(a)(2).

Defendant argues that as a result of his initial waiver of his speedy trial right, the prosecution "dramatically strengthened" its case against him, and that Lucero, as retained counsel, was motivated by personal financial considerations in advising him to waive that right. If these allegations are true, Lucero labored under an actual conflict of interest, and defendant need not demonstrate a probable prejudicial effect upon the outcome of his trial to prevail on his claim of ineffective assistance of counsel. *See People v. Miera*, ___ P.3d ___, ___ (Colo. App. No. 06CA1284, Feb. 7, 2008).

We conclude that remand to the trial court is necessary for an evidentiary hearing and factual findings to determine whether Lucero labored under an actual conflict of interest when he advised defendant to waive his right to speedy trial and if so, whether defendant waived his right to conflict-free representation. *See Ardolino*, 69 P.3d at 77; *see also Kenny*, 30 P.3d at 746 (remanding for hearing on issue of whether counsel's interests relative to his pending disciplinary proceedings interfered with his representation of defendant).

2. Alleged Trial Errors

In his Crim. P. 35(c) motion, defendant made several additional allegations of error by trial counsel and argued that he received ineffective assistance of counsel. However, none of those claims is addressed or argued in his briefs on appeal. Therefore, we decline to consider them. *See People v. Osorio*, 170 P.3d 796, 801, (Colo. App. 2007) (claims raised in Crim. P. 35(c) motion but not reasserted on appeal from trial court's denial of motion are abandoned).

B. Alleged Modified *Allen* Instruction

Finally, defendant contends that the jury was given a

"modified *Allen* instruction" off the record, and he was therefore deprived of his right to directly appeal that instruction. We decline to remand the case for a reconstruction of the record on this issue.

"As a general proposition, a criminal defendant is entitled to a record on appeal which includes a complete transcript of the proceedings at trial." *People v. Rodriguez*, 914 P.2d 230, 300 (Colo. 1996). To obtain relief on a due process claim arising from an incomplete record, a defendant must always demonstrate specific prejudice resulting from the state of that record. *Id.* at 301.

However, it is the appellant's obligation to take all steps necessary under the appellate rules to obtain the necessary record for review, and if he or she fails to attempt to reconstruct the record as required by C.A.R. 10(c) and (e), he or she may not thereafter complain that the record is inadequate. *In re Marriage of McSoud*, 131 P.3d 1208, 1211 (Colo. App. 2006).

In *Allen v. People*, 660 P.2d 896 (Colo. 1983), the Colorado supreme court ruled that the giving of a "time-fuse" instruction may have a coercive effect "because it orders the jury to end its deliberations with a verdict or have a mistrial declared." *Id.* at 898. In that case, the court ruled that the potentially coercive effect of

that instruction denied Allen a fair trial. *Id.*

Here, defendant acknowledges that there is no record that the trial court gave the jury such a "time-fuse" instruction and states in support of his claim only that he "believes that [the judge] did do this as a matter of fact." Thus, the argument goes, he was deprived of due process because direct appeal counsel was unaware of the erroneous modified *Allen* instruction, and defendant was therefore unable to argue that error on direct appeal.

Though defendant's allegation is one of specific prejudice, *see Rodriguez*, 914 P.2d at 301, he has not complied with the requirements of C.A.R. 10 in seeking reconstruction of the record on the modified *Allen* instruction issue. Therefore, we decline to order the relief he requests on appeal.

The order denying defendant's motion for postconviction relief is reversed as to the claim of ineffective assistance of counsel based on conflict of interest, and the case is remanded for an evidentiary hearing on that issue. If the trial court determines that defendant received ineffective assistance of counsel because of counsel's conflict of interest, the trial court should consider what remedy, if any, defendant is entitled to under these circumstances. On

remand, the trial court also should reconsider defendant's request for appointment of counsel. In all other respects, the order is affirmed.

JUDGE TAUBMAN and JUDGE LOEB concur.