

IN THE UTAH COURT OF APPEALS

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Marcos Moreno-Montano,	)	MEMORANDUM DECISION	
	)	(Not For Official Publication)	
Petitioner and Appellant,	)		
	)	Case No. 20050904-CA	
v.	)		
	)	F I L E D	
Greg Jacquert,	)	(December 15, 2005)	
	)		
Respondent and Appellee.	)	<table border="1"><tr><td>2005 UT App 543</td></tr></table>	2005 UT App 543
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Third District, Salt Lake Department, 050911087  
The Honorable Robert K. Hilder

Attorneys: Marcos Moreno-Montano, Gunnison, Appellant Pro Se

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Before Judges Davis, Orme, and Thorne.

PER CURIAM:

Appellant Marcos Moreno-Montano appeals the dismissal of his petition for post-conviction relief as frivolous on its face. This case is before the court on a sua sponte motion for summary disposition.

We review the denial of a petition for post-conviction relief "for correctness without deference to the lower court's conclusions of law." Gardner v. Galetka, 2004 UT 42, ¶7, 94 P.3d 263. The district court's findings of fact will be disturbed "only if they are clearly erroneous." Matthews v. Galetka, 958 P.2d 949, 950 (Utah Ct. App. 1998). After reviewing the record, "we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." Id.

The petition for post-conviction relief raised three claims. First, Moreno-Montano claims that he was denied a fair trial because the same judge who had presided over his preliminary hearing presided over the jury trial that resulted in his convictions of rape of a child and attempted aggravated sexual abuse of a child, both first degree felonies. He claims that the trial judge was required to enter a disqualification because his impartiality might reasonably be questioned or that the judge had "personal knowledge of disputed evidentiary facts" as a result of

the preliminary hearing. Utah Code of Judicial Conduct Canon 3(E)(1). There is no support for the assertion that the judge had personal knowledge of the facts of the case through participation in an earlier court proceeding. Similarly, presiding over an earlier stage of the case, without more, would not support an inference of actual bias. The district court correctly rejected this claim.

Moreno-Montano next asserts that he was convicted on multiple counts for a single act. The district court rejected this claim as unsupported by the exhibits provided to the court. Those exhibits demonstrate that the rape charge was based upon an act of vaginal intercourse, while the attempted aggravated sexual abuse of a child charge resulted from a separate act in which Moreno-Montano attempted to cause the victim to touch his penis. Although closely related in time, the district court correctly concluded that the charges were based upon separate acts. The assertion that Moreno-Montano was twice convicted for the same act is without merit.

Finally, Moreno-Montano asserts that his counsel at trial and on direct appeal was ineffective by failing to raise the foregoing claims. Because neither claim has merit, failure to raise them cannot constitute ineffective assistance of counsel.

We affirm the dismissal of the petition for post-conviction relief.

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James Z. Davis, Judge

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge