

DA 21-0154

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 146N

DENIS AGUADO,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Stillwater, Cause No. DV 18-39
Honorable Randal I. Spaulding, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Denis Aguado, Self-represented, Deer Lodge, Montana

For Appellee:

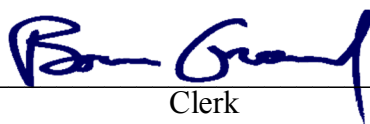
Austin Knudsen, Montana Attorney General, Michael P. Dougherty,
Assistant Attorney General, Helena, Montana

Nancy Rohde, Stillwater County Attorney, Columbus, Montana

Submitted on Briefs: June 15, 2022

Decided: July 19, 2022

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Denis Aguado appeals the denial of his petition for postconviction relief by the Twenty-Second Judicial District Court, Stillwater County. Aguado raises four issues on appeal: (1) whether the District Court correctly denied Aguado's claim the State lacked jurisdiction and probable cause to arrest him; (2) whether the District Court correctly denied Aguado's claim the prosecutor committed misconduct; (3) whether the District Court correctly denied Aguado's claim he was illegally restricted from making phone calls while incarcerated; and (4) whether the District Court correctly denied Aguado's claim that his trial counsel and appellate counsel provided him with ineffective assistance of counsel. We affirm.

¶3 Aguado was convicted of Sexual Abuse of Children, a felony, in violation of § 45-5-625(1)(c), MCA (2011), and Sexual Assault, a felony, in violation of § 45-5-502(1), (3), MCA (2011). This Court affirmed his convictions on appeal. *See State v. Aguado*, 2017 MT 54, 387 Mont. 1, 390 P.3d 628. Aguado filed a petition for postconviction relief on May 16, 2018, raising numerous claims as grounds for relief. The District Court denied the petition on February 17, 2021, and Aguado appeals.

¶4 We review a district court’s denial of a petition for postconviction relief to determine whether the district court’s findings of fact are clearly erroneous and whether its conclusions of law are correct. *Maldonado v. State*, 2008 MT 253, ¶ 10, 345 Mont. 69, 190 P.3d 1043. We review a claim of ineffective assistance of counsel de novo. *Maldonado*, ¶ 10.

¶5 Aguado’s claims that the State lacked probable cause to arrest him, the prosecutor committed misconduct, and the State illegally restricted him from making phone calls are all claims that could have been brought on direct appeal. Section 46-21-105(2), MCA, provides “grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided” in a postconviction relief proceeding. As Aguado could have brought these claims on direct appeal, they are all now procedurally barred from review. The District Court did not err in denying relief on these claims.

¶6 On appeal, Aguado also appears to claim that the State lacked jurisdiction to arrest and prosecute him in this case. Aguado maintains the State of Montana lacked jurisdiction over his criminal case because the victim was in Kentucky when she recorded the sexually explicit phone call that was used as evidence against him. Aguado correctly asserts issues involving subject matter jurisdiction may be raised at any stage of a judicial proceeding. *See* § 46-21-101(1), MCA; *Thurston v. State*, 2004 MT 142, ¶ 13, 321 Mont. 411, 91 P.3d 1259. However, § 46-2-101(1)(a), MCA, provides that a person is subject to prosecution in Montana for an offense the person commits if “the offense is committed either wholly or partly within the state.” The criminal conduct for which Aguado was convicted—

sexually abusing and assaulting a child—all occurred “either wholly or partly” in the state of Montana. The State had jurisdiction to arrest and prosecute Aguado for the crimes of Sexual Abuse of Children and Sexual Assault.

¶7 Aguado’s remaining claim on appeal alleges his trial and appellate counsel provided ineffective assistance of counsel when they failed to challenge the District Court’s jurisdiction or the admission of the sexually explicit recorded phone call between Aguado and the victim under 18 U.S.C. §§ 2511 and 2515. Aguado argues the recording of the phone call between him and the victim was inadmissible under these federal statutes, as the victim was too young to consent to the recording of the phone call.

¶8 To prevail on a claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24, of the Montana Constitution, a petitioner must show the performance of counsel was deficient and the deficient performance prejudiced the defense. *See Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. To be deficient, counsel’s representation must fall below an objective standard of reasonableness based on prevailing professional norms. *Whitlow*, ¶ 14. The question is whether the choices made by counsel were reasonable considering all the circumstances. *Whitlow*, ¶ 14. A court reviewing counsel’s performance “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Whitlow*, ¶ 15 (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). Furthermore, claims of ineffective assistance of counsel for which the record in the underlying case explains why counsel

took or failed to take a certain action must be raised on direct appeal and are not reviewable in a petition for postconviction relief. *See Hagen v. State*, 1999 MT 8, ¶ 12, 293 Mont. 60, 973 P.2d 233; *State v. Savage*, 2011 MT 23, ¶ 23, 359 Mont. 207, 248 P.3d 308.

¶9 Aguado’s first claim that trial and appellate counsel failed to challenge the District Court’s jurisdiction fails as the District Court had jurisdiction in this case. Aguado’s second claim that his trial and appellate counsel should have challenged the admissibility of the recorded phone call under federal law also fails. In his petition for postconviction relief, Aguado did not raise the argument that his appellate counsel was ineffective for failing to challenge the admissibility of the recorded phone call on direct appeal. Our review of his claim against his appellate counsel is thus procedurally barred by § 46-21-105(1)(a), MCA (“All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition.”).

¶10 Turning to Aguado’s claim against his trial counsel, Aguado’s trial counsel explained during a hearing at which the trial court had issued a *Gillham* order¹ that there was a disagreement between him and Aguado about whether federal law precluded introduction of the recorded phone call. Trial counsel explained he believed the statutes were irrelevant. Based on this testimony, Aguado’s claim of ineffective assistance of counsel arguably reasonably could have been raised on direct appeal as trial counsel’s statements to the trial court evidenced he did not challenge the recording under federal law

¹ *In re Gillham*, 216 Mont. 279, 704 P.2d 1019 (1985).

because he thought it was irrelevant. Thus, § 46-21-105(2), MCA, procedurally bars review of this claim of ineffective assistance of counsel against trial counsel.

¶11 What's more, Aguado fails to demonstrate either his trial or appellate counsel were deficient in failing to challenge the admissibility of the recorded phone call under 18 U.S.C. §§ 2511 and 2515. Aguado's trial counsel did move to suppress the recording, along with other evidence collected by the victim's family, under the legal theory that the victim's uncle was acting as a state agent when he helped record the phone call and gathered other evidence against Aguado. The District Court partially granted this motion and excluded some evidence from trial, not including the recorded phone call. In his petition for postconviction relief, Aguado now faults his trial counsel for not also challenging the recorded phone call under 18 U.S.C. §§ 2511 and 2515. 18 U.S.C. § 2515 provides that communications illegally recorded under 18 U.S.C. § 2511 are not admissible in court. 18 U.S.C. § 2511 provides it is unlawful to surreptitiously record oral or electronic communications, such as a phone call. It is not unlawful under 18 U.S.C. § 2511, however, for a person to record a phone call "where such person is a party to the communication or one of the parties to the communication has given prior consent to such" recording. *See* 18 U.S.C. § 2511(c), (d). Here, the victim consented to the recording of the phone call, knew the call was being recorded, and participated in the recording of the phone call. Given this plain language of the statute and considering the totality of the circumstances in the underlying case, Aguado cannot demonstrate the choices made by his trial and appellate counsel were not reasonable or that they provided ineffective assistance of counsel by

failing to challenge the admission of the phone call based on 18 U.S.C. §§ 2511 and 2515.

The District Court did not err in denying relief based on ineffective assistance of counsel.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶13 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR