

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

CHRISTIAN D. MOLINA-SOLORZANO,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2018-954

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

OCT 10 2019

SUMMARY OPINION

**JOHN D. HADDEN
CLERK**

ROWLAND, JUDGE:

Appellant Christian D. Molina-Solorzano appeals his Judgment and Sentence from the District Court of Beckham County, Case No. CF-2017-259, for Aggravated Trafficking in Illegal Drugs, in violation of 63 O.S.Supp.2015, § 2-415.¹ The Honorable F. Douglas Haught, District Judge, presided at the non-jury trial, found Molina-Solorzano guilty, and sentenced him to fifteen years imprisonment and a \$1,000.00 fine plus one year of post-imprisonment supervision.² Molina-Solorzano raises the following issues:

- (1) whether he was denied effective assistance of counsel because defense counsel failed to challenge the basis for the traffic stop;

¹ The district court found Molina-Solorzano not guilty of child neglect.

² Under 21 O.S.Supp.2015, § 13.1, Molina-Solorzano must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

- (2) whether he was denied effective assistance of counsel because defense counsel failed to inform him of his rights under the Vienna Convention on Consular Relations; and
- (3) whether he is entitled to retroactive application of recent changes in law concerning eligibility for parole consideration for those convicted of aggravated drug trafficking.

We find relief is not required and affirm the Judgment and Sentence of the district court.

1.

Molina-Solorzano contends he is entitled to relief because of ineffective assistance of trial counsel. He faults defense counsel for failing to challenge the lawfulness of the traffic stop, claiming the traffic stop was a pretext for race-based discrimination resulting in an unlawful seizure. He also contends the alleged fog light infraction provided insufficient grounds to stop him. This claim is without merit.

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable

results.³ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. We begin our analysis with the strong presumption that defense counsel's conduct "fell within the wide range of reasonable professional assistance." *Malone*, 2013 OK CR 1, ¶ 15, 293 P.3d at 206. To overcome this presumption, Molina-Solorzano must show that defense counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* He must also affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. This requires him to show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head*, 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. This Court need not determine whether counsel's performance was deficient if there is no showing of harm. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

³ Appellate counsel mistakenly conflates the *Strickland* standard with plain error review.

The Fourth Amendment proscribes unreasonable searches and seizures. *State v. Stark*, 2018 OK CR 16, ¶ 9, 422 P.3d 1282, 1285; U.S. Const. amend. IV. Courts have long recognized that a traffic stop constitutes a Fourth Amendment seizure. *See State v. Strawn*, 2018 OK CR 2, ¶ 21, 419 P.3d 249, 253. Because a routine traffic stop is more akin to an investigative detention than a custodial arrest, a traffic stop is reasonable if (1) the officer's action was justified at its inception, and (2) the officer's action was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136.

To determine the initial validity of a traffic stop, we consider whether the stop was objectively justified. *McGaughey*, 2001 OK CR 33, ¶ 25, 37 P.3d at 136-37. Generally, a routine stop is objectively justified when probable cause or reasonable articulable suspicion exists to believe a traffic violation has occurred. *Id.* The actual motivations or subjective beliefs and intentions of the officer are irrelevant provided the officer had probable cause to believe that a driver was violating some traffic law. *Id.*

Molina-Solorzano's claim challenging the proof supporting probable cause is belied by the record. The videotape of the traffic stop provided ample proof the stop was objectively justified by the fog light infraction, any subjective motivation gleaned by Molina-Solorzano notwithstanding. His claim—that the alleged fog light infraction provided insufficient grounds to stop a motorist—is equally unavailing and his reliance on *United States v. DeGasso*⁴ is misplaced. The court in *DeGasso* found the driver's use of fog lights in that case did not violate the statute in effect at the time of the traffic stop and therefore the trooper's mistake of law left him without probable cause to stop the defendants based upon the alleged fog light infraction. *DeGasso*, 369 F.3d at 1144-45. Title 47 O.S.2011, § 12-217 permits the use of fog lights only when visibility is limited to one-half mile or less. According to the trooper in this case, visibility on the night of the stop was well over a mile making Molina-Solorzano's use of his fog lights a violation of Oklahoma traffic laws, namely 47 O.S.2011, § 12-217(D)(1). The record reveals that the trooper lawfully stopped Molina-Solorzano for a traffic violation. Accordingly, he cannot show that, but

⁴ 369 F.3d 1139 (10th Cir. 2004).

for defense counsel's failure to challenge the initial basis for the traffic stop, the result of his trial would have been different. Without a showing of prejudice, he cannot prevail on his ineffective assistance of counsel claim.

Molina-Solorzano also seemingly challenges the validity of his consent to extend the traffic stop encounter and to search his truck. The record shows defense counsel moved to suppress the drug evidence based upon invalid consent, i.e. no reasonable person in Molina-Solorzano's position would feel free to terminate the encounter or refuse the officer's request to search. The district court rejected defense counsel's argument. Because defense counsel raised the very issue Molina-Solorzano claims should have been presented, he cannot show defense counsel was ineffective. This claim is denied.

2.

Molina-Solorzano claims defense counsel was ineffective for failing to inform him of his rights under, and advocate compliance with, the mandates of the Vienna Convention on Consular Relations (VCCR). The VCCR governs access of consular officers to their nationals detained by authorities in a foreign country. He maintains

had he known of his rights that he would have contacted the Consulate of Mexico in Little Rock and that consulate representative, Josue Villa, would have assisted him in formulating his defense and in investigating his claim that he knew nothing of the drugs hidden in the tailgate. Because Molina-Solorzano cannot meet his burden under the *Strickland* test, this claim must be rejected.

In evaluating a VCCR claim, we consider: “(1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant.” *Torres v. State*, 2005 OK CR 17, ¶ 4, 120 P.3d 1184, 1186. “Under this test, prejudice is presumed if all three factors are present.” *Id.* The defendant has the burden under the third prong of the test to present evidence showing what efforts his consulate would have made to assist in his criminal case. *Id.*

Assuming *arguendo* that Molina-Solorzano fell within the purview of the VCCR,⁵ the record in this case is devoid of any evidence showing that he was unaware of his VCCR rights or that he

⁵ The evidence was that Molina-Solorzano had been in the United States since he was an infant and had finally obtained his Green Card in 2016.

would have availed himself of those rights provided he was unaware of them. He has not submitted an affidavit claiming as much and appellate counsel's bald assertion in the Reply Brief is insufficient. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Nor does Molina-Solorzano explain what, if anything, his consulate would have done to assist his defense. Again, his bald assertion in his Reply Brief that the Mexican consulate would have assisted him, without details or an affidavit substantiating the assertion, is insufficient to support his claim that the consulate would have rendered assistance. Because Molina-Solorzano has not met his burden and shown that any alleged failure by defense counsel to apprise him of his VCCR rights affected the outcome of his case, this claim is denied.

3.

Molina-Solorzano argues recent changes concerning eligibility for parole consideration for aggravated trafficking convictions should be applied retroactively to him. At the time of his conviction for aggravated trafficking, Molina-Solorzano's sentence was subject to the 85% Rule, i.e. he would not be eligible for parole consideration until

he had served 85% of the sentence imposed. 21 O.S.Supp.2015, § 13.1; 63 O.S.Supp.2015, § 2-415(D). He cites a Senate Bill filed during the 2019 session that proposed reducing the amount of required service time to 60% (SB 766). That bill, however, was never voted on by the Legislature and will not, contrary to his assertion, go into effect this November. His conviction for aggravated trafficking remains subject to the 85% Rule. 21 O.S.Supp.2015, § 13.1. Because the authority upon which he relies was not enacted into law, the claim presented is moot.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY,
THE HONORABLE F. DOUGLAS HAUGHT, DISTRICT JUDGE**

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OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
HUDSON, J.: Concur

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