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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

CARMELO A.Q. MENDIOLA SR.,

Petitioner-Appellant,

v.

FRANK ISHIZAKI,

Acting Director of Department of Corrections,

Respondent-Appellee.

Supreme Court Case No.: CVA17-028

Superior Court Case No.: SP0061-14

OPINION

Cite as: 2019 Guam 26

Appeal from the Superior Court of Guam
Argued and submitted on October 18, 2018
Hagåtña, Guam

Appearing for Petitioner-Appellant:

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] Petitioner-Appellant Carmelo A.Q. Mendiola Sr. appeals the trial court’s denial of his Petition for Writ of Habeas Corpus (“Petition”). In the underlying criminal trial, Mendiola was tried for the third time with certain criminal offenses—his first trial having resulted in a conviction later overturned for prosecutorial vouching, *see People v. Mendiola*, 2010 Guam 5 ¶ 2, and his second trial having ended in a hung jury. Mendiola’s Petition asserts ineffective assistance of counsel based on his trial counsel’s failure to investigate and call a key witness with potentially exculpatory information. Mendiola asserts that failing to call this witness prejudiced his case and contributed to his conviction and his resulting sentence of life imprisonment with the possibility of parole, in addition to other concurrent sentences for the lesser charges. The trial court found that trial counsel’s actions were reasonable trial strategy and denied Mendiola’s Petition. This appeal followed. For the reasons discussed below, we deny the Petition.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Mendiola was indicted on one count of First Degree Criminal Sexual Conduct (As a First Degree Felony), one count of Second Degree Criminal Sexual Conduct (As a First Degree Felony), one count of Assault with Intent to Commit Criminal Sexual Conduct (As a Third Degree Felony), Assault (As a Misdemeanor), one count of Family Violence (As a Misdemeanor), and one count of Child Abuse (As a Misdemeanor). *See Mendiola*, 2010 Guam 5 ¶ 3. A jury returned a verdict of guilty on the charges of First Degree Criminal Sexual Conduct,

¹ Because the only proper way for this court to review this case is to treat it as an original petition for writ of habeas corpus, invoking original rather than appellate jurisdiction, *see infra* Part II, the proper disposition would be to grant or deny the Petition, rather than to affirm or reverse the judgment.

Family Violence, and Child Abuse. *Id.* ¶ 1. Mendiola appealed, and this court reversed the conviction for prosecutorial vouching and remanded for a new trial. *Id.* ¶¶ 2, 36.

[3] Mendiola was tried a second time in August 2011. During that trial, Mendiola’s ex-wife, Melissa Juanico, testified that she never left Mendiola alone with the alleged victim during the time the alleged victim claimed she was sexually assaulted. Juanico further testified to details she recalled surrounding the day of the alleged assault and as to her belief that the alleged victim’s demeanor toward Mendiola never changed after she accused Mendiola of sexually assaulting her. The second trial resulted in a hung jury.

[4] Mendiola was tried for a third time on these charges in November 2011. Juanico did not testify during the third trial. The jury returned a verdict of guilty as to all charges against Mendiola. Mendiola was sentenced to the following, to run concurrently: (1) life imprisonment, with a possibility of parole for First Degree Criminal Sexual Conduct, (2) fifteen years of imprisonment for Second Degree Criminal Sexual Conduct, (3) one year of imprisonment for Assault, (4) one year of imprisonment for Family Violence; and (5) one year of imprisonment for Child Abuse. Mendiola appealed, and we affirmed his conviction and sentence. *See People v. Mendiola*, 2014 Guam 17.

[5] Mendiola later filed a Petition for Writ of Habeas Corpus in the Superior Court.² The trial court examined the merits of Mendiola’s ineffective assistance claim based on trial counsel’s failure to interview or call Juanico as a witness during the third trial. Juanico was the only witness who testified to support Mendiola’s defense theory during his second trial, which ended in a hung jury.

² Mendiola initially filed his Petition *pro se*. However, shortly thereafter, the trial court appointed counsel to represent him in his habeas proceeding.

[6] During the habeas proceedings below, the trial court received briefing and conducted evidentiary hearings, establishing a record for review. During the evidentiary hearings, testimony was taken from Juanico and from counsel for the third trial, Attorney Jeffrey A. Moots. The trial court ultimately denied Mendiola’s Petition, determining that trial counsel’s actions amounted to reasonable trial strategy and not ineffective assistance. This appeal followed.

II. JURISDICTION

[7] This court has ruled that a petitioner for habeas relief may not appeal the denial of a petition for writ of habeas corpus. *See Borja v. Bitanga*, 1998 Guam 29 ¶ 12 (“Accordingly, we hold that Petitioners do not have the right to appeal the denial of their petitions for habeas corpus, the right to appeal being granted by statute only to the government.”); *see also* 8 GCA § 135.74 (2005) (“An appeal may be taken to the Guam Supreme Court *by the Attorney General* from a final order of the Superior Court made upon the return of a writ of habeas corpus discharging a defendant after his conviction, in all criminal cases prosecuted in a court of record.” (emphasis added)). However, this court has further ruled that it does have the discretion to treat the appeal of the denial as an original petition for writ of habeas corpus, invoking this court’s original jurisdiction. *See* 7 GCA § 3107(b) (2005); *see also Borja*, 1998 Guam 29 ¶ 11 (stating that 7 GCA § 3107(b) vests this court “with original jurisdiction over matters generally characterized as writ proceedings, including mandamus, prohibition and injunction. While a habeas corpus proceeding is not specifically enumerated, the ‘similar’ remedies language . . . provides this court with the basis to hear habeas proceedings using its original jurisdiction.”). We have opted to exercise such discretion in previous cases. *See, e.g., Borja*, 1998 Guam 29 ¶¶

14-15; *White v. Klitzkie*, 1998 Guam 31 ¶ 13; *May v. People*, 2005 Guam 17 ¶¶ 7-8; *Ignacio v. People*, 2012 Guam 14 ¶ 5.

[8] In his opening brief, Mendiola argued that the court has jurisdiction to hear this appeal under 7 GCA § 25102(f)—the statutory provision that gives this court appellate review of orders granting or dissolving, or refusing to grant or dissolve, an injunction. Appellant’s Br. at 1 (Mar. 27, 2018). This, however, is not an applicable source of appellate jurisdiction in this instance. Mendiola later asserted in his reply brief that the source of jurisdiction to hear this appeal rests instead on the “similar remedies” language of 7 GCA § 3107(b), citing *May*, 2005 Guam 17 ¶ 8. Appellant’s Reply Br. at 10-11 (July 16, 2018).

[9] Respondent-Appellee Frank Ishizaki,³ in his capacity as Acting Director of the Department of Corrections (the “Government”), urges this court not to exercise its discretion, arguing that the limitations of 8 GCA § 135.74 would essentially be rendered meaningless if this court were to exercise this discretion every time a defendant appeals rather than properly files a new petition with this court. Appellee’s Br. at 3 (May 10, 2018). The Government further argues this discretion should be reserved for cases where the petitioner is *pro se* and failed to recognize the Supreme Court’s original jurisdiction. *Id.* at 2. Mendiola counters that, although he was eventually represented by counsel during the habeas proceedings below and now on appeal, he started the original petition *pro se*. Reply Br. at 11; *see also supra* note 2.

[10] The court likens Mendiola to the three petitioners in *Borja*, who at first filed their respective petitions for habeas corpus in the trial court *pro se* and were later appointed counsel to

³ The Petition originally named Jose San Augustin, in his official capacity as the Director of the Department of Corrections. However, under Guam Rule of Appellate Procedure 23(c), Frank Ishizaki has been substituted in, as he was appointed Acting Director in November 2019 and is therefore the incumbent of the position. *See Mendiola v. Ishizaki*, CVA17-028 (Order (Dec. 3, 2019)).

represent them in their petitions. 1998 Guam 29 ¶ 7. Based on this, we elect to exercise our discretion and treat Mendiola's appeal as an original petition for habeas corpus, invoking our original rather than appellate jurisdiction. We are mindful of the Government's concerns that the limitations of 8 GCA § 135.74 may be rendered meaningless were this court to consistently exercise such discretion whenever a defendant incorrectly files an appeal rather than a new petition. To that end, we limit our decision to exercise this discretion to cases in which the petitioner was *pro se* at the onset of the petition proceedings, or for some meaningful period thereafter; to be clear, we do not and will not exercise this discretion simply as a matter of course.

III. STANDARD OF REVIEW

[11] Having elected to treat Mendiola's appeal as an original petition for writ of habeas corpus, invoking this court's original rather than appellate jurisdiction, the appropriate standard of review is *de novo*. See *Ignacio*, 2012 Guam 14 ¶ 6 (citing *White*, 1998 Guam 31 ¶ 13).

IV. ANALYSIS

[12] This appeal addresses the trial court's denial of Mendiola's Petition for Writ of Habeas Corpus, the reasoning pronounced in its Amended Findings of Fact and Conclusions of Law, and the merits of Mendiola's ineffective assistance of counsel claims. We review Mendiola's challenges *de novo*. *Id.* This court has adopted the two-prong test discussed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and we have held that a defendant must show (1) that trial counsel's performance was deficient, and (2) this deficient performance prejudiced his defense. See *People v. Borja*, 2017 Guam 20 ¶ 15. "The benchmark for judging an ineffective assistance claim is whether counsel's conduct 'so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (quoting *Strickland*, 466 U.S. at 686).

[13] In determining whether trial counsel’s performance was deficient under the first prong of the *Strickland* test, a reviewing court must “‘judge the reasonableness of counsel’s challenged conduct on the facts of the particular case,’ viewed at the time of the conduct.” *People v. Leon Guerrero*, 2001 Guam 19 ¶ 11 (quoting *People v. Kintaro*, 1999 Guam 15 ¶ 12). When challenging a conviction based on a claim of ineffective assistance of counsel, a convicted defendant “must identify the acts or omissions of counsel that are alleged to be the result of unprofessional conduct.” *Id.* (citing *Kintaro*, 1999 Guam 15 ¶ 12). Here, Mendiola identifies for the court trial counsel’s failure to interview Juanico and to call her as an exculpatory witness in the third trial as the ground for his claim of ineffective assistance of counsel. Appellant’s Br. at 1.

[14] Not every decision to forgo calling a witness, however, is tantamount to deficient representation. “It is well-settled that an otherwise reasonable decision by counsel not to call certain witnesses is not ineffective simply because it differed from the defendant’s wishes.” *Hardwick v. Pierce*, 148 F. Supp. 3d 338, 359 (D. Del. 2015) (citing *Diggs v. Owens*, 833 F.2d 439, 445-46 (3d Cir. 1987)). To succeed on an ineffective assistance of counsel claim based on counsel’s failure to call certain witnesses, a petitioner must show how the proposed witness’s testimony would have been favorable and material. *Id.* at 359. Further, “the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.” *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

[15] Here, Mendiola asserts that Juanico’s proposed testimony, in line with her testimony during his second trial, would have contradicted the testimony of the alleged victim, and thus trial counsel’s failure to call her deprived him of a fair trial. *See* Transcript (“Tr.”) at 17-18 (Evid. Hr’g, Mar. 20, 2017). Mendiola proffered a declaration from Juanico in addition to presenting her for live testimony at an evidentiary hearing on the Petition. *See* Record on Appeal (“RA”), tab 36 (Decl. Juanico, Dec. 17, 2015); Tr. at 5-10 (Evid. Hr’g, July 6, 2016). In both her declaration and her live testimony, Juanico stated she had testified during Mendiola’s second trial that she had never left the alleged victim alone with Mendiola on the day of the claimed sexual assault. RA, tab 36 ¶¶ 3-4 (Decl. Juanico); Tr. at 5-6 (Evid. Hr’g, July 6, 2016). She further stated she had testified during Mendiola’s second trial to the effect that she never noticed any change in the demeanor of the alleged victim toward Mendiola after the alleged victim claimed he assaulted her. RA, tab 36 ¶ 10 (Decl. Juanico). Juanico stated that although Mendiola’s counsel during the third trial knew about her prior testimony, he never called her to ask her to testify at the third trial. *Id.* ¶ 11. She stated that, had he called her, she would have been willing to testify and would have made arrangements with her job and her babysitter so she could be available. *Id.* ¶¶ 11-14; *see also* Tr. at 7 (Evid. Hr’g, July 6, 2016) (wherein Juanico stated that trial counsel called her only the night before he wanted her to testify, but because she didn’t have a babysitter, counsel told her not to come in to testify).

[16] Based on her declaration and live testimony at the evidentiary hearing, the court finds that Mendiola satisfied the initial hurdle of showing that Juanico was available to testify, what she would have testified to had she been called, and that her testimony would have been favorable to Mendiola. *See Day*, 566 F.3d at 538. However, the Government, in its cross-examination of Juanico during the evidentiary hearing, challenged some of Juanico’s assertions.

See, e.g., Tr. at 9 (Evid. Hr'g, July 6, 2016) (wherein the People questioned Juanico about her prior testimony that she never left Mendiola alone with alleged victim, pointing out that she testified during second trial that Mendiola, at time period in question, picked up alleged victim from school and was alone with her); *id.* at 10 (wherein the People extracted from Juanico the fact that Mendiola was unsupervised with other minors in the house whenever Juanico took her daily showers).

[17] The Government also called Attorney Jeffrey A. Moots to testify at an evidentiary hearing. Attorney Moots was Mendiola's counsel during his third trial and is an associate of Attorney F. Randall Cunliffe, who represented Mendiola during the second trial at which Juanico had testified and which resulted in a hung jury. Tr. at 4 (Evid. Hr'g, Mar. 20, 2017). Attorney Moots countered some of Juanico's assertions, particularly her claim that Attorney Moots never attempted to contact her prior to the night before the hearing at which, according to Juanico, he wanted her to testify. *Id.* at 6, 12-15. Contrary to her assertions, Attorney Moots testified that he made several attempts to meet with Juanico to assess her strength as a witness and to prepare her to testify. *Id.* He stated that he gave her the option of choosing a date and time convenient for her to come in and meet with him, that Juanico would schedule appointments with him at times of her choosing, and that she would then fail to appear at each scheduled meeting. *Id.* at 8. He stated this happened on around three or four occasions. *Id.*

[18] Attorney Moots further stated that he consulted with Attorney Cunliffe about Juanico's behavior to get a sense of whether her repeated non-appearance could signal she was wavering on her prior testimony or could indicate cause for concern about her strength and credibility as an exculpatory witness. *Id.* at 7-9. He stated that Attorney Cunliffe did tell him he developed concerns about Juanico's veracity. *Id.* Finally, Attorney Moots denied calling Juanico the night

before a hearing asking her to testify the following day, and he said that he did not tell her she need not testify because she had no babysitter—directly contradicting Juanico’s sworn statements and live testimony. *Id.* at 13-14. Attorney Moots testified instead that he called Juanico when the trial ended after the defense rested and told her the trial was over and there was no longer a need for her to come in. *Id.*

[19] Finally, Attorney Moots testified that he had over twenty years of trial experience and that it was his reasoned decision, based on Juanico’s repeated non-appearance coupled with the input he obtained from Attorney Cunliffe regarding Juanico’s strength as an exculpatory witness, to not risk putting Juanico on the stand. *Id.* at 6-7, 9-10, 15-16. Moreover, he was not able to meet with her and prepare her as a witness. He testified that he consulted with Mendiola about his strategic decision not to put Juanico on the stand, and that Mendiola agreed to proceed in this manner. *Id.* at 11, 15-16. Mendiola’s habeas counsel was able to cross-examine Attorney Moots during the evidentiary hearing. *See id.* at 6-12.

[20] The trial court, in its Amended Findings of Fact and Conclusions of Law, recounted Juanico’s statements in her declaration and her testimony at the evidentiary hearing, in addition to the testimony of Attorney Moots. *See* RA, tab 73 at 6-8, 12-14 (Am. Finds. Fact & Concl. Law, Nov. 20, 2017). Quoting language in *Angoco v. Bitanga*, 2001 Guam 17 ¶ 9, the court stated that “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 10. The trial court also stated that “effective assistance of counsel does not guarantee errorless representation, but instead affords the defendant counsel reasonably likely to render effective assistance.” *Id.* at 11.

[21] The trial court found that “Juanico’s testimony that she could confirm ‘with 100% certainty’ that Mendiola was never left alone with [the alleged victim] is incredible, given that it is unreasonable for her to be present in the same room with both the victim and Mendiola at each and every waking and sleeping moment of the day such that she could confirm they were *never* left alone together.” *Id.* at 13. The trial court concluded:

Attorney Moots’s decision not to call Juanico was clearly made after several futile attempts to meet and prepare her for trial and was a deliberate and conscious decision which he reached after conferring with co-counsel as well as with his client.

Considering the arguments of [Mendiola] and [the Government], the testimony of both Juanico and Moots, the Declaration of Juanico in support of [Mendiola’s] Writ and the applicable case law, the Court finds that Attorney Moots’s decision not to proffer the testimony of Ms. Juanico at the Third Trial does not support a finding of ineffective assistance of counsel under the circumstances.

Id. at 14.

[22] In presenting an ineffective assistance claim, “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *People v. Reyes*, 1998 Guam 32 ¶ 22 (citing *Strickland*, 466 U.S. at 688). Here, based on a *de novo* review of the record established during the habeas proceedings below and the strong presumption that counsel has rendered effective assistance, *see People v. Quintanilla*, 1998 Guam 17 ¶ 9, we find that Mendiola has not surmounted his burden of establishing the first prong of the *Strickland* test, which asks whether counsel’s performance was deficient.

[23] This court has consistently held that decisions of trial counsel regarding trial strategy do not alone amount to ineffective assistance of counsel. *See Angoco*, 2001 Guam 17 ¶ 9 (“Where counsel consciously decides to omit a defense or pursue a certain argument, such conduct is deliberate strategy, and a choice of strategy that backfires is not the equivalent of ineffective

assistance of counsel.”); *see also Leon Guerrero*, 2001 Guam 19 ¶ 11. Attorney Moots testified—and there is no indication that his testimony is not to be believed—that he made numerous attempts to meet with Juanico at a time of her convenience to assess her performance as a witness and to prepare her for trial, but that Juanico repeatedly failed to show up at these meetings. Further, when pressed during the evidentiary hearing about the testimony she would have offered had she been called as a witness during Mendiola’s third trial, weaknesses in her testimony were exposed—thus reinforcing Attorney Moots’s reservations about putting Juanico on the stand without testing her performance as a witness.

[24] Attorney Moots testified that he consulted with Attorney Cunliffe about Juanico’s prior testimony and her behavior in failing to keep her appointments with Attorney Moots, and that he thereafter made a reasoned and strategic decision grounded in his twenty years of experience and training as a trial attorney to forgo putting Juanico on the stand. He also testified that he informed Mendiola about this decision and stated that Mendiola agreed. Here, as in *Reyes*, counsel did not fail to render assistance outright; there was no allegation that trial counsel failed to vigorously cross-examine the People’s witnesses during the third trial or that he failed to raise objections. *Reyes*, 1998 Guam 32 ¶ 22. Although there are other avenues that Attorney Moots could have pursued to secure Juanico’s appearance, or more he might have done to investigate her claims, this alone does not render his performance deficient under the circumstances. And while the court agrees with Mendiola that Attorney Moots could have exerted greater efforts considering what was at stake for Mendiola, we do not agree this conduct rises to the level of deficiency under *Strickland*.⁴

⁴ To be clear, the court finds that Attorney Moots’s actions did not rise to the type of conduct or dereliction discussed in the cases cited by Mendiola. *See* Appellant’s Br. at 10; *cf. Crisp v. Duckworth*, 743 F.2d 580, 583-84

[25] The United States Supreme Court has held that “while in some instances ‘even an isolated error’ can support an ineffective-assistance claim if it is ‘sufficiently egregious and prejudicial,’ it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (citation omitted). The Court in *Harrington* further held that where “[trial counsel] represented [the defendant] with vigor and conducted a skillful cross-examination . . . it would have been reasonable to find that [the defendant] had not shown his attorney was deficient under *Strickland*.” *Id.*

[26] Again, the only action or omission complained of is the decision not to proffer Juanico as a witness. Although Mendiola was convicted, “conviction is not sufficient to overcome the strong presumption that counsel’s actions were sound trial strategy.” *Reyes*, 1998 Guam 32 ¶ 22 (citing *Strickland*, 466 U.S. at 689). We cannot say, therefore, that Attorney Moots’s decision under the circumstances, viewed at the time of the conduct, fell below an objective standard of reasonableness to be deemed deficient under *Strickland*. See *Leon Guerrero*, 2001 Guam 19 ¶ 11. “[U]nless a showing of deficient performance is made then there is no need to address the prejudice prong of the inquiry.” *Id.* (citing *People v. Perez*, 1999 Guam 2 ¶ 35, *overruled on other grounds by People v. Shimizu*, 2017 Guam 11). Thus, because Mendiola has failed to meet the first prong, there is no need to address the second prong of the *Strickland* test—i.e., whether trial counsel’s deficient performance prejudiced Mendiola so as to deny him a fair trial.

(7th Cir. 1984); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984). Here, Attorney Moots made repeated attempts to meet with Juanico, which, coupled with his skepticism of her strength as a witness based on information from the prior trial, weighs against a finding of deficient performance in this case.

V. CONCLUSION

[27] We hold that Mendiola did not satisfy the first prong of *Strickland* because he failed to demonstrate that trial counsel’s specific action or omission of not proffering Juanico as a witness, under the circumstances as they existed at the time of the action or omission, fell below an objective standard of reasonableness and “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Because he failed to meet the first part of the test, we need not proceed to the second part of the *Strickland* analysis. The Petition is **DENIED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice