

SUPREME COURT OF VIRGINIA

Velasquez-Lopez v. Clarke, 290 Va. 443

778 S.E.2d 504 (2015) · No. Record No. 150303 · Decided November 19, 2015

SUMMARY

The Supreme Court of Virginia reviewed the dismissal of Jose Cristino Velasquez-Lopez's habeas corpus petition alleging ineffective assistance of counsel for failing to perfect an appeal. The Court held that the habeas court's finding that Velasquez-Lopez had instructed counsel not to file the appeal was supported by credible evidence and was not plainly wrong. The Court affirmed the circuit court's judgment, with two justices dissenting.

CASE DETAILS

COURT	Supreme Court of Virginia
WRITING FOR THE COURT	Justice Elizabeth A. McClanahan; Justice Roush; Justice Goodwyn; All other Justices of the Supreme Court of Virginia
JURISDICTION	Virginia
DECIDED	November 19, 2015
DOCKET	Record No. 150303
DISPOSITION	affirmed
PROCEDURAL POSTURE	Velasquez-Lopez appealed the Circuit Court of Culpeper County's dismissal of his petition for a writ of habeas corpus alleging ineffective assistance of counsel for failure to perfect a direct appeal.
STANDARD OF REVIEW	Factual findings in a habeas corpus hearing are presumed correct and will be upheld unless plainly wrong or unsupported by credible evidence. The application of law to the facts is reviewed under the governing habeas and ineffective-assistance standards.
PRECEDENTIAL VALUE	Published opinion; majority opinion of the Supreme Court of Virginia.
PARTIES	Jose Cristino Velasquez-Lopez v. Harold Clarke

TOPICS

[ineffective assistance](#)[right to counsel](#)[habeas corpus](#)[appellate procedure](#)[standard of review](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the circuit court clearly erred in finding that Velasquez-Lopez had conveyed that he did not want trial counsel to file an appeal.
2. Whether trial counsel provided ineffective assistance under the Sixth Amendment by failing to file a petition for appeal.

HOLDINGS

1. The circuit court's finding that Velasquez-Lopez clearly conveyed that he did not want counsel to file an appeal was not plainly wrong or unsupported by credible evidence.
2. Counsel was not constitutionally ineffective because the evidence supported the finding that Velasquez-Lopez had instructed counsel not to file an appeal; counsel therefore did not disregard an express instruction to appeal.

KEY QUOTATIONS

“Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal.” (at 449)

“a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.” (at 449)

“We will not recognize a new scenario, outside of Strickland, imposing a Sixth Amendment duty upon counsel to prosecute an appeal in defiance of the client's instructions.” (at 452)

FACTUAL BACKGROUND

Velasquez-Lopez, a native of El Salvador who did not speak English, pleaded guilty to 33 counts of taking indecent liberties with a child after receiving appointed counsel and assistance from a Spanish-language interpreter. He was sentenced to 156 years' imprisonment, with all but 18 years suspended. After sentencing, he sent letters expressing dissatisfaction with counsel and asking that the case be reopened so another attorney could help him appeal. Counsel filed a notice of appeal but did not file a petition for appeal, and the Court of Appeals dismissed the appeal.

PROCEDURAL HISTORY

Velasquez-Lopez pleaded guilty to 33 counts of taking indecent liberties with a child and received a sentence of 156 years' imprisonment, with all but 18 years suspended. Trial counsel filed a notice of appeal but did not file the required petition for appeal, and the Court of Appeals dismissed the appeal. The circuit court conducted an evidentiary hearing on the habeas petition, found that Velasquez-Lopez had clearly instructed counsel not to file an appeal, and dismissed the petition. The Supreme Court of Virginia affirmed.

DISPOSITION

affirmed

CASES CITED

- Abbott v. Peyton, 211 Va. 484, 486, 178 S.E.2d 521, 523 (1971)
- Fuentes v. Clarke, 290 Va. ___, ___, ___ S.E.2d ___, ___ (Oct. 29, 2015)
- Dominguez v. Pruett, 287 Va. 434, 440, 756 S.E.2d 911, 914 (2014)
- Zemene v. Clarke, 289 Va. 303, 307, 768 S.E.2d 684, 686 (2015)
- Roe v. Flores-Ortega, 528 U.S. 470, 477-80, 484 (2000)
- Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)
- Miles v. Sheriff, 266 Va. 110, 114, 581 S.E.2d 191, 193 (2003)
- Jenkins v. Director, Va. Ctr. for Behav. Rehab., 271 Va. 4, 17, 624 S.E.2d 453, 461 (2006)
- Nolan v. Peyton, 208 Va. 109, 112, 155 S.E.2d 318, 321 (1967)
- Smyth v. White, 195 Va. 169, 173-74, 77 S.E.2d 454, 456 (1953)
- Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997)
- Datts v. United States, Case No. CV412-009, 2012 U.S. Dist. LEXIS 170569 (S.D. Ga. 2012)