

2007

Joseph Chavez v. State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH CHAVEZ,

Petitioner/Appellant,

vs.

STATE OF UTAH,

Respondent/Appellee.

Case No. 20070133-CA

BRIEF OF APPELLEE

**APPEAL FROM A DENIAL OF A PETITION FOR POST-CONVICTION
RELIEF, IN THE SECOND JUDICIAL DISTRICT COURT, WEBER
COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL D. LYON
PRESIDING.**

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Petitioner appeals the denial of his petition for post-conviction relief in the Second Judicial District Court in Weber County, State of Utah, the Honorable Michael D. Lyon presiding. This Court has jurisdiction to consider the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

Issue 1: Was the trial court correct in dismissing petitioner's claim that his guilty plea to theft by receiving, providing false information to a police officer and failing to have insurance on his vehicle was not entered knowingly and voluntarily?

Issue 2: Was the trial court correct in dismissing petitioner's claim that he was denied his right to allocution at sentencing?

Issue 3: Was the trial court correct in dismissing petitioner's claims that his attorneys' representation was constitutionally deficient and that petitioner was thereby prejudiced?

Standard of Review for all Three Issues ““We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law.”” *Myers v. State*, 2004 UT 31, ¶ 9, 94 P.3d 211 (quoting *Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467). Further, ““we survey the record in the light most favorable to the findings and judgment; and 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.* (quoting *Medina v. Cook*, 779 P.2d 658, 658 (Utah 1989)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following procedural rule is relevant to one of the issues raised in this case:

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.

Utah R. Crim. P. 22(a).

STATEMENT OF THE CASE

Petitioner was charged in separate Informations with burglary, theft and receiving stolen property (case no. 041901031) and providing false information to a police officer, driving on a revoked or suspended driver's license and operating a vehicle without registration or insurance (case no. 041903489).

Both matters were resolved by plea agreement entered into on July 12, 2004. *See* Statement of Defendant in Support of Guilty Plea and Certificate of Counsel (“Plea Statement”), R. 55-60. Pursuant to the agreement, petitioner pleaded guilty to theft by receiving, a third-degree felony; providing false information to a police officer, a class A misdemeanor; and failing to have insurance on his vehicle, a class B misdemeanor.

Petitioner was sentenced to zero to five years at the Utah State Prison for theft by receiving; one year in jail for providing false information; and six months in jail for failure to have auto insurance. R. 62-64. At the State’s recommendation, the court ran the sentences concurrently, suspended the prison term and imposed probation conditioned on a one-year jail sentence. R. 147:3.

On August 23, 2004, petitioner filed an untimely notice of appeal, but the State stipulated, and this Court agreed, that the notice of appeal had been placed in the prison mail system within the 30-day period within which to appeal and was therefore deemed timely under the “mailbox rule.” *See State v. Chavez*, 2005 UT App 363 (Memorandum Decision), R. 72-73.

On September 5, 2004, petitioner violated his probation by walking away from a work release detail. *See* Affidavit in Support of Order to show Cause and Warrant Request, dated September 9, 2004, R. 66-67. Petitioner was apprehended and on February 9, 2005, the court signed an order revoking his probation and reinstating the prison term of zero to five years on the receiving stolen property charge. *See* Minutes: Amended Sentencing on Affid.,

dated February 9, 2005, R. 69-70. The jail terms imposed for the misdemeanor counts were also re-imposed.

The Utah Court of Appeals dismissed petitioner's appeal by Memorandum Decision on August 25, 2005, because petitioner had not filed a timely motion to withdraw his guilty plea, which deprived the court of jurisdiction to review his claims. *See Chavez*, 2005 UT App 363, R. 73.

On February 8, 2006, the State received petitioner's Petition for Writ of Habeas Corpus and Post[-]Conviction Relief. R. 1-10.

The State responded with a motion to dismiss and supporting memorandum. R. 39-51.

The trial court granted the State's motion and dismissed three of petitioner's claims, but ruled that the claim that his plea was entered involuntarily required an evidentiary hearing. R. 74-80.

On January 31, 2007, the court held an evidentiary hearing. R. 101-02; 145 (Transcript of Evidentiary Hearing). Petitioner testified, as did his trial counsel, Steve Laker, and the prosecutor, Sandra Corp. *See id.*

On February 26, 2007, the court denied petitioner's claims and dismissed the petition. R. 128.

On February 5, 2007, petitioner filed a hand-written document captioned "Motion to Appeal" with the Utah Court of Appeals. R. 122. A deputy clerk informed petitioner by letter dated February 7, 2007, that rule 4(a) of the Utah Rules of Appellate procedure

requires that a notice of appeal be filed with the trial court and that the “Motion to Appeal” was therefore returned to the trial court, R. 124, where it apparently arrived on February 8, 2007. R. 122. The appeal was timely. *See* Utah R. App. P. 4(c) (“A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof”).

STATEMENT OF FACTS

In exchange for petitioner’s guilty plea to felony theft and two unrelated misdemeanor counts, the State agreed to drop the remaining charges and recommend jail instead of prison, credit for time served, good time (if earned), work release and concurrent sentences. *See* Plea Statement at 3; *see also* Plea Hearing (transcript), dated July 12, 2004, R. 145.

During the Plea Hearing, the court questioned petitioner to establish that he understood the Plea Statement and rights he was waiving by pleading guilty. After attorneys outlined the plea agreement, the court asked petitioner if had an opportunity to read the Plea Statement and if it accorded with his understanding.

THE COURT: Is that your agreement, Mr. Chavez?

MR. CHAVEZ: Yes, sir.

THE COURT: . . . Mr. Chavez, you’ve had an opportunity to read this plea agreement, have you?

MR. CHAVEZ: Yes, your honor.

THE COURT: Did your lawyer answer your questions for you?

MR. CHAVEZ: Yes, sir.

THE COURT: Did you understand the agreement?

MR. CHAVEZ: Yes, I did.

THE COURT: Do you acknowledge you're waiving the rights and protections that are defined in that document?

MR. CHAVEZ: I understand.

THE COURT: Do you feel pressured by anyone to enter a plea of guilty this morning?

MR. CHAVEZ: Not at all.

THE COURT: Is your mind clear? You understand what you're doing?

MR. CHAVEZ: Yes.

R. 146:2-3.

Petitioner was also advised that he could move to withdraw his plea at any time before sentencing. R. 146:5. He did not move to withdraw his plea.

On August 12, 2004, petitioner was sentenced to serve zero to five years at the Utah State Prison for theft by receiving; one year in jail for providing false information; and six months in jail for failure to have auto insurance. R. 147:2-6. The court suspended the prison term and imposed a one-year jail sentence. R. 147:3.

Before the imposition of sentence, there was some confusion concerning the Plea Statement and the State's recommendations. The prosecutor, who was not the same attorney who negotiated the agreement, told the court he did not believe the State had agreed to recommend concurrent sentences. R. 147:2. But, at defendant's urging, defense counsel

pointed out that the Plea Statement explicitly called for the State to recommend concurrent sentences and the court agreed: “It does provide for concurrent sentencing.” R. 147:3.

The court adopted the State’s recommendations, but with great reluctance. “But for the recommendation of the State, this court would send you to prison, Mr. Chavez. You have an extensive history. You’ve been to prison before. You have violated parole three times. It’s with great reservation that I will go along with the recommendation.” R. 147:3.

Defense counsel asked about work release and the court replied simply: “No.” R. 147:3. The court asked petitioner if he had a G.E.D. or high school diploma. Petitioner replied: “Sir, I have a G.E.D./high school diploma. I’ve been to Utah State University and Salt Lake Community College.” R. 147:4. Petitioner then personally requested that the court reconsider and impose work release, but the court refused. R. 147:5. However, the court apparently later reconsidered because the signed minute entry for the hearing contains a provision for work release. *See Minutes: APP Sentencing; Sentencing, Judgment, Commitment; Notice*, dated August 16, 2004, R. 62-64.

Petitioner filed a motion to correct the sentence, claiming he did not receive the benefit of his bargain because the court followed all but one of the State’s sentencing recommendations, to wit: Credit for good time. R. 43. The court rejected that argument, pointing out that defendant did receive the benefit of his bargain because the court is not bound by the sentencing recommendations of either party. *Id.* The court further pointed out that the Plea Statement, which petitioner acknowledged he had read and understood, explicitly stated that the trial court was not bound by sentencing recommendations. *Id.*

On August 23, 2004, petitioner filed a notice of appeal. *Id.*

On September 5, 2004, defendant violated his probation by walking away from a work release detail. *See* Affidavit in Support of Order to show Cause and Warrant Request, dated September 9, 2004, R. 66-57. Defendant was apprehended and on February 9, 2005, the court signed an order revoking his probation and reinstating the prison term of zero to five years on the receiving stolen property charge. *See* Minutes: Amended Sentencing on Affid., dated February 9, 2005, R. 69-70. The jail terms imposed for the misdemeanor counts were also re-imposed.

The Utah Court of Appeals dismissed petitioner's appeal by Memorandum Decision on August 25, 2005, because petitioner had not filed a timely motion to withdraw his guilty plea, which deprived the court of jurisdiction to review his claims. *See State v. Chavez*, 2005 UT App 363 (Memorandum Decision), R. 72-73.

On February 8, 2006, the State received petitioner's petition for relief under the Utah Post-Conviction Remedies Act. The petition alleged four claims/grounds for relief: (1) ineffective assistance of counsel; (2) unlawfully induced guilty plea; (3) denial of allocution; and (4) unknowing and involuntary plea.

On June 5, 2006, the State moved to dismiss the petition and deny all claims. The court denied and dismissed claims (1)-(3), but reserved ruling on the fourth claim and scheduled an evidentiary hearing to receive testimony or other evidence concerning petitioner's claim that his plea was not knowing and voluntary because he was unaware that the trial court was not bound by the State's recommendations.

On January 31, 2007, the trial court held an evidentiary hearing. Petitioner was given an opportunity to offer any evidence he believed supported his petition. He also examined his defense attorney and the prosecutor concerning his claim that his plea was not knowing and voluntary.

During the hearing, petitioner focused essentially on two claims. First, he claimed that he did not understand that the trial court was not bound by the plea agreement, even though the plea agreement explicitly states “**TRIAL COURT NOT BOUND**” and petitioner acknowledged in the Plea Statement “that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecution attorney are not binding on the Judge.” R. 22 (emphasis in original). Second, petitioner claimed that he believed the plea agreement required a “one-year flat jail term with no probation” instead of a prison term, which was suspended on the condition that he serve a year in jail. R. 148:8-9.

At the conclusion of the hearing, the court reiterated its denial of claims (1)-(3) and denied claim (4) as well. The court also expressed dismay that petitioner was complaining about his sentence given that it was essentially everything petitioner requested, with the exception of allowance of “good time,” which allows an inmate to earn certain benefits for good behavior.

THE COURT: You got a good deal, and I’m surprised that you’re here this morning whining about it. I find as a matter of fact this morning in this proceeding that you never told your attorney that you wanted a flat year—one-year jail sentence with no probation. I find that had you said that to him he would have told you—and I find that you made an assumption that when you got the year that it would be with probation, but I find that is a misapprehension on your part because it is contrary to

page 1 of the plea agreement that says that a one-year jail sentence would be imposed. So your argument this morning that you did not expect a prison sentence does not square with the plea agreement.

R. 148:53.

The trial court filed Findings of Fact, Conclusions and an Order formally dismissing petitioner's claims on February 26, 2007. R. 132-38.

Petitioner timely appealed.

SUMMARY OF ARGUMENT

Point I.A: Petitioner's claim that he misunderstood the plea agreement because he believed he would receive a year in jail fails because he actually received precisely what he bargained for—a year in jail. Moreover, his claim that his attorney told him he would receive a “straight jail term” without probation was contradicted by testimony from his attorney.

Point I.B: The record demonstrates that petitioner's plea was knowing and voluntary. His claim that he did not understand that the trial court was not bound by sentencing recommendations is contradicted by the properly incorporated Plea Statement, which petitioner acknowledged reading and understanding, and which clearly states that the trial court was not bound by sentencing recommendations.

Point II: Petitioner's allocution rights were not violated because the trial court was fully informed and defendant engaged in a substantive colloquy with the judge during his sentencing hearing.

Point III: Petitioner has not met his burden to demonstrate ineffective assistance of counsel. Petitioner's claims that his counsel was ineffective because he (1) did not move for a recess when the prosecutor "showed disfavor of the plea agreement"; (2) did not make sure petitioner was given his right to allocution; and (3) did not make sure petitioner understood that the trial judge was not bound by sentencing recommendations all fail because petitioner has not demonstrated deficient performance or prejudice.

ARGUMENT

I. PETITIONER'S PLEA WAS KNOWING AND VOLUNTARY BECAUSE THE RECORD DEMONSTRATES HE UNDERSTOOD THE TERMS OF THE PLEA AGREEMENT.

When a defendant pleads guilty, the trial court is charged with assuring that the plea is entered knowingly and voluntarily. *See* Utah R. Crim. P. 11(e). When a petitioner challenges his guilty plea on post-conviction, he must affirmatively show that his or her guilty plea was *in fact* not knowing and voluntary. *Salazar v. Warden, Utah State Prison*, 852 P.2d 988 (Utah 1993); *see Semon v. Turner*, 289 F. Supp. 803, 808 (D. Utah 1968) (to demonstrate that his plea was not knowing and voluntary, petitioner must do more than assert he subjectively misunderstood the consequences of his plea). Petitioner has not met this burden.

A. Petitioner's Sentence—A Year In Jail—Was Precisely What Petitioner Bargained for in the Plea Agreement.

Petitioner essentially claims that he was subjected to a "bait and switch." According to petitioner, he was promised a year in jail in exchange for his guilty plea and that he

instead was sent to prison. *See, e.g.*, Pet. Br. at 9. “There’s a difference between a suspended prison sentence and a jail sentence, Chavez expecting the latter.” *Id.*¹

This claim is frivolous. With the exception of “good time,” the trial court adopted all of the State’s sentencing recommendations and petitioner got precisely the sentence he bargained for. In exchange for his guilty plea to theft by receiving, providing false information to a police officer, and failing to have insurance on his vehicle, R. 55, 58, the State agreed to dismiss the remaining counts, including burglary, theft, and driving on a suspended license. R. 57. The State also agreed to recommend jail in lieu of prison, good time (if earned), work release, credit for time served and concurrent sentencing. *Id.*

Thus, the trial court adopted virtually all of the State’s recommendations, but it did so with great reluctance. “But for the recommendation of the State, this court would send you to prison, Mr. Chavez. You have an extensive history. You’ve been to prison before. You have violated parole three times. It’s with great reservation that I will go along with the recommendation.” R. 147:3.

The court’s hesitation proved to be entirely warranted when petitioner absconded from work release on September 29, 2004. R. 66-57. When petitioner was apprehended, the court revoked his probation and reinstated the zero-to-five year prison term. R. 69-70. Thus, although petitioner attempts to blame the court and/or his attorneys, the fact that he is in

¹ Although petitioner now claims that his misunderstanding concerning the jail term is the “main focus of this complaint,” R. 145:19, he did not mention this specific claim until the evidentiary hearing in this case on January 31, 2007. It was not among the claims raised in his petition. *See* R. 1-10.

prison instead of jail is entirely his own doing. If petitioner had simply held up his end of the plea bargain and not absconded from work release, he would have spent a year in jail and would now be a free man. Instead, petitioner violated probation is now experiencing the entirely predictable consequences.

Finally, petitioner's alleged misunderstanding is not supported by anything other than his testimony at the January 31, 2007 evidentiary hearing. *See, e.g.*, R. 145:8-20. Petitioner's attorney, Steven Laker, stated that petitioner never requested that he be given a "straight jail term"; nor did he ever indicate that he believed he would receive a straight jail sentence. R. 145:29. As Laker recalled: "I doubt seriously that he said that [he wanted a straight jail term] because if he did say that, I would have told him that—that they're requiring a plea to a third degree felony, and a one-year sentence is not on the table with regard to that. The best we can do is a suspended prison sentence and impose a jail—a one-year jail sentence, if we can do that." *Id.* The prosecutor, Weber County Deputy Attorney Sandra Corp, also testified that a straight jail term and no probation was never a possibility. R. 145:37.

In sum, petitioner's claim that he misunderstood the plea agreement because he believed he was to receive a "straight jail term" instead of a suspended prison term and probation conditioned on a year in jail is baseless.

B. The Record Demonstrates Petitioner Understood The Trial Court Was Not Bound By Sentencing Recommendations

Petitioner next contends that it was not made "perfectly clear" to him that the trial court was not bound by the plea agreement. Pet. Br. at 9. "Never during court proceedings

did prosecution, defense attorney, or judge ‘tell’ Chavez that judge was not bound by plea agreement in ‘open court,’ thus amounting to making it ‘perfectly clear’ as required.” *Id.* (emphasis by petitioner). This claim is contradicted by the record.

It is true that the trial court did not explicitly advise petitioner orally during the plea hearing that the court was not bound by the plea agreement. However, such an explicit admonishment is not required, especially where petitioner’s Plea Statement explicitly stated that the trial court was not bound by sentencing recommendations:

TRIAL JUDGE NOT BOUND. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecution attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Judge may do are not binding on the Judge.

R. 22.

Petitioner also acknowledged during the plea colloquy that he had read and understood the Plea Statement and the rights he was waiving by pleading guilty.

THE COURT: Is that your agreement, Mr. Chavez?

MR. CHAVEZ: Yes, sir.

THE COURT: . . . Mr. Chavez, you’ve had an opportunity to read this plea agreement, have you?

MR. CHAVEZ: Yes, your honor.

THE COURT: Did your lawyer answer your questions for you?

MR. CHAVEZ: Yes, sir.

THE COURT: Did you understand the agreement?

MR. CHAVEZ: Yes, I did.

THE COURT: Do you acknowledge you're waiving the rights and protections that are defined in that document?

MR. CHAVEZ: I understand.

THE COURT: Do you feel pressured by anyone to enter a plea of guilty this morning?

MR. CHAVEZ: Not at all.

THE COURT: Is your mind clear? You understand what you're doing?

MR. CHAVEZ: Yes.

R. 146:2-3.

Additionally, during the evidentiary hearing on his post-conviction petition, petitioner acknowledged that he understood "recommendations" are not binding.

Q. Do you understand what the word *recommendation* means?

A. I do.

Q. What does it mean?

A. Something that's to be recommended.

Q. And does it mean that when someone recommends something to you that you have to do it?

A. No.

Q. It's optional. Right?

A. Correct.

R. 148:21.

Clearly, the court properly established that petitioner “read . . . understood, and acknowledge[d] all the information contained” in the Plea Statement. *Mora*, 2003 UT App 117 at ¶ 19. Petitioner understood that the “recommendations” by the State were just that—recommendations. Moreover, the court followed almost all of the State’s recommendations and petitioner received almost exactly what he wanted—a jail term and work release. Accordingly, his claim that his plea was entered unknowingly and involuntarily fails.

II. PETITIONER’S ALLOCUTION RIGHTS WERE NOT VIOLATED BECAUSE THE TRIAL COURT WAS FULLY INFORMED DURING SENTENCING AND DEFENDANT ENGAGED IN A SUBSTANTIVE COLLOQUY WITH THE SENTENCING JUDGE.

Next, petitioner claims that he was denied his right to allocution because the trial court did not explicitly ask him if he had anything to say during sentencing. Petition at 9-10. This claim fails because the trial court was fully informed during sentencing, in part because petitioner engaged in a meaningful dialogue with the sentencing judge. Alternatively, error, if any, error was harmless.

The trial court acknowledged that it did not formally ask petitioner if he wished to exercise his right to allocution during his sentencing. R. 145:6. Nonetheless, the trial court correctly observed that the failure to formally invite allocution is not, in itself, a constitutional violation.

In general, a defendant is granted a right to address the court, known as the right to allocution, as “a means for the defendant to request understanding and mercy.” *State v.*

Maestes, 2002 UT 123, ¶ 46, 63 P.3d 621. The right of allocution is implemented by rule 22, Utah Rules of Criminal Procedure, which states:

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.

Utah R. Crim. P. 22(a). “Allocution is an ‘inseparable part’ of the right to appear and defend in person guaranteed by [art. I, § 12 of] the Utah Constitution.” *Maestes*, 2002 UT 123, ¶ 48 (citing *State v. Anderson*, 929 P.2d 1107, 1109-10 (Utah 1996)). In other words, it is “‘*part of the right to be present.*’” *Id.* (quoting *Anderson*, 929 P.2d at 1111) (emphasis added).

Here, the petitioner clearly exercised his right to speak during the sentencing hearing, even correcting the court—and the prosecutor—that the plea agreement called for concurrent sentencing. R. 147:3. The transcript of the sentencing hearing confirms that petitioner had an open and direct colloquy with the court. The court asked petitioner if he had a G.E.D. or high school diploma. Petitioner replied: “Sir, I have a G.E.D./high school diploma. I’ve been to Utah State University and Salt Lake Community College.” R. 147:4. Petitioner also protested when the court initially declined to allow work release. R. 147:3. Petitioner’s persistence was apparently effective given that the court relented and decided to allow work release. *See Minutes*, August 16, 2004. As the post-conviction court noted, “[T]here had been a free exchange between us. You had – you had asked me for work release. You had also protested that what was coming down at the time – initially at sentencing was not what had been agreed, and so it was my impression that you had been free to say what you wanted to say.” R. 145:6.

Petitioner claims that if he had been affirmatively offered the right to allocution, he would have attempted to withdraw his plea and demanded a jury trial. Pet. Br. at 9. This claim is completely unsupported by the record. As noted, petitioner showed an ability and willingness to speak up during the hearing, even correcting the judge and the prosecutor on the actual terms of the plea agreement. R. 147:3. If petitioner had wished to withdraw his plea, it is hard to understand why he would not have said so at that point.²

Moreover, the right to allocution has nothing to do with withdrawing a guilty plea. As noted, allocution is “a means for the defendant to request understanding and mercy,” *Maestes*, 2002 UT at ¶ 46, “or to show any legal cause why sentence should not be imposed.” Utah R. Crim. P. 22(a). Petitioner has never contended, either before the trial court or on appeal, that there was any legal cause why his sentence should not be impose. Moreover, petitioner’s input convinced the court to show “understanding and mercy,” at least to the extent that the court imposed work release, even though the judge had declined to do so prior to petitioner’s request.

Finally, any error from the petitioner’s not being formally invited to allocute was harmless. In essence, petitioner got everything he asked for in plea agreement. The only recommendation the trial court rejected was the request for “good time.” But petitioner has never challenged the trial court’s refusal to accept that recommendation; nor has he stated

² In any event, petitioner could not have withdrawn his plea at that point absent a showing that the plea was not knowingly and voluntarily entered. Utah Code Ann. § 77-13-6 (West 2004).

how he would have persuaded the trial court to grant “good time” if he had been formally asked to allocute. Moreover, the sentencing judge stated that it is his policy to never sentence a defendant to both “good time” and work release. Because the court granted work release, “[t]here is nothing Petitioner could have said before being sentenced, which would have persuaded the Court to give both work release and good time.” R. 86.

Accordingly, he has failed to demonstrate that his allocution right was violated. Alternatively, any error was harmless.

III. PETITIONER’S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Petitioner complains that his attorney was ineffective because (1) did not move for a recess when the prosecutor “showed disfavor of the plea agreement”; (2) did not make sure petitioner was given his right to allocution; and (3) did not make sure petitioner understood that the trial judge was not bound by sentencing recommendations. *See, e.g.*, Petition at 7.

These claims fail because petitioner has not demonstrated that his counsel’s performance was constitutionally deficient or that petitioner suffered any prejudice. To demonstrate ineffective assistance of counsel, petitioner must establish that (1) his attorney’s performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). To satisfy the first prong of the *Strickland* test, petitioner must demonstrate that counsel’s “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. To establish that such serious errors occurred, a petitioner must identify counsel’s specific acts or omissions that “fall outside the wide range of professionally competent assistance.” *State v. Classon*, 935 P.2d

524, 532 (Utah App. 1997) (citations omitted and internal quotation marks omitted). “‘Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.’” *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (citing *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)).

To establish deficient performance, a petitioner must “rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy.” *State v. Litherland*, 2000 UT 76, 19, 12 P.3d 92. To prevail on a claim of ineffective assistance, appellant must demonstrate “‘that counsel’s actions were not conscious trial strategy,’” and “‘that there was a ‘lack of any conceivable tactical basis’ for counsel’s actions.” *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (quoting *State v. Ellifritz*, 835 P.2d 170, 174 (Utah. App.1992))

To meet his burden under the second, prejudice prong of the *Strickland* test, petitioner must show that he was actually harmed by any alleged deficiencies. To meet this criterion, petitioner must demonstrate that there is a reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993). The courts have defined a reasonable probability as “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Petitioner has not met his burden. The claim concerning allocution fails because, as demonstrated in section II, above, petitioner’s allocution rights were not violated. Accordingly, his counsel cannot be faulted for not protecting his right to allocution. Similarly, petitioner’s claim that he did not understand the trial court was not bound by

sentencing recommendations is also without merit, *see* section I.B, above, and cannot be a basis for a claim of ineffective assistance.

Petitioner's claim that his counsel should have asked for a recess concerns the brief confusion during the sentencing hearing, when the prosecutor mistakenly asserted that the State had made no commitment to recommend concurrent sentences. At defendant's prompting, defense counsel pointed out that the State had agreed to such a recommendation and the trial court, after reviewing the Plea Statement, agreed. R. 147:3. Thus, there was no deficiency and no prejudice.

Thus, petitioner's claims of ineffective assistance of counsel fail.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's dismissal of the petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 26th day of October, 2007.

MARK L. SHURTLEFF
Attorney General

A handwritten signature in black ink, appearing to read "Brett J. DelPorto", written in a cursive style.

BRETT J. DELPORTO
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2007 I caused to be U.S. Mail two
copies of the foregoing to:

Joseph Chavez, #22911
Box Elder County Jail
PO BOX 888
Brigham City, Utah 84302-0888

A handwritten signature in cursive script, appearing to read "Cheryl L. Pias", is written over a horizontal line.