

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LOPEZ A/K/A KEVIN JOSEPH
LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42904

FILED

SEP 17 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Kevin Lopez's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On September 12, 2002, the district court convicted Lopez, pursuant to a jury verdict, of robbery with the use of a deadly weapon. The district court sentenced Lopez to serve a term of 48 to 120 months in the Nevada State Prison and an equal and consecutive term for the deadly weapon enhancement. This court affirmed in part and remanded in part to correct the judgment of conviction.¹ The remittitur issued January 28, 2003.²

¹Lopez v. State, Docket No. 40304 (Order Affirming in Part, and Remanding in Part to Correct Judgment of Conviction, December 31, 2002). The judgment of conviction incorrectly reflected that Lopez was convicted pursuant to a guilty plea.

²An amended judgment of conviction was filed on January 14, 2003.

On November 21, 2003, Lopez filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Lopez or to conduct an evidentiary hearing. On February 24, 2004, the district court denied Lopez's petition. This appeal followed.

In his petition, Lopez asserted several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Lopez must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that his counsel's errors were so severe that they rendered the jury's verdict unreliable.³ The district court may dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, Lopez argued that his counsel was ineffective for advising him not to testify on his own behalf and for not filing a motion in limine to prevent the State from introducing his prior conviction in the event he testified. "On appeal, this court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion."⁵ Here, the record reveals that shortly

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 697.

⁵Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991).

after Lopez committed the instant offense, he suffered a felony robbery conviction, which would have been admissible to impeach Lopez had he testified.⁶ Accordingly, we conclude that Lopez failed to demonstrate that his counsel was ineffective in this regard.

Second, Lopez contended that his counsel was ineffective because counsel did not adequately "test" the State's case against him. Specifically, Lopez argued that his counsel did not adequately cross-examine the robbery victim, Zaka Khan. The record reveals that defense counsel cross-examined Khan extensively. Moreover, Lopez failed to explain what further cross-examination he desired his counsel to undertake.⁷ We conclude that Lopez did not demonstrate that his counsel's cross-examination of Khan fell below an objective standard of reasonableness.

Third, Lopez claimed that his counsel was ineffective for conceding Lopez's guilt to the offense of battery with the use of a deadly weapon during closing argument. After closing argument and outside the jury's presence, Lopez's counsel advised the district court that he conceded Lopez's guilt to a lesser offense with Lopez's approval. Although counsel

⁶See Givens v. State, 99 Nev. 50, 52, 657 P.2d 97, 98-99 (1983), overruled on other grounds, Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986); NRS 50.095.

⁷See Strickland, 466 U.S. at 690 (stating that "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment"); Pellegrini v. State, 117 Nev. 860, 866, 34 P.3d 519, 523 (2001).

did not specifically enumerate the lesser-included offenses for which he secured permission from Lopez to concede guilt, Lopez was present during counsel's closing argument and voiced no objection despite the opportunity to do so. Rather, Lopez acknowledged his acquiescence to counsel conceding his guilt to a lesser offense on the record to the district court.⁸ We conclude Lopez did not demonstrate that his counsel was ineffective in conceding Lopez's guilt to a lesser-included offense.

Lastly, Lopez argued that his counsel was ineffective for failing to conduct an adequate pre-trial investigation. Specifically, Lopez contended that his counsel was ineffective for failing to read Sheriff v. Jefferson⁹ prior to the pretrial investigation. The State presented sufficient evidence at the preliminary hearing to bind Lopez over for trial on the robbery charge.¹⁰ Consequently, we conclude that Lopez failed to demonstrate that his counsel was ineffective in this regard.

⁸See Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994).

⁹98 Nev. 392, 649 P.2d 1365 (1982).

¹⁰Robertson v. Sheriff, 85 Nev. 681, 682-83, 462 P.2d 528, 529 (1969) (stating, "at a preliminary hearing there need not be produced the quantum of proof required at a trial to establish the guilt of the offender beyond a reasonable doubt;" there only need be sufficient evidence presented that establishes probable cause to believe that an offense has been committed and the defendant committed it).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Lopez is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Kevin Lopez
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have reviewed all documents that Lopez has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Lopez has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.