

IN THE SUPREME COURT OF THE STATE OF NEVADA

ENCARNACION AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45966

FILED

JAN 11 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On January 13, 2004, the district court convicted appellant, pursuant to a jury verdict, of transporting a controlled substance and trafficking in a controlled substance. The district court sentenced appellant to serve a term totaling ten to twenty-five years in the Nevada State Prison. This court upheld appellant's conviction on direct appeal.¹ The remittitur issued on March 8, 2005.

On June 23, 2005, appellant 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 appellant or to conduct an evidentiary hearing. On October 3, 2005, the district court denied appellant's petition. This appeal followed.

¹Aguilar v. State, Docket No. 42807 (Order of Affirmance, December 2, 2004).

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a jury verdict, a petitioner must demonstrate two things: counsel's deficiency, meaning that counsel's performance fell below an objective standard of reasonableness,² and resulting prejudice, meaning a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant claimed his counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus seeking to dismiss the indictment based on the relevant statute of limitations. Appellant failed to demonstrate such a petition would have been successful. Counsel filed a motion to dismiss the indictment based on the statute of limitations, which had the same effect as a pretrial petition for a writ of habeas corpus. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed his counsel was ineffective for failing to protect his right to a speedy trial. Appellant's preliminary hearing was originally set for July 20, 2001, and was continued four times

²Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

³Id. at 694; see also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (adopting the Strickland two-part test for ineffective assistance of counsel).

⁴Strickland, 466 U.S. at 697.

until it took place on September 17, 2001. At that time, the State declared its intention to dismiss the charges and seek a grand jury indictment. The case was then dismissed. Appellant failed to demonstrate that counsel's performance prejudiced him. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed his counsel was ineffective for failing to object to testimony by the State's expert witness based on insufficient notice of the expert. This claim is belied by the record.⁵ Counsel filed a motion to strike the witness and exclude the testimony. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed his counsel was ineffective for failing to file a motion to dismiss the indictment based on lack of notice of the grand jury proceedings. Appellant failed to demonstrate such a motion would have been successful. Appellant admitted he was served with a notice of intent to seek indictment at the conclusion of the preliminary hearing. Our review of the record on appeal reveals that the notice met the requirements of NRS 172.241. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed his counsel was ineffective for failing to challenge admission of evidence that was seized during a search appellant claimed was unlawful. This claim is belied by the record.⁶ Counsel filed a motion to suppress the evidence. Accordingly, we conclude the district court did not err in denying this claim.

⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on claims that are belied by the record).

⁶Id.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Michael A. Cherry, District Judge
Encarnacion Aguilar
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).