

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE DOMINGO GOMEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47395

FILED

NOV 08 2006

ORDER OF AFFIRMANCE

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

This is an 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; David Wall, Judge.

On February 10, 2004, appellant Jose Domingo Gomez was convicted, pursuant to a guilty plea, of one count each of possession of a stolen vehicle, trafficking in a controlled substance, child abuse and neglect, battery on an officer, and failure to stop on the signal of a police officer. The district court sentenced Gomez to serve a prison term of 48 to 156 months for the trafficking count, a consecutive prison term of 28 to 72 months for the failure to stop count, and lesser concurrent terms for the remaining counts. Gomez did not file a direct appeal.

On June 9, 2004, Gomez filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Without conducting an evidentiary hearing or appointing counsel, the district court denied the petition. Gomez appealed, and this court affirmed in part and reversed in part and remanded. Specifically, this court remanded for an evidentiary hearing on whether any plea offers

were made, and if so, whether defense counsel was ineffective for failing to communicate such offers.¹

On remand, the district court appointed counsel to represent Gomez and conducted an evidentiary hearing on Gomez's claim. The district court denied the petition. Gomez filed this timely appeal.

Gomez claims that the district erred by denying his petition because the State failed to preserve material evidence. Citing to State v. Manus² and Sparks v. State,³ Gomez argues that the district attorney's case file would be the "best evidence" to prove at the post-conviction hearing whether a plea offer was made. Gomez argues that the failure of the district attorney to preserve his file "constitutes the type of willfulness or indifference to a defendant's rights that amount to bad faith . . . [and the] remedy for such bad faith should be to grant defendant's motion to withdraw the plea." We conclude that Gomez's contention lacks merit.

As a preliminary matter, we note that Manus and Sparks are inapposite because they concern a defendant's access to the State's evidence before trial. Nonetheless, even assuming the district attorney had a duty to preserve the case file, Gomez has failed to show that he was

¹Gomez v. State, Docket No. 43908 (Order Affirming in Part, Reversing in Part and Remanding, May 19, 2005).

²597 P.2d 280 (N.M. 1977), overruled on other grounds by Sells v. State, 653 P.2d 162 (N.M. 1982).

³104 Nev. 316, 759 P.2d 180 (1988).

prejudiced by breach of that duty.⁴ At the post-conviction hearing, former defense counsel Victor Austin and the Chief Deputy Prosecutor testified that only one plea offer was made to Gomez. Although defense counsel could not recall if he communicated the offer to Gomez, defense counsel testified that his general practice was to always convey any plea offer made to a client. Further, the transcript of the sentencing hearing indicates that defense counsel advised the sentencing court that he had previously conveyed a plea offer to Gomez, but it was rejected. In light of the evidence in the record that only one plea offer was made and communicated to Gomez, it could not be reasonably anticipated that the district attorney's case file would have contained additional material evidence. Accordingly, the district court did not err by rejecting Gomez's claim.

Gomez next contends that the district court erred by denying his petition because defense counsel was ineffective for failing to challenge the prosecutor's allegedly vindictive conduct.⁵ In particular, Gomez alleges that the prosecutor acted vindictively by withdrawing the plea

⁴See generally Sparks, 104 Nev. at 319, 459 P.2d at 182 (to show prejudice, the appellant must establish that "it could be reasonably anticipated that the evidence sought would be exculpatory and material") (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

⁵To the extent that Gomez raises his claim outside of the context of a claim for ineffective assistance of counsel, we note that he waived the claim by failing to raise it in a direct appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

offer after Gomez asserted his right to a preliminary hearing. Citing to State v. Sather,⁶ Gomez argues the practice of withdrawing a plea offer based on a defendant's exercise of a constitutional right amounts to a violation of the right to due process. We disagree.

In this case, after hearing testimony on the issue at the post-conviction hearing, the district court found that the district attorney's personal practice of revoking an early offer after the preliminary hearing was permissible. We agree. This court has recognized "that a prosecutor can withdraw a plea bargain offer anytime before a defendant pleads guilty, so long as the defendant has not detrimentally relied on the offer."⁷ Moreover, a claim of vindictive prosecution requires that a prosecutor file more serious criminal charges to punish a defendant for the exercise of a constitutional right.⁸ Here, there is no indication that the prosecutor filed additional criminal charges to punish Gomez for the exercise of a constitutional right. Accordingly, we conclude that the district court did not err by finding that defense counsel provided effective representation with regard to the plea negotiations.


⁶564 P.2d 1306 (Mont. 1977) (holding that a prosecutor acted vindictively by filing more serious criminal charges the day before trial in order to coerce a guilty plea).


⁷State v. Crockett, 110 Nev. 838, 845, 877 P.2d 1077, 1081 (1994).

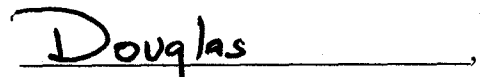
⁸See generally Blackledge v. Perry, 417 U.S. 21 (1974) (discussing prosecutorial vindictiveness).

Having considered Gomez's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. David Wall, District Judge
Terrence M. Jackson
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk