

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35217

KEVIN MADDEN,

Appellant,

vs.

WARDEN, LOVELOCK CORRECTIONAL
CENTER, JACKIE CRAWFORD,

Respondent.

FILED

APR 12 2000

NETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court's order dismissing appellant's post-conviction petition for a writ of habeas corpus.

Appellant was convicted pursuant to a jury verdict of trafficking in a controlled substance and eluding a police officer. The district court sentenced appellant to serve a term of twenty-five years in the Nevada State Prison with minimum parole eligibility after ten years for the trafficking offense, and a concurrent term of thirteen to sixty months in prison for eluding a police officer. This court dismissed appellant's direct appeal. *Madden v. State*, Docket No. 31297 (Order Dismissing Appeal, February 12, 1999). Thereafter, appellant filed a petition for a writ of habeas corpus in the district court. The district court dismissed his petition without an evidentiary hearing pursuant to the State's motion.

Appellant first contends that the district court

MO-05873

erred by not conducting an evidentiary hearing on his claim that his trial counsel was ineffective for failing to file a motion to suppress evidence discovered while appellant was attempting to flee from the police. Appellant asserts that the police officers' initial attempt to stop and question him was without reasonable suspicion or probable cause and that, therefore, the evidence discovered in the course of the attempted stop should have been suppressed. We disagree.

The police officers testified at trial that prior to attempting to stop appellant, they observed him exchanging items with known cocaine dealers, making an illegal U-turn, and then driving from the area at a high rate of speed. When the officers activated their overhead lights in an attempt to stop appellant, he pulled his car to the side of the road, threw a brown sack out of the passenger window, and then sped off in an attempt to elude the officers. The officers retrieved the brown sack, which contained a large quantity of crack cocaine. Moments later, appellant wrecked his car. He was subsequently apprehended while attempting to escape the accident scene on foot.

The record discloses that the officers' initial attempted stop was based on a reasonable suspicion supported by specific and articulable facts that criminal activity had occurred. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); see also *Sonnenfeld v. State*, 114 Nev. 631, 958 P.2d 1215 (1998). Moreover, after throwing the brown sack out the car window,

appellant no longer retained any reasonable expectation of privacy in its contents. See State v. Taylor, 114 Nev. 1071, 1077-8, 968 P.2d 315, 320 (1998) (quoting United States v. Veatch, 674 F.2d 1217, 1220 (9th Cir. 1981)). Under these circumstances, the district court did not err in rejecting appellant's claim without an evidentiary hearing. Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996) (a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record).

Second, appellant claims his trial counsel was ineffective for failing to file a pre-trial petition for a writ of habeas corpus challenging the justice court's finding of probable cause. Again, the record repels appellant's contention. The testimony of the officers at the preliminary hearing clearly established probable cause to believe appellant was engaged in drug sales in the area under surveillance. The district court did not err in rejecting this claim without an evidentiary hearing.


Third, appellant contends his trial counsel was ineffective for failing to challenge the admissibility of the "drug dealer profile evidence" used by the State in its case-in-chief. In light of the other evidence of appellant's guilt, we conclude appellant failed to demonstrate that, but for counsel's alleged deficiency, the result of the trial would be different. See Strickland v. Washington, 466 U.S. 668 (1984) (to establish a claim of ineffective assistance of

counsel, a petitioner must demonstrate both (1) that counsel's representation fell below an objective standard of reasonableness and (2) that but for counsel's errors, the result of the proceeding would have been different); see also Davis v. State, 107 Nev. 600, 601-602, 817 P.2d 1169, 1170 (1991).

Fourth, appellant contends his trial counsel was ineffective because he failed to propose "mere presence" jury instructions. Appellant asserts this claim for the first time on appeal. Because appellant did not present this claim to the district court and no issue of constitutional dimension is implicated, we decline to consider the issue on appeal. See Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude the district court did not err in denying appellant's petition. Accordingly, we

ORDER this appeal dismissed.




Maupin

J.



Shearing

J.



Becker

J.

cc: Hon. Steven P. Elliot, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk