

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD LEROY HUBBARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 65594

**FILED**

**FEB 04 2015**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying appellant Richard Hubbard's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Hubbard argues that the district court erred by denying his ineffective-assistance claims because trial counsel was ineffective for failing to challenge the drug evidence and appellate counsel was ineffective for failing to challenge the district court's pretrial suppression ruling. He asserts that if trial counsel had investigated how the drug evidence was stored, she could have made the argument that others had the ability to tamper with it. And he contends that appellate counsel should have pursued the suppression issue because it was preserved for appeal, it had a greater chance of success than the sentencing issue that was presented, and its remedy would have resulted in the dismissal of the case. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The district court conducted an evidentiary hearing on Hubbard's habeas petition and found, among other things, that Officer


Reed Thomas seized the drug evidence from Hubbard's truck and stored it in an off-site gun locker that was only accessible to four other detectives. When Officer Thomas retrieved the evidence from the locker, it did not appear to have been "tampered with, jostled, or moved." The court further found that trial counsel appeared to have made a tactical decision not to challenge the evidence. And, even if counsel's performance was deficient in this regard, Hubbard failed to demonstrate prejudice because the evidence did not appear to have been moved and it proved to be exactly what Hubbard said it would be—"speed"—thereby weakening any argument that the trial outcome would have been different absent counsel's deficient performance.


The district court also found that appellate counsel was not ineffective. Trial counsel filed a pretrial motion to suppress the evidence on the basis of due process and *Miranda* warning violations. The record from the pretrial motion showed that Officer Thomas initiated the traffic stop with the use of police lights and asked Hubbard to sit on the curb—no handcuffs were used and no guns were drawn. Officer Thomas asked Hubbard if there was anything illegal in his truck and Hubbard responded "speed," and Officer Thomas then asked if he could retrieve the "speed" and Hubbard responded "yes." Hubbard was subsequently allowed to leave the scene without being placed under arrest. District Judge Patrick Flanagan denied the motion after finding that Hubbard had been free to leave and had voluntarily made his statements. Appellate counsel did not pursue the *Miranda* issue because neither she nor her supervisor thought that the Nevada Supreme Court would reverse Judge Flanagan's ruling. The district court concluded from these circumstances that Hubbard failed

to demonstrate that the *Miranda* issue had a reasonable probability success on appeal.

Our review of the record reveals that the district court's factual findings are supported by substantial evidence and are not clearly wrong, and Hubbard has not demonstrated that the district court erred as a matter of law. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing two-part test for ineffective assistance of counsel); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (applying *Strickland* to ineffective appellate counsel claims); *Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Elliott A. Sattler, District Judge  
David Kalo Neidert  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk