

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE MANUEL GARCIA-GAONA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68007

FILED

MAR 16 2016

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Jose Manuel Garcia-Gaona claims the district court erred by denying two of his ineffective assistance of counsel claims raised in his petition filed on April 18, 2014, and his supplemental petition filed on October 20, 2014. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but

review the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

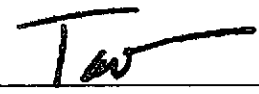
First, Garcia-Gaona claims counsel was ineffective for failing to file a motion to suppress the search of his car. He claims the tow company employees who searched his car and found the bag with the drugs were acting as agents of the State, and therefore, the search should be suppressed because it was a warrantless search.

We note the Nevada Supreme Court concluded on direct appeal that Garcia-Gaona failed to demonstrate the failure to suppress the search amounted to plain error. *Garcia-Gaona v. State*, Docket No. 63255 (Order of Affirmance, March 12, 2014). We likewise conclude Garcia-Gaona fails to demonstrate counsel was deficient for failing to file the motion or resulting prejudice. The search in this case was done by tow company employees prior to contacting law enforcement. “[T]he Fourth Amendment ‘is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official.’” *State v. Miller*, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Further, the police did not exceed the scope of the original search of the vehicle and the warrantless testing of the drugs did not run afoul of the constitution. *See Jacobsen*, 466 U.S. at 115, 123-25. Therefore, a motion to suppress would have been futile, *see Donovan v. State*, 94 Nev. 671, 675, 584 P.2d, 708, 711 (1978) (stating counsel is not deficient for failing to file futile motions), and Garcia-Gaona fails to demonstrate a reasonable probability of a different outcome at trial had counsel filed the motion. Therefore, the district court did not err in denying this claim.

Next, Garcia-Gaona claims counsel was ineffective for failing to request the mere presence instruction apply to other theories of liability beyond the theory of aiding and abetting. Garcia-Gaona fails to demonstrate prejudice. On appeal from the judgment of conviction and sentence, the Nevada Supreme Court concluded there was overwhelming evidence of Garcia-Gaona's direct involvement with the crimes. *Garcia-Gaona v. State*, Docket No. 63255 (Order of Affirmance, March 12, 2014). Therefore, Garcia-Gaona fails to demonstrate a reasonable probability of a different outcome at trial had counsel requested the mere presence instruction apply to more theories of liability. Accordingly, the district court did not err in denying this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk