

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARVIN DWAYNE MOSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67740

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. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant Marvin Mosby claims the district court erred in denying his claim of ineffective assistance of counsel raised in his supplemental petition filed on August 26, 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).


Mosby claims counsel was ineffective for failing to file a motion to stay his trial proceedings to wait for the outcome of the United States Supreme Court's decision in *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945 (2012). Specifically, he claims the charges against him were based on an illegal search of his vehicle because the police used a GPS device to track his vehicle without first obtaining a warrant. *Jones* determined the use of GPS devices without a warrant constituted an illegal search. *Jones*, 565 U.S. at ___, 132 S. Ct. at 949. Mosby was tried and convicted in late 2011 with his judgment of conviction being entered in 2012. *Jones* was decided in January 2012. Mosby claims counsel should have filed a motion for stay until the *Jones* case was decided, and if counsel had filed the motion and it was successful, he would not have been convicted because of the illegal search. Mosby's counsel did file a motion to suppress based on the GPS constituting an illegal search, and the district court denied it.

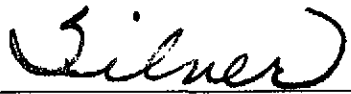
We conclude Mosby fails to demonstrate he was prejudiced because he fails to demonstrate a reasonable probability the result of his trial would have been different had the motion been granted. The Nevada Supreme Court already determined the good faith exception applied to the officer's actions in this case and that the district court did not err by denying the motion to suppress. *Mosby v. State*, Docket No. 60536 (Order of Affirmance, May 15, 2013). As the Nevada Supreme Court already determined the district court did not err in denying the motion to suppress, Mosby fails to demonstrate a reasonable probability of a

different outcome at trial had counsel moved to stay his case. Therefore, the district court did not err in denying this claim, and we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Kathleen E. Delaney, District Judge
Law Offices of Gamage & Gamage
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹We note the district court specifically declined to address the prejudice prong in this case. Nevertheless, we affirm the district court's decision for the reasons discussed in this order. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).