IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENTON ALVIN PACK, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37296

FILED

SEP 10 2002

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

ORDER OF AFFIRMANCE

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

On January 12, 1998, the district court convicted appellant, pursuant to a plea of nolo contendre, of one count of ex-felon in possession of a firearm. The district court sentenced appellant to a maximum term of thirty-six months in prison with a minimum parole eligibility of twelve months. Appellant filed a notice of appeal, but thereafter filed a motion to voluntarily withdraw his appeal, which was granted by this court on May 4, 1998.

On August 31, 1998, Pack filed a proper person post-conviction writ of habeas corpus in the district court. Pursuant to NRS 34.750, the district court appointed counsel to represent Pack. Counsel was given forty-five days to file supplemental points and authorities. Counsel filed two supplemental points and authorities, however, they were filed approximately four months past the deadline set by the district court. The first was filed nine days before the evidentiary hearing. The second was filed two days before the evidentiary hearing. The State moved to dismiss the supplemental authorities as being untimely and procedurally barred. The district court found them to be untimely, but did not specifically find them to be procedurally barred. Thereafter, the district court refused to

consider the issues raised in the supplemental points and authorities. After conducting two evidentiary hearings, the district court denied Pack's petition. This appeal followed.

In his petition, Pack claimed his trial counsel was ineffective for failing to: (1) move for a dismissal based upon a violation of the double jeopardy clause of the Fifth Amendment; (2) preserve his right to challenge the validity the search warrant on appeal; (3) investigate the validity of his Utah conviction; (4) conduct discovery, file pre-trial motions, and develop a defense. Pack also raised a claim of factual innocence and ineffective assistance of appellate counsel. Pack asserted appellate counsel was ineffective in advising him to withdraw his appeal, and appellate counsel should have raised ineffective assistance of trial counsel on direct appeal because trial counsel's ineffective performance was apparent from the record.

On appeal, Pack asserts three claims of error. Pack argues that the district court erred by: (1) rejecting Pack's claim of factual innocence; (2) refusing to consider issues raised in his supplemental points and authorities; and (3) concluding that trial counsel's failure to preserve issues regarding the search warrant on appeal did not amount to ineffective assistance.[1]

In order to establish a claim of ineffective assistance of counsel, Pack must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient

---

[1]Pack does not contend that the district court erred with respect to any other findings and does not challenge the denial of the remaining issues raised in his petition.

performance prejudiced Pack's defense.[2] A court does not have to consider both test elements if the defendant makes an insufficient showing on either prong.[3]

First, Pack contends that his plea of nolo contendre was not freely, knowingly, and voluntarily entered because he is factually innocent. Subsequent to his arrest, and while the post-conviction proceedings were pending, Pack filed a motion in Utah to have his Utah felony conviction reduced to a misdemeanor. The Utah conviction is the basis for the ex-felon element of his conviction for ex-felon in possession of a firearm. He also contends that his trial counsel was ineffective because counsel should have investigated the Utah conviction more thoroughly and discovered the felony could be reduced to a misdemeanor.

The record belies Pack's claim of ineffective assistance.[4] No evidence was presented that Pack told his counsel that his Utah conviction was a misdemeanor or should have been reduced to a misdemeanor from a felony. Counsel reviewed the documents possessed by the State and concluded the State could prove Pack was an ex-felon. The district court did not err in concluding counsel was not ineffective.

Even if we were to assume trial counsel should have known about any potential defects in the Utah conviction, we conclude Pack has not demonstrated prejudice. Under Utah law, Pack was convicted of a felony. If he completed certain programs, he would be eligible to have his

---

[2]See Strickland v. Washington, 466 U.S. 668, 687 (1984).

[3]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

felony reduced to a misdemeanor. Pack does not dispute that that sentence reduction was not automatic.

The record of the Utah proceedings indicates Pack was not a model participant in the program, but he eventually did complete it and become eligible for a reduction of his conviction from a felony to a misdemeanor. However, no motion for reduction was filed and the Utah records do not indicate his conviction was automatically reduced to a misdemeanor. Therefore, the conviction remained a felony at the time of his arrest.

Pack sought to reduce his felony conviction to a misdemeanor only after he filed his petition for post-conviction relief. The Utah court granted Pack's request to reduce the felony to a misdemeanor on June 15, 1999. The order amending the conviction to a misdemeanor indicated it was a nunc pro tunc order. The Utah records, however, do not establish that there was a clerical mistake in the earlier Utah judgment of conviction. That is, they do not indicate that Pack's felony conviction had previously been reduced to a misdemeanor, and someone simply forgot to enter an amended judgment of conviction or some similar ministerial error.

The object of a nunc pro tunc order is to make a record speak the truth concerning acts already done. It cannot serve to supply omitted actions retroactively.[5] We have stated that:

> [T]he court may in its discretion rely on its memory as to what was actually done and may

---

[5]See Finley v. Finley, 65 Nev. 113, 119-120, 189 P.2d 334, 337 (1948), overruled on other grounds, Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964).

> refresh its memory from any source it deems reliable, nevertheless, the court would not have the power to modify its decree so as to affect the substantial rights of the parties as they existed under the original order and make such an entry nunc pro tunc. . . . The power to make such an order and have it entered nunc pro tunc depends on something having actually happened which was not recorded. The consent of the parties cannot confer jurisdiction.[6]

The Utah order reducing Pack's felony conviction to a misdemeanor does not correct an erroneous record. It creates a new record and is beyond the scope of a nunc pro tunc modification. The result would be the same even if trial counsel had attempted to have the Utah felony reduced prior to the entry of Pack's plea. The district court did not err in finding that Pack was an ex-felon at the time of his arrest and denying his factual innocence and ineffective assistance of trial counsel claims involving the validity of the Utah conviction.

Next, Pack asserts that the district court erred in striking Pack's supplemental points and authorities. In his supplemental authorities, Pack contended that trial counsel should have raised additional challenges to the search warrant's validity in the original motion to suppress. He argues the issues come within the general scope of the petition's claims that trial counsel failed to file appropriate pre-trial motions. Pack contends the supplemental authorities were simply more detailed arguments on the claims contained in the original petition. As such, Pack asserts the matters raised in the supplemental authorities are

---

[6]Id. at 120, 180 P.2d at 337 (internal citations omitted); see also Robertson v. State, 109 Nev. 1086, 1088 n.1, 863 P.2d 1040, 1041 n.1 (1993).

not procedurally barred under NRS 34.750(3). We agree. However, the record reflects that the district court refused to consider the authorities because they were untimely filed with respect to the district's courts scheduling order, not necessarily because they were procedurally barred.

We conclude the district court did not abuse its discretion in refusing to consider the supplemental authorities filed shortly before the original evidentiary hearing. However, the evidentiary hearing was continued, and we further conclude that the district court should have considered the supplemental points and authorities once it continued the evidentiary hearing. There was plenty of time for the district attorney to respond to the pleadings and present evidence, if necessary, to address the issues discussed in the supplemental authorities. However, the error is harmless as the additional grounds for challenging the validity of the search warrant lack merit.

The supplemental authorities asserted that trial counsel failed to challenge the warrant on two additional theories: (1) the warrant was an improper quasi-administrative warrant and (2) the warrant was based on stale information. Neither assertion has merit.

The warrant was issued to collect evidence of violations of the Washoe County code. Code violations are misdemeanors. The record reflects the warrant was not issued to look for unsafe or hazardous conditions that required administrative action. It was issued to seize evidence of a crime. We conclude it was not a quasi-administrative warrant.[7]

---

[7]Owens v. City of North Las Vegas, 85 Nev. 105, 111, 450 P.2d 784, 788 (1969).

Pack also argues that the search warrant was invalid where it was issued based upon stale evidence.[8] The record belies this claim.[9] Specifically, the deputy sheriff stated, under oath, that he had observed code violations as late as January 31, 1997, and that the violations had been ongoing for the last six months. The search warrant was issued on February 3, 1997, and executed on February 5, 1997. Thus, we conclude that the warrant was not issued on stale information.

Next, Pack contends that the district court's findings on ineffective assistance regarding trial counsel's failure to preserve the search warrant issues for appeal are in error. We agree. During the evidentiary hearing, Pack testified that he would not have agreed to plead no contest had he not received assurances from trial counsel that the issue of suppression of the firearms would be preserved for appellate review. Pack's trial counsel testified that he intended to have Pack plead no contest with the intention of preserving the suppression issue for appellate purposes, but failed to include language preserving this issue in the plea agreement or during the oral canvass.

The district court concluded that trial counsel was not ineffective because Pack's plea was freely, knowingly, and voluntarily entered. The district court apparently believed because the canvass and written plea agreement contained no reservation, Pack knew he was

---

[8]At the evidentiary hearing, the State objected to this argument asserting that it was a new issue not included in the original petition. Counsel for Pack argued that Pack had improperly phrased the argument as a double jeopardy issue in his pro per petition. As such, Pack asserted that he was entitled to liberal review of his arguments.

[9]Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

waiving his right to challenge the validity of the warrant on appeal. However, Pack was specifically told that his rights were being preserved, and trial counsel became aware of the mistake when told by appellate counsel. Thus, the validity of Pack's plea is not in question. The issue is whether trial counsel was ineffective, and if so, whether Pack suffered prejudice.

We conclude trial counsel's failure to preserve the warrant issues for appeal falls below an objective standard of reasonableness, and trial counsel was therefore ineffective. However, the district court also found that even if trial counsel was ineffective, Pack failed to demonstrate he was prejudiced by counsel's deficient performance because the denial of the motion to suppress would be upheld on appeal. We agree that Pack has not demonstrated prejudice and conclude the district court did not err in dismissing this claim.

In his motion to suppress, Pack contended that the search warrant exceeded the scope of the warrant's language. Specifically, Pack contended that the search was for documents (i.e., car registrations and titles) that would not logically be stored in the bedrooms or bedroom closets of a residence. Pack also pointed to the fact that the judge who issued the warrant scratched out the word "residence" and replaced it with the word "building." Pack asserts that the change limited the officers' search to the outbuildings only and did not permit a search of Pack's residence.

The district court found that the use of the word "building" was intended by the issuing judge to include all structures at the premises, including Pack's residence. The district court also found that the warrant permitted a search of any area where the documents could be

stored, including bedroom closets. There is substantial evidence to support these findings.[10]

Pack also argues that, even if the language of the warrant included a search of Pack's home, once the officers had located the items listed in the search warrant, they had no authority to continue searching in the area where the rifle was found. In support of this contention, Pack argues that his wife handed documents listed in the warrant to the officers when they entered into his residence and there was no reason for the officers to conduct a search. The district court found that the officers were not required to believe Pack's wife and could still conduct an independent search. We agree. The district court did not err in dismissing this claim.

The district court concluded that the rifle was either the product of a protective search or admissible under the plain view doctrine. Pack contends the rifle was seized from an area outside the scope of a Chimel[11] search. We agree. When Pack was handcuffed, the rifle was in a closet, in a separate room. However, there is sufficient evidence to support the district court's application of the plain view doctrine. This court has concluded that items located in plain view may be seized where officers are lawfully present at the point of observation.[12] The evidence supports an inference that the officers knew Pack was a convicted felon when they saw the rifle in what was plainly a gun case. Documents could

---

[10]Little v. Warden, 117 Nev. ___, ___, 34 P.3d 540, 546 (2001) (citing Riley v. State, 110 Nev. 368, 647, 878 P.2d 272, 278 (1994)).

[11]Chimel v. California, 395 U.S. 752 (1969).

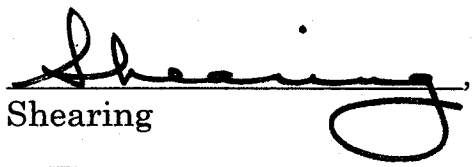
[12]See Hayes v. State, 106 Nev. 543, 549-50, 797 P.2d 962, 965-66 (1990) (citing Maryland v. Buie, 494 U.S. 325 (1990)).

have been stored in the closet where the rifle was found. Thus, the rifle would have been in plain view to anyone seeking to find documents in the closet pursuant to the search warrant.

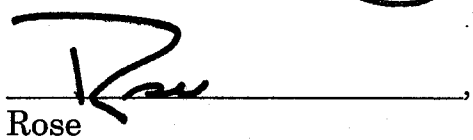
Having reviewed Pack's challenges to the validity of the warrant and the scope of the search, we conclude that the district court did not err in finding Pack's claims would not have succeeded on appeal, and Pack was not prejudiced by trial counsel's failure to preserve the issues for appeal.

Having considered Pack's claims of error and finding them to be without merit, we

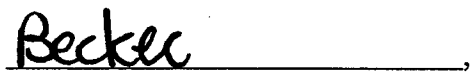
ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk