

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO ZALDIVAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37928

FILED

MAY 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*

ORDER OF AFFIRMANCE

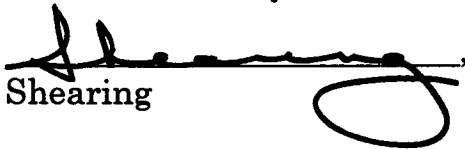
This is an appeal from an order of the district court denying appellant Gustavo Zaldivar's post-conviction petition for a writ of habeas corpus.

In the petition, Zaldivar presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹ Zaldivar has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Zaldivar has not demonstrated that the district court erred as a matter of law.

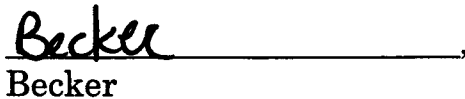
¹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.²


Shearing J.


Rose J.


Becker J.

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender
Gustavo Zaldivar
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

²Although this court has elected to file the Fast Track response submitted, we note that it does not comply with the requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(f)(2). Specifically, the Fast Track response submitted by the State cites to a record on appeal; however, such a record has not been filed with this court in this matter. Counsel is cautioned that failure to comply with the requirements for briefs in the future may result in the brief being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

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Sally L. Loehrer
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1 **ORDR**
2 **STEWART L. BELL**
3 **DISTRICT ATTORNEY**
4 **Nevada Bar #000477**
5 **200 S. Third Street**
6 **Las Vegas, Nevada 89155**
7 **(702) 455-4711**
8 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **GUSTAVO ZALDIVAR,**
13 **#1222344**

14 **Defendant.**

Case No.. C132869A
Dept. No. II

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FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATES OF HEARING: 5/2/2000; 8/18/2000; 11/3/2000
TIME OF HEARINGS: 8:30 A.M.

15 THIS CAUSE having come on for hearing before the Honorable Sally Loehrer, District
16 Judge, on May 2, 2000, August 18, 2000 and November 3, 2000, the Petitioner not being present,
17 represented by DAVID HOUSTON, Esquire, the Respondent being represented by STEWART
18 L. BELL, District Attorney, by and through ERIC G. JORGENSEN, Chief Deputy District
19 Attorney, and the Court having considered the matter, including briefs, transcripts, arguments
20 of counsel, and documents on file herein, now therefore, the Court makes the following findings
21 of fact and conclusions of law:

FINDINGS OF FACT

- 22 1. On November 30, 1995, the defendant and co-defendant Rudy Torres sold
23 approximately 900 grams of methamphetamine to LVMPD Detective Harness for \$26,000.00.
24 2. The defendant was charged with conspiracy to sell a controlled substance, trafficking
25 in controlled substance, and carrying a concealed weapon.

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1 3. The defendant was tried by jury on February 20, 1996 through February 26, 1996. The
2 jury convicted the defendant on all charges.

3 4. On June 13, 1996, the defendant was sentenced to 15 to 38 months in NSP for the
4 conspiracy, 10 to 25 years for the trafficking in controlled substance and one year in jail for the
5 carrying a concealed weapon. The sentences were concurrent. The Judgment of Conviction
6 was filed on June 28, 1996. Joseph Sciscento, Esq. represented the defendant at trial and
7 sentencing.

8 5. The Honorable Stephen Huffaker was the trial judge.

9 6. The defendant appealed his conviction claiming that (1) the trial court improperly
10 restricted the defense's impeachment of the confidential informant, Shannon Williams; (2) there
11 was improper contact between a juror and a State's witness; and (3) the defendant was
12 entrapped. The Nevada Supreme Court dismissed the appeal; the Order Dismissing Appeal,
13 filed on November 24, 1998, is attached as Exhibit 1.

14 7. The defendant filed the instant petition for writ of habeas corpus (post-conviction)
15 claiming (1) that trial counsel was ineffective because he failed to advance the procuring agent
16 defense, see Roy v. State, 87 Nev. 517, 489 P.2d 1158 (1971); and (2) that appellate counsel was
17 ineffective for failing to raise the issue of the trial court's denial of a defense motion to continue
18 the trial to investigate Shannon Williams.

19 8. At calendar call on February 15, 1996, the State advised the trial court that Mr.
20 Sciscento had requested information regarding Shannon Williams and that Mr. Williams was
21 concerned about his safety and was not willing to talk with the defense. The State did not learn
22 the true name of Mr. Williams until the week before trial. The State provided that information
23 to the defense shortly thereafter.

24 9. On February 20, 1996, before the trial started, the State produced Shannon Williams
25 for an evidentiary hearing. The defense was given adequate opportunity to question Mr.
26 Williams about the facts of the case, his background, his felony convictions, and the agreement
27 Mr. Williams made with the State. Judge Huffaker ruled that there was no showing of
28 entrapment and that the defense had failed to show the need for a continuance for further

1 investigation. The trial court allowed the defense to pursue the entrapment issue at trial. The
2 State provided the defense with a copy of Mr. Williams' rap sheet. The defense also had six
3 days of trial and a weekend in order to further investigate Mr. Williams.

4 10. The evidence adduced at trial showed that the defendant contacted the drug supplier
5 and arranged for the drugs to be brought into Nevada to be sold. Co-defendant Torres carried
6 the drugs to the meeting with Detective Harness. The defendant asked Detective Harness if he
7 wanted to see the drugs. The defendant set the price of the drugs and then accepted the
8 \$26,000.00 payment from the detective. After receiving the money, the defendant gave
9 \$1000.00 to Williams and \$300.00 to Torres. The defendant split the remaining money into two
10 bundles; he gave \$20,000.00 to Torres for the drug supplier and the defendant kept the remaining
11 \$4,700.00. Throughout the transaction, the defendant discussed the possibility of future
12 narcotics transactions with Detective Harness. At trial, the defendant denied that he intended
13 to keep the \$4700.00; however, he admitted that he was to receive \$1000.00 for his participation
14 in the deal.

15 11. A video tape of the crime was made by the police. The video tape was admitted into
16 evidence at the trial and played for the jury (State's trial exhibits #12 and #16.)

17 12. The Honorable Sally Loehrer presided over the evidentiary hearing for the instant
18 post-conviction petition. Judge Loehrer certified the question to the trial judge, "If Mr.
19 Sciscento had requested a procuring agent instruction would one have been given." Judge
20 Huffaker responded that he would not have given the instruction.

21 13. Judge Loehrer viewed the video tape of the crime and determined that, if she had been
22 the trial judge, she would not have given a procuring agent instruction.

23 14. The defendant was acting on behalf of the drug supplier, not the recipient. The
24 defendant received money in consideration for the sale of the methamphetamine.

25 15. In light of the evidence in the trial, Mr. Sciscento made a tactical decision that the
26 entrapment defense was a more viable defense than the procuring agent defense.

27 16. Mr. Sciscento provided the defendant with effective assistance of counsel.

28 17. The defendant failed to show that the performances of his trial counsel and his

1 appellate counsel were deficient and that he, the defendant, was prejudiced.

2 CONCLUSIONS OF LAW

3 In order to demonstrate ineffective assistance of counsel, the defendant must show (1) his
4 counsel's performance was defective; and (2) that counsel's deficient performance prejudiced
5 the case. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The presumption is
6 that counsel fully discharged his duties; the presumption can only be overcome by strong and
7 convincing proof to the contrary. *Donovan v. State*, 94 Nev. 671, 584 P.2d 708 (1978). On
8 appeal, the Court will not second-guess counsel's tactical decisions relating to trial strategy
9 which are within counsel's discretion. "This remains so even if better tactics appear, in
10 retrospect, to have been available." *Davis v. State*, 107 Nev. 600, 603, 817 P.2d 1169 (1991).

11 A person cannot be found guilty of drug sales, if the person did not act for the supplier,
12 but acted solely for the recipient. *Roy v. State*, 87 Nev. 517, 489 P.2d 1158 (1971). "[T]he
13 procuring agent defense in a prosecution for a sale of a controlled substance can be maintained
14 only if the defendant was merely a conduit for the purchase and in no way benefited from the
15 transaction. Thus, if a defendant receives . . . any amount of money in consideration for the
16 transaction, the defense of procuring agency is not available." *Love v. State*, 111 Nev. 545, 548,
17 893 P.2d 376 (1995). The procuring agent defense is not available when the defendant obtains
18 drugs from a person with whom the defendant is associated in selling drugs. *Colon v. State*, 113
19 Nev. 484, 938 P.2d 714 (1997).

20 The granting of a motion to continue is within the sound discretion of the trial court.
21 *Batson v. State*, 113 Nev. 669, 941 P.2d 478 (1997); *Doleman v. State*, 107 Nev. 409, 812 P.2d
22 1287 (1991).

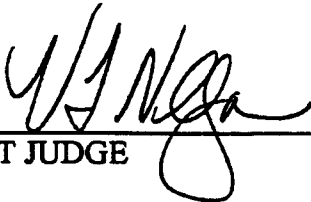
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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 21st day of May, 2001.



DISTRICT JUDGE AW

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY 

ERIC G. JORGENSEN
Chief Deputy District Attorney
Nevada Bar #001802

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