

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. GONCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38124

FILED

SEP 19 2003

ORDER OF AFFIRMANCE

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

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

In the petition, appellant 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 Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant 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.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

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CL.

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
8 Plaintiff,

9 -vs-

10 FAIN TERRANT GONCE,
11 #0771548
12 RICHARD ALLEN GONCE,
13 #0790400

14 Defendants.

Case No.. C158587
Dept. No. V
Docket H

16 **FINDINGS OF FACT, CONCLUSIONS OF**
17 **LAW AND ORDER**

18 DATE OF HEARING: 5-29-01
19 TIME OF HEARING: 9:00 A.M.

20 THIS CAUSE having come on for hearing before the Honorable Jeffrey D. Sobel, District
21 Judge, on the 29th day of May, 2001, Petitioners FAIN TERRANT GONCE and RICHARD
22 ALLEN GONCE not being present, represented by DAVID L. PHILLIPS, ESQ., the Respondent
23 being represented by STEWART L. BELL, District Attorney, by and through MICHAEL H.
24 SCHWARZ, Deputy District Attorney, and the Court having considered the matter, including
25 briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court
26 makes the following findings of fact and conclusions of law:

27 **FINDINGS OF FACT**

28 1) On May 5, 1999, Fain T. Gonce and Richard A. Gonce ("Defendants") were charged by
Indictment with Conspiracy to Commit Robbery (Felony-NRS 200.380; 199.480); Robbery with

1 Use of a Deadly Weapon (Felony-NRS 200.380, 193.165); Burglary While in Possession of a
2 Firearm (Felony-NRS 205.060); and First Degree Kidnapping With Use of a Deadly Weapon
3 (Felony-NRS 205.060).

4 2) On August 31, 1999, the Defendants pled guilty to one count of Conspiracy to Commit
5 Robbery and one count of Robbery.

6 3) On November 8, 1999, Defendant Fain Gonce was sentenced as to the Conspiracy to
7 Commit Robbery count, to a maximum term of thirty months and a minimum of twelve months
8 in the Nevada Department of Prisons, and as to the Robbery count, to a maximum term of sixty
9 months and a minimum term of twenty months in the Nevada Department of Prisons, to run
10 concurrently with the conspiracy sentence. A conforming Judgment of Conviction was filed
11 November 18, 1999.

12 4) On November 8, 1999, Defendant Richard Gonce was sentenced as to the Conspiracy to
13 Commit Robbery count, to a maximum term of thirty months and a minimum of twelve months
14 in the Nevada Department of Prisons, and as to the Robbery count, to a maximum term of
15 seventy-five months and a minimum term of thirty months in the Nevada Department of Prisons,
16 to run concurrently with the conspiracy sentence. A conforming Judgment of Conviction was
17 filed November 24, 1999.

18 5) On March 27, 2000, Defendant Richard Gonce filed a pro per Petition for Writ of Habeas
19 Corpus, to which the State filed its Opposition on May 8, 2000. On April 27, 2000, Defendant
20 Fain Gonce filed a pro per Petition for Writ of Habeas Corpus, to which the State filed its
21 Opposition on June 7, 2000.

22 6) On June 19, 2000, attorney David Lee Phillips substituted as counsel for both Defendants
23 and was ordered by the court to file a supplement to the Defendants' petitions. On December
24 20, 2000, the Defendants filed a joint Supplemental Petition for Writ of Habeas Corpus, to which
25 the State filed its Opposition on February 23, 2001.

26 7) The Defendants' claims that counsel were ineffective for failing to meet more often with
27 the Defendants is a bare allegation belied by the record. Defense counsel met frequently with
28 the Defendants. Defendant Richard Gonce acknowledges that defense counsel met with him at

1 the Clark County Detention Center on two occasions, Defendant Fain Gonce acknowledges that
2 defense counsel met with him at the Clark County Detention Center on four occasions.
3 Additionally, the Defendants also met with counsel at the courthouse.

4 8) Even if counsel should have met with the Defendants more often, the Defendants suffered
5 no prejudice because the Defendants cannot show that had they met more often with counsel,
6 they would have chosen to proceed to trial rather than plead guilty. Both Defendants, in
7 pleading guilty, acknowledged that they had discussed the guilty plea negotiations with their
8 attorneys. Both acknowledged that their lawyers had discussed with them the elements of the
9 crime and any possible defenses the Defendants might have to the crime. The Defendants
10 discussed possible defenses with their attorneys and chose to plead guilty.

11 9) The Defendants' claims that counsel were ineffective for failing to provide them with
12 discovery is a bare allegation unsupported by the record. Moreover, even if counsel did not
13 provide Defendants with discovery, the Defendants failed to identify any information that could
14 have been exposed during discovery, therefore they can not show that had they been provided
15 discovery, they would have proceeded to trial.

16 10) The Defendants' claims that counsel failed to inform the Defendants of the nature of a
17 pretrial writ of habeas corpus is a bare allegation unsupported by the record. Moreover, even
18 if counsel did fail to inform the Defendants of the availability of a pretrial petition for writ of
19 habeas corpus, the Defendants have failed to identify any basis for which a pretrial petition for
20 writ of habeas corpus could have been based and therefore cannot show that such a petition
21 would have been successful.

22 11) The Defendants' claims that counsel were ineffective for failing to file motions to
23 suppress incriminating statements the Defendants made following their arrest is a bare allegation
24 belied by the record. Moreover, the Defendants cannot show that had such motions been filed,
25 they would have been successful.

26 12) The Defendants' claims that counsel were ineffective for not filing a motion to sever is
27 a bare allegation belied by the record. On August 31, 1999, the date scheduled for Defendant
28 Zessman's Motion to Sever, the Defendants entered their plea of guilty. The Defendants have

1 failed to allege that had a motion to sever been filed on their behalf, such motion would have
2 been successful, and the Defendants would have chosen to proceed to trial rather than plead
3 guilty.

4 13) The Defendants' claims that their attorneys were ineffective for failing to investigate and
5 interview witnesses whose names the Defendants provided their attorneys are bare claims that
6 are not supported by the record. First, Defendants cannot show that counsel did not conduct
7 investigations and interviews, as these would not have been reflected in the record. Defendants
8 failed to provide this Court with the names of the such witnesses and with affidavits declaring
9 what information the witnesses could have provided to aid the Defendants.

10 14) Even if counsel did fail to investigate and interview witnesses, the Defendants suffered
11 no prejudice. The Defendants have failed to show that the recommended investigations would
12 have uncovered any exculpatory evidence and the Defendants would have proceeded to trial
13 rather than plead guilty.

14 15) The Defendants' claims that counsel were ineffective for failing to discuss possible
15 defenses with them is a bare allegation belied by the record. Both Defendants, in pleading
16 guilty, acknowledged in open court and in the Guilty Plea Agreement that they had discussed
17 possible defenses with their attorneys.

18 16) The Defendants' claims that the failure of counsel to communicate adequately with the
19 Defendants resulted in a plea entry that was more coerced than voluntary is a bare allegation
20 belied by the record. The Defendants admitted in open court and in the Guilty Plea Agreement
21 that they were pleading guilty voluntarily.

22 CONCLUSIONS OF LAW

23 1) Claims of ineffective assistance of counsel must be reviewed under the "reasonably
24 effective assistance" standard and require a defendant to show that counsel's assistance was
25 "deficient" and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S.
26 668, 687, 104 S.Ct. 2052, 2064 (1984).

27 2) In the context of guilty pleas, the first half of Strickland remains the same as the standard
28 of competence set forth in Strickland. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 270,

1 88 L.Ed.2d 203 (1985). "The second, or 'prejudice' requirement, on the other hand, focuses on
2 whether counsel's constitutionally ineffective performance affected the outcome of the plea
3 process. . . . the defendant must show that there is a reasonable probability that, but for counsel's
4 errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474
5 U.S. at 59, 106 S.Ct. at 270.

6 3) In order to be entitled to a hearing on the allegation of ineffective assistance of counsel,
7 a defendant is required to present an affidavit which presents factual allegations of the attorney's
8 misconduct which were outside of the record. Bolden v. State, 99 Nev. 181, 659 P.2d 886
9 (1983).

10 4) Bare assertions that are belied by the record do not entitle a defendant to an evidentiary
11 hearing. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

12 5) A defendant may not repudiate statements made in open court to the sentencing judge.
13 Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 215 (1973).

14 6) "The Sixth Amendment guarantees every defendant the right to counsel and requires that
15 counsel be adequate and effective, but does not guarantee that every defendant will have a
16 meaningful relationship with his counsel and does not guarantee counsel of defendant's choice."
17 Barnes v. Housewright, 603 F.Supp. 330, 331-32 (D. Nev. 1985).

18 7) Defense counsel is not required to "make every conceivable motion no matter how remote
19 the possibilities are of success." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

20 8) In order to be entitled to relief based on counsel's failure to file a pretrial petition for
21 habeas corpus, the defendant is required to show that had such petition been filed, such petition
22 would have been successful. Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1997).

23 9) "When an ineffective assistance claim is based upon counsel's failure to file a motion to
24 suppress evidence allegedly obtained in violation of the Fourth Amendment, the prejudice prong
25 must be established by a showing that the claim was meritorious and that there was a reasonable
26 likelihood that the exclusion of the evidence would have changed the result of a trial." Kirksey,
27 112 Nev. at 990, 923 P.2d at 1109.

28 10) "The advice of counsel to plead guilty to the lesser charges . . . is certainly appropriate

1 within the Strickland standard." Hurd v. State, 114 Nev. 182, 189, 953 P.2d 270, 274-275
2 (1998). See also Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983).

3 **ORDER**

4 Based on the Findings of Fact and Conclusions of Law herein contained, it is hereby:

5 ORDERED, ADJUDGED, AND DECREED that Defendants' Petition for Writ
6 of Habeas Corpus and Supplemental Petition for Writ of Habeas Corpus are denied.

7 DATED this 9 day of June, 2001.

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9 _____

DISTRICT JUDGE

10
11 STEWART L. BELL
12 DISTRICT ATTORNEY
13 Nevada Bar #000477

14 BY Michael H. Schwarz
15 MICHAEL H. SCHWARZ
16 Deputy District Attorney
17 Nevada Bar #005126
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