

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELOY PADILLA-SALDANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38468

FILED

NOV 05 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. R. [Signature]
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying Eloy Padilla-Saldana's post-conviction petition for a writ of habeas corpus. Padilla-Saldana asserts that he was provided ineffective assistance of counsel in various instances at trial and on direct appeal. We conclude that each of Padilla-Saldana's allegations of ineffective assistance of counsel lack merit.

Under Strickland v. Washington,¹ to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the result of the trial would have been different.

First, Padilla-Saldana argues that his trial counsel was ineffective for failing to object or make a motion to strike the State's new criminal complaint and to request that the plea agreement be reinstated. But a motion to strike or dismiss the new charging document and request for reinstatement of the plea agreement would have failed. Padilla-

¹466 U.S. 668, 687 (1984); see also Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000).

Saldana materially breached the plea agreement when he misrepresented his prior criminal history. Once Padilla-Saldana breached the plea agreement, the agreement became "null and void," thus dissolving the State's obligation and permitting the State to bring any charges it chose.² As such, we conclude that Padilla-Saldana's trial counsel's failure to make a motion to strike the State's new criminal complaint did not constitute ineffective assistance of counsel.

Next, Padilla-Saldana contends that his trial counsel provided ineffective assistance by not seeking a "theory of the case" instruction as to honest and reasonable mistake of fact. However, testimony adduced at the post-conviction hearing demonstrates that trial counsel acted reasonably in not requesting this instruction. Trial counsel testified that his factual theory of the case was that Padilla-Saldana did not know the gun was loaded. Padilla-Saldana's counsel explained that he researched and considered a reasonable mistake of fact instruction, but rejected it because Padilla-Saldana was intoxicated and it did not seem plausible to have a mistake of fact. Having reviewed the record on post-conviction appeal, we conclude that trial counsel's decision not to offer a reasonable-mistake-of-fact instruction did not fall below an objective standard of reasonableness.

Padilla-Saldana next argues that his trial and appellate counsel provided ineffective assistance regarding the issue of uncharged

²See United States v. Britt, 917 F.2d 353, 357 (8th Cir. 1990) (noting that "a defendant must be compelled to abide by his agreement both before and after his plea is entered and that in order to do so the government must have the option of moving to vacate a noncomplying defendant's guilty plea and instituting more severe charges").

misconduct. First, Padilla-Saldana asserts that trial counsel was ineffective for failing to seek a limiting instruction on uncharged misconduct, in particular, testimony regarding "drug sales." We conclude that this contention lacks merit because trial counsel did seek and receive a limiting instruction regarding uncharged misconduct before closing argument. Second, Padilla-Saldana contends that appellate counsel failed to perfect this issue on appeal. We disagree. We considered the issue of uncharged misconduct on direct appeal and rejected it.

Finally, Padilla-Saldana argues that trial and appellate counsel provided ineffective assistance by failing to challenge several instances of prosecutor misconduct during closing argument. We disagree. We conclude that none of the alleged instances amounted to prosecutor misconduct.


In addition to challenging the effectiveness of his trial and appellate counsel, Padilla-Saldana challenges the trial court's admission of Graciella Rubio-Diaz's testimony of specific threats. Because this issue was raised and decided on direct appeal, this argument is barred by the law-of-the-case doctrine.³ We recognize that a court may disregard this doctrine where the first decision was clearly erroneous.⁴ We conclude, however, that our prior ruling on direct appeal was not clearly erroneous.

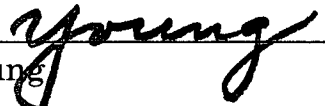
Having concluded that Padilla-Saldana's contentions lack merit, we

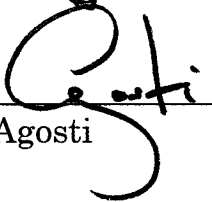
³See Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993).

⁴See U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Brent T. Adams, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk