IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CLEVELAND NEAL,
Appellant,
vs.
NEIL HARRIS, ELKO COUNTY SHERIFF,
Respondent.

No. 39327

FILED

OCT 07 2002

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

ORDER OF AFFIRMANCE

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

On October 31, 2001, Neal was convicted, pursuant to a jury verdict, of one count of possession of a controlled substance, a category E felony. The jury found Neal not guilty of third-offense driving under the influence. The district court sentenced Neal to serve a prison term of 12-48 months; his sentence was suspended and he was placed on probation with several conditions for a period of 2 years, including that he serve 180 days in the Elko County Jail. This court dismissed Neal's direct appeal.[1]

On December 14, 2001, Neal filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On February 4, 2002, after conducting an evidentiary hearing, the district court denied Neal's petition. This timely appeal followed.

---

[1]Neal v. State, Docket No. 38841 (Order Dismissing Appeal, March 29, 2002).

Neal contends that his trial counsel was deficient and that the district court erred in denying his habeas petition. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[3] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[4] Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."[5]

First, Neal contends that his trial counsel's performance was deficient because he failed to obtain a police dispatch tape of the evening of his arrest. We disagree.

Neal cannot demonstrate how he was prejudiced by his counsel in this regard. At the evidentiary hearing in the district court, Neal testified that he thought it was possible that the dispatch tape might

---

[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 697.

[4]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[5]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

have recorded conversations between the arresting officer and others, and that the tape potentially contained exculpatory information. This court has stated that "'[a] bare assertion that a document "might" bear such fruit is insufficient.'"[6] Therefore, we conclude that Neal's contention that trial counsel's performance was deficient for not obtaining the dispatch tape is without a factual basis and without merit.[7]

Second, Neal contends that his trial counsel's performance was deficient because he failed to file a motion to suppress evidence seized during the search incident to his arrest, or otherwise raise any defense to the possession charge. We disagree.

During the evidentiary hearing on his petition, Neal testified and conceded that the marijuana found in a vial hidden in the liner of his vest after he was arrested was, in fact, his. Neal's trial counsel testified that he believed the marijuana was lawfully seized incident to Neal's arrest, and that filing a motion to suppress this evidence would have been fruitless, and would have damaged his credibility before the jury; counsel chose to focus his efforts in challenging the more serious DUI charge. We conclude that Neal has failed to demonstrate that a suppression motion would have had any likeliness of success, or that his counsel was deficient in failing to file such a motion.

---

[6]Sonner v. State, 112 Nev. 1328, 1341, 930 P.2d 707, 715 (1996) (quoting State v. Blackwell, 845 P.2d 1017, 1021 (Wash. 1993)).

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

Having considered Neal's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.[8]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. J. Michael Memeo, District Judge
Brian D. Green
Elko County District Attorney
Elko County Clerk

---

[8]Although this court has elected to file the fast track statement submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e); NRAP 32(a). Specifically, the fast track statement, in its entirety, is single-spaced. Counsel is cautioned that failure to comply with the requirements for fast track statements in the future may result in the fast track statement 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. See NRAP 3C(n).