IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTURO ANDRADE GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39929

FILED

FEB 0 5 2003

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 Arturo Andrade Garcia's post-conviction petition for a writ of habeas corpus.

First, Garcia argues for the first time on appeal that, pursuant to State v. Kopp,[1] the district court did not have jurisdiction to convict him of the misdemeanor charges included in the indictment. We disagree and conclude that because Garcia's case was already final at the time of our decision, Kopp does not apply retroactively to his case.[2]

Second, Garcia presented several claims of ineffective assistance of trial counsel. The district court determined that Garcia's arguments were either belied by the record or alleged without the

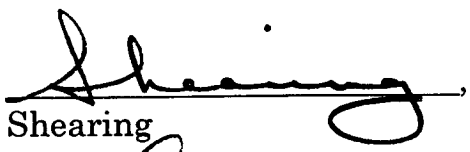
[1]118 Nev. ___, 43 P.3d 340 (2002).

[2]See Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (holding that a case is final when a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for filing a petition for certiorari has elapsed or a petition for certiorari has been finally denied); see also Colwell v. State, 118 Nev. ___, 59 Nev. 463 (2002); Richmond v. State, 118 Nev. ___, 59 P.3d 1249 (2002).

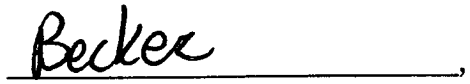
requisite factual specificity.[3] The district court also found that Garcia's counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[4] Garcia has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.[5] Moreover, Garcia has not demonstrated that the district court erred as a matter of law.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[3]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

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

[5]Id.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ARTURO ANDRADE GARCIA,
#1223071

Defendant.

Case No.. C153946
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 06/24/02
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable Lee A. Gates, District Judge, on the 24th day of June, 2002, the Petitioner not being present, represented by CHRISTOPHER R. ORAM, Esq., the Respondent being represented by STEWART L. BELL, District Attorney, by and through TERA AMES, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Arturo Garcia, hereinafter Defendant, was charged by way of Indictment filed on October 7, 1998 with two (2) counts of Driving and/or Being in Actual Physical Control While Under the Influence of Intoxicating Liquor (Counts I and II), two (2) counts of Reckless Driving (Counts III and IV), two (2) counts of Leaving the Scene of an Accident (Counts V and VI), Operation of Motor Vehicle without Security (Count VII) and Unlawful Open Container in

Motor Vehicle (Count VIII).

2. Defendant's trial by jury commenced on February 23, 1999. Defendant was convicted of all counts on February 25, 1999.

3. Defendant was sentenced as follows: Count I- one hundred ninety-two (192) months with a minimum parole eligibility of seven.y-six (76) months and to pay a $3,000 fine; Count II- a maximum of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months and to pay a $3,000 fi.e to run concurrent with Count I; Count V- a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of sixty-two (62) months and to pay a $3,000 fine to run consecutive to Counts I and II; Count VI- a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of sixty-two (62) months and to pay a $3,000 fine to run concurrent with Count V; Count VII five (5) months in Clark County Detention Center to run concurrent with Counts I, II, V and VI. Counts III and IV were dismissed.

4. The Judgment of Conviction was filed on May 12, 1999.

5. Defendant filed a Notice of Appeal to the Nevada Supreme Court on May 4, 1999. Defendant initially filed a Fast Track Statement. The Nevada Supreme Court subsequently ordered a full briefing by the parties. The Nevada Supreme Court filed an opinion denying Defendant's appeal on February 16, 2001. Garcia v. State, 117 Nev. Adv. Op. 13, 17 P.3d 994 (2001).

6. Remittitur was issued on March 14, 2001.

7. Defendant filed the instant petition for writ of habeas corpus on January 4, 2002.

8. Defendant's petition alleged a number of instances of ineffective assistance of counsel, including: 1) failure to challenge expert opinions; 2) failure to procure accident reconstruction expert; 3) failure to refer to the involvement of the Mexican Consulate; 4) failure to procure genetic typing experts; 5) failure to procure corrected vision expert; 6) failure to investigate vehicle's defects; 7) failure to communicate with the Defendant; 8) failure to file a writ regarding leaving the scene of the accident; and 9) failure to move for the suppression of evidence found in the vehicle.

9. Trial counsel's failure to call an expert to testify regarding the injury on Defendant's chest did not prejudice his case.

10. Defendant was not prejudiced when his attorney did not call an accident reconstructionist during trial.

11. Defendant has failed to demonstrate that he was prejudiced when his attorney did not involve the Mexican consulate in his defense.

12. Defendant was not prejudiced by his attorney's failure to employ a genetic expert to testify regarding the tissue sample and blood samples.

13. Trial counsel's failure to secure an expert to testify about Defendant's vision did not prejudice Defendant's case.

14. Defendant received effective assistance of counsel.

15. Defendant is not entitled to an evidentiary hearing.

CONCLUSIONS OF LAW

1. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

2. The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

3. Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonable effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id.

4. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

Every effort [must be made] to eliminate the distorting effects of hindsight

> to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, at 689-690.

5. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

6. Reasonable assistance of counsel does not require that defense counsel make every conceivable motion no matter how remote the possibilities are of success in order to protect himself against allegations of inadequacy. Donovan, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

7. The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

8. It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984).

9. In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999); *citing* Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89, 694.

10. Defendant's claim that his attorney's representation was ineffective when he failed to challenge the testimony of the two witnesses regarding the seatbelt injury is belied by the record. Hargrove v. State. 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Defendant's trial counsel unsuccessfully moved for the exclusion of testimony regarding the injury on the Defendant's chest. (TT 2/19/99, p.8-9). Further, Defendant's attorney renewed his objection

after the testimony of the two witnesses. (TT 2/24/99, p.170-171). Additionally, Defendant's trial counsel effectively cross-examined Mario Alfonsi and Joyce Marshall regarding the source of Defendant's chest injury. (TT 2/24/99, p.108-109, 150-151). During closing argument, trial counsel pointed out the weakness of the State's position as it related to Defendant's injury and argued that the injury was consistent with the defense position. (TT 2/25/99, p.220). Clearly, the record indicates that Defendant's attorney challenged the testimony about the seatbelt injury.

11. The decision as to what witness should be called to testify on the defendant's behalf is a tactical, strategic decision. Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). Thus, the attorney should decide how many, if any, witnesses to call. Id. As Defendant's trial counsel made a tactical decision not to call an expert witness to testify about the seatbelt injury on Defendant's chest, Defendant cannot demonstrate that his counsel's performance fell below an objective standard of reasonableness. See Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

12. Defendant has failed to demonstrated that his attorney's failure to call an expert to testify about the seatbelt injury prejudiced his case as required by Strickland, at 686. The State presented overwhelming evidence of the Defendant's guilt. Multiple witnesses identified Defendant as the driver of the vehicle that was traveling far in excess of the speed limit. Defendant was observed exiting the vehicle which caused the accident. Upon being detained and searched soon after the automobile accident, the keys to the car were discovered in the Defendant's pocket along with pieces of glass from a vehicle windshield. As such, Defendant cannot show a reasonable probability that the result of the trial would have been different if Defendant's counsel had employed a seatbelt injury expert. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999).

13. An ineffective assistance of counsel claim premised upon a theory of a failure to investigate requires that "'[a] defendant who alleges [a] failure to investigate ... must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) (*quoting* United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989).

14. It is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). Defendant fails to demonstrate how his counsel's performance was deficient when he did not hire an accident reconstructionist. Defendant fails to specify whether an expert could have been procured and what assistance to the Defendant's case an expert could have rendered. As such, Defendant cannot demonstrate that the testimony of the accident reconstructionist would have exculpated him. Id.

15. Defendant has failed to demonstrate that his attorney's failure to hire an accident reconstructionist prejudiced his case. Strickland, at 686. At trial, it was Defendant's position that he was a passenger in the vehicle at the time of the accident. During his examination, the Defendant admitted that he was in the vehicle and was drunk, but that he was a passenger when the accident occurred. (TT 2/25/99, p.184). None of the testimony provided by the State's accident reconstructionist was inconsistent with the Defendant's theory of the case. (TT 2/24/99, p.140-148). Thus, counsel's failure to consult an accident reconstruction expert did not prejudice Defendant and was not ineffective assistance.

16. The Sixth Amendment does not guarantee to a criminal defendant counsel of choice. Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978); See also Barnes v. Housewright, 603 F. Supp. 330, 332 (D. Nev. 1985). The amendment merely guarantees that a criminal defendant receives adequate and effective representation. Barnes, 603 F. Supp. at 332. Defendant's claim that his attorney was ineffective in not involving the Mexican consulate because they would have provided him with a private attorney is without merit. Defendant cites no authority for his proposition that defense counsel was ineffective in not informing him of his right to contact the Mexican consulate. Further, Defendant's allegation that the involvement of the Mexican Consulate could have resulted in the retention of a private attorney and its own investigation has no support and is a naked allegation. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

17. Defendant has not sufficiently demonstrated that his counsel's failure to involve

the Mexican consulate resulted in prejudice as required by Strickland, at 686. Defendant has failed to demonstrate that but for his counsel's errors, there is a reasonable probability that the result of the trial would have been different. See Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068. In light of the overwhelming evidence of guilt presented by the State, Defendant cannot show that the presence of an attorney from the Mexican consulate would have changed the outcome of his trial.

18. Defendant has not demonstrated that his attorney's failure to employ a genetic expert prejudiced his case. Strickland, at 686. Defendant has failed to allege with specificity what the consultation with a genetic typing expert would have revealed and how it would have altered the outcome of the trial. See United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) (*quoting* United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). During opening statement, trial counsel informed the jury that the tissue sample did not belong to the Defendant. (TT 2/24/99, p.24). Trial counsel made this point again during cross-examination of Mario Alfonsi. (TT 2/24/99, p.98-99). Further, the fact that a piece of skin was discovered on the driver's side of the windshield and did not belong to Defendant bolstered Defendant's claim that he was the passenger of the vehicle.

19. Defendant fails to demonstrate that his attorney's actions were ineffective when he did not retain an expert to testify about the blood in the vehicle. See Strickland, at 686. Defendant has not demonstrated that there were any samples available to be examined. On cross-examination, Mario Alfonsi stated that when police inspected the vehicle, the blood in the vehicle was dried and not preferred for samples. (TT 2/24/99, p.100). As the samples were untestable, there was nothing that trial counsel could have done to assist his client's case other than pointing out the State's failure to examine and test the blood in question.

20. Trial counsel's decision not to investigate Defendant's vision and present evidence of the same was a strategic decision that is "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also, Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Defendant's position at trial was that he was the passenger in the vehicle. (TT 2/25/99, p.184). In light of Defendant's position, his vision was not relevant. Evidence

regarding the Defendant's vision would only have had the effect of confusing the jury or damaging the Defendant's claim that he was the passenger of the vehicle.

21. The Nevada Supreme Court has held that a criminal defendant can only be exculpated where, due to a superseding cause, he was in no way the "proximate cause" of the result." Etcheverry v. State, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991). Any "intervening cause" must, effectively, break the chain of causation. Id. Thus, an intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act. Id. Defendant's attorney was not ineffective for not presenting evidence of Defendant's poor vision as it would not have demonstrated a supervening cause.

22. Trial counsel's decision to focus on the theory that Defendant was a passenger rather than investigating other possible superseding causes of the accident was a reasonable strategy decision which should not be second guessed. Dawson, at 117. Defendant makes no attempt to demonstrate what an inspection of the vehicle would have revealed and how it would have altered the outcome of the trial. See United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) (*quoting* United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). Trial counsel could not have argued that the Defendant was a passenger and also that the condition of the vehicle, rather than Defendant's driving, caused the accident without damaging the credibility of the defense or confusing the jury.

23. The Sixth Amendment does not guarantee a "meaningful relationship" between a defendant and his counsel, only that counsel be effective. Morris v. Slappy, 461 U.S. 1, 13, 103 S. Ct. 1610, 1617 (1983). Defendant fails to allege what information trial counsel failed to obtain that could have been learned through better communication with the Defendant. The fact that Defendant may not have had as much access to trial counsel as he wished does not rise to level of ineffective assistance of counsel.

24. NRS 484.219 states:

> 1. The driver of any vehicle involved in an accident on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled

the requirements of NRS 484.223.

Defendant's claim that his counsel should have filed a writ to dismiss counts of leaving the scene is without merit. The plain language of the statute requires that Defendant immediately stop his vehicle **and** return to the scene of the accident. While it can be argued that the Defendant did stop the vehicle, the evidence presented to the grand jury and at trial clearly demonstrated that the Defendant fled the scene of the accident. In fact, the Defendant admitted to fleeing the scene of the accident. (TT 2/25/99, p.189-190). Defendant's trial counsel did not render ineffective assistance by failing to challenge these counts through a writ of habeas corpus as they would have been unsuccessful.

25. Defendant's claim that his attorney was ineffective for failing to suppress evidence gained by the police when they searched him is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). With regard to the search of Defendant and the discovery of the keys, trial counsel did file a motion to suppress statements made by Defendant during his detention and search. The District Court conducted an evidentiary hearing and determined that the police effected a valid Terry stop and that the evidence was admissible. (TT 2/23/99, p.6-15).

26. Counsel is not required to make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing, Cooper, 551 F.2d at 1166 (9th Cir. 1977). Trial counsel's performance was not ineffective in not filing a motion to suppress evidence collected when the police searched Defendant's vehicle as the motion would have been meritless because Defendant lacked standing to file such a motion.

27. In Scott v. State, 110 Nev. 622, 627-628, 877 P.2d 503, 507-508, the Nevada Supreme Court noted that although owners will ordinarily have standing to challenge a search of a vehicle, non-owner passengers will rarely have standing to challenge the search of the car. citing John Wesley Hall, Jr. *Search and Seizure* § 6:10 (2nd ed. 1991). Defendant testified that the vehicle in question was owned by his sister and that he was a passenger. (TT 2/25/99, p.183-184). If Defendant wanted to maintain his defense that he was the passenger, then he did not have standing to file a motion to suppress. It was sound trial strategy by his counsel to forgo

filing a motion that had small chance of success rather than taking the risk of damaging the primary defense employed during trial.

28. According to the Nevada Supreme Court, there should be a hearing on the allegation of ineffective assistance of counsel if the defendant 1) presents an affidavit, 2) which presents factual allegations of the attorney's misconduct, and 3) which is outside of the record and thus not reviewable by this Court on appeal. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant has not presented any such affidavit. He merely presents bare allegations without any supporting facts. To the extent that a defendant advances merely "naked" allegations, he is not entitled to an evidentiary hearing. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

ORDER

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

DATED this 3 day of July, 2002.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
BRUCE W. NELSON
Deputy District Attorney
Nevada Bar #001936