

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN BUSTER GIBBS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42468

FILED

MAY 28 2004

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 appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a guilty plea, of one count of trafficking in a controlled substance. The district court sentenced appellant to a prison term of 48 to 120 months.

Appellant subsequently filed a timely proper person post-conviction petition, and the district court appointed counsel, who filed a supplement to the petition. Following an evidentiary hearing, the district court denied the petition. Appellant contends that the district court erred by denying the petition because appellant's trial counsel Derrick Lopez was ineffective for failing to adequately investigate and to file a motion to suppress.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a

reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.¹

In the instant case, Lopez testified that he and appellant discussed filing a motion to suppress, but that Lopez did not think that a motion to suppress would be successful. Before Lopez could file a motion to suppress, the State offered the plea agreement that appellant decided to accept. According to Lopez, the State was unwilling to let appellant litigate the suppression issue and then accept the offered guilty plea agreement if he lost.

Lopez also testified that the State was going to seek adjudication as a habitual criminal if appellant was convicted at trial, and that part of the negotiated agreement was that the State would not seek habitual criminal adjudication and that the State would also not prosecute two unrelated charges of sales of a controlled substance. As to the issue of investigation, Lopez testified that he did conduct some preliminary investigation before the entry of the guilty plea. Specifically, Lopez recalled speaking to one of four witnesses who appellant told him could testify that another individual lived with appellant in the trailer where the drugs and weapons were discovered.

Appellant testified that he was worried about criminal habitual adjudication and that he accepted the plea bargain because he felt it would mean a shorter sentence. Appellant also testified that he had discussed with Lopez the validity of the search and the possibility of filing a motion to suppress.

¹See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

We conclude that appellant has failed to demonstrate a reasonable probability that he would not have pleaded guilty if Lopez had done more extensive investigation or filed a motion to suppress. We therefore conclude that the district court did not err by denying appellant's petition.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker _____, J.
Becker

Agosti _____, J.
Agosti

Gibbons _____, J.
Gibbons

cc: Hon. David R. Gamble, District Judge
Kay Ellen Armstrong
Attorney General Brian Sandoval/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk