

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060737-CA
v.)	
)	F I L E D
Raymond Charles Marquez,)	(September 20, 2007)
)	
Defendant and Appellant.)	2007 UT App 313

Seventh District, Price Department, 061700024
The Honorable Scott N. Johansen

Attorneys: Don M. Torgerson, Price, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City,
for Appellee

Before Judges Greenwood, Billings, and Davis.

PER CURIAM:

Raymond Charles Marquez appeals his convictions on drug and weapons possession charges. We affirm.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the outcome, depriving the defendant of a fair trial. See State v. Templin, 805 P.2d 182, 186 (Utah 1990). A "[d]efendant has the burden of meeting both parts of this test." Id. An appellate court need not address both components "if [a defendant] makes an insufficient showing on one." Parsons v. Barnes, 871 P.2d 516, 523 (Utah 1994). If it is easier to dispose of a claim on the ground that a defendant failed to show prejudice, there is no need to determine whether counsel's performance was deficient. See id. Counsel's failure to make motions which would be futile if raised does not constitute ineffective assistance. See id. at 525.

Marquez asserts that trial counsel was ineffective because he failed to move to suppress evidence obtained as a result of a weapons search during a traffic stop. Marquez argues that the weapons frisk was unreasonable. An officer may perform a protective frisk pursuant to a lawful stop when the officer

reasonably believes a person is armed and dangerous. See State v. Warren, 2003 UT 36, ¶13, 78 P.3d 590. The purpose of the frisk is to protect the officer. See id. "The reasonableness of the stop and the frisk are evaluated objectively according to the totality of the circumstances." Id. at ¶14. The reasonableness of a search depends on "whether the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate." Id. (quotations omitted).

Here, the weapons frisk was not illegal because it was reasonable. The trooper was involved in a traffic stop, which is "inherently dangerous." See id. at ¶22. Additionally, two knives were visible in Marquez's car and within his reach. Given the presence of weapons, a protective frisk for additional weapons is objectively reasonable. Because the search was legal, any motion to suppress the evidence obtained from the search would have been futile. As a result, the failure to file such a motion cannot be ineffective assistance of counsel. See Parsons, 871 P.2d at 525.

Marquez also asserts that trial counsel's failure to call a witness to testify regarding the knives found was unsound trial strategy and constituted ineffective assistance. In assessing trial counsel's performance, an appellate court must "indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." State v. Templin, 805 P.2d 182, 186 (Utah 1990) (quotations omitted). An unfavorable result is not sufficient to show ineffectiveness of counsel. See State v. Tyler, 850 P.2d 1250, 1258 (Utah 1993). Rather, counsel's decision regarding what witnesses to call, if any, is a matter of trial strategy "which will not be questioned and viewed as ineffectiveness unless there is no reasonable basis for that decision." Id. at 1256.

Marquez has not established that there was no reasonable basis for trial counsel's decision. On the contrary, his implication that a witness would be available to testify regarding the dangerousness of the knives is mere speculation. Such speculation is insufficient to show ineffective assistance of counsel. See Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993).

Finally, Marquez asserts that trial counsel failed to investigate the case properly, particularly by failing to view the videotape of the stop. Proof of ineffective assistance cannot be speculative, but must be a demonstrable reality. See

id. Marquez cannot show prejudice merely by identifying an unexplored avenue of investigation. See Parsons v. Barnes, 871 P.2d 516, 523 (Utah 1994). Rather, he must demonstrate that the additional investigation, i.e., reviewing the tape, would have provided exculpatory information which would have altered the outcome of the trial. See id. at 523-24. Instead, however, Marquez acknowledges that the tape may not be exculpatory. He has not established any prejudice from trial counsel's failure to view the tape.

In sum, Marquez has not established that he received ineffective assistance of counsel at trial. Accordingly, his convictions are affirmed.

Pamela T. Greenwood,
Associate Presiding Judge

Judith M. Billings, Judge

James Z. Davis, Judge