

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7669
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

NOLBERTO ZUNIGA-SALINAS,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-L-92-66 (5:CR-89-00287-01)

- - - - -
August 18, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Nolberto Zuniga-Salinas appeals the denial of his 28 U.S.C. § 2255 motion. To establish an ineffective-assistance-of-counsel claim Zuniga-Salinas must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 74 (1984). The claim may be rejected because of an insufficient showing of prejudice without assessing the adequacy of counsel's performance. United States

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

v. Pierce, 959 F.2d 1297, 1302 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992). To establish Strickland prejudice Zuniga-Salinas must show that counsel's errors were so serious as to render the trial unreliable and fundamentally unfair. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

Zuniga-Salinas argues that his attorney was ineffective because he did not obtain a photograph of the interior of the truck to establish that there was no door or window handle on the passenger-side door and that the window was closed. Alternatively, he argues that his attorney was ineffective because he did not stipulate that the door handle was broken.

At trial Agent Ramirez testified that the window on the passenger-side of the truck was down when Zuniga-Salinas was stopped, and that although the interior door handle did not work properly, the door was ajar and could be opened from the outside. This testimony corroborated Ruben Olvera-Garcia's written confession that he had thrown the marijuana in the truck cab out the window, and then had climbed out of the window to the bed of the truck. Given this testimony, the failure of defense counsel to obtain a photograph of the current position of the window, or to obtain a stipulation from the Government that the door handle did not operate properly, were not serious errors that rendered his trial unreliable or fundamentally unfair.

Zuniga-Salinas also argues that his attorney was ineffective for failing to introduce evidence that a canine unit had alerted on the bed of his truck several days earlier. When reviewing

counsel's performance on a § 2255 motion, this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and the movant "must overcome the presumption that the challenged action might be considered sound strategy." Wilkerson v. Collins, 950 F.2d 1054, 1064 (5th Cir. 1992) (internal quotations and citation omitted), cert. denied, 113 S.Ct. 3035 (1993).

Zuniga-Salinas's attorney filed a motion in limine to prevent the Government from introducing direct or indirect evidence of any prior arrests or convictions or extraneous offenses, and the Government agreed not to discuss Zuniga-Salinas's prior arrests or stops. Zuniga-Salinas has not demonstrated that counsel's pretrial decision to exclude evidence of prior stops for illegal activity was not sound trial strategy.

AFFIRMED.