

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCOS ALMAZAN A/K/A JOHN
BARRIETOS, JR. A/K/A MARCOS
BARRIETOS, JR.,

Appellant,

vs.

WARDEN, LOVELOCK
CORRECTIONAL CENTER, CRAIG
FARWELL,
Respondent.

No. 48606

FILED

JUN 27 2007
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On May 12, 1998, the district court convicted appellant Marcos Almazan, pursuant to a jury verdict, of two counts of possession of a controlled substance and one count each of possession of a controlled substance for sale and trafficking in a controlled substance. On direct appeal, this court remanded the matter, concluding that two of the convictions merged.¹ Upon remand, on February 16, 2000, the district court convicted Almazan of possession of a controlled substance and

¹Almazan v. State, Docket No. 32363 (Order of Remand, November 18, 1999).

trafficking in a controlled substance and sentenced him to serve terms totaling ten years to life in prison.

On June 21, 2000, Almazan filed a postconviction petition for a writ of habeas corpus in the district court. He obtained counsel, who supplemented the petition. The State opposed the petition and supplement. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

In his petition, Almazan claimed he received ineffective assistance of counsel. 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 but for counsel's errors the result of the proceeding would have been different.² A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.³ The district court's factual findings regarding ineffective assistance of counsel are entitled to deference upon review.⁴ Judicial review of counsel's representation is highly deferential,

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

³Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

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

and a defendant must overcome the presumption that a challenged action might be considered sound strategy.⁵

First, Almazan argues that the district court erred by denying his claim that his trial counsel was ineffective for failing to file a motion to suppress evidence found in the truck he was driving when he was arrested. He claims counsel should have argued that the search of the truck was a "general rummaging for evidence," not a proper inventory search. Almazan's appellate counsel raised the propriety of the search on direct appeal, but this court declined to address it because trial counsel had not objected to the search. Other than appellate counsel's speculative testimony that the search was merely a ruse, Almazan failed to present any evidence to support this claim. We therefore conclude the district court did not err in denying it.

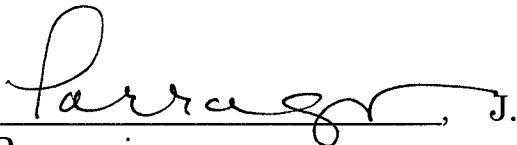
Second, Almazan argues that the district court erred by denying his claim that trial counsel was ineffective for failing to introduce a ski pass and credit card found in the truck Almazan was driving when he was arrested. Almazan contends that admission of the cards, neither of which was in Almazan's name, would have supported his theory that other people had access to the truck and the narcotics in the truck were not his. At the evidentiary hearing, counsel testified that he decided not to seek admission of the cards because their admission could have lead to a felony

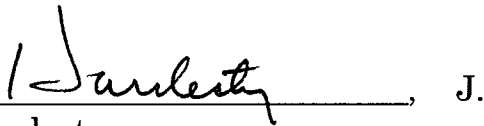
⁵Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001) (citing Strickland, 466 U.S. at 689).


charge of possession of a stolen credit card or enabled the State to bring witnesses to testify that Almazan stole the cards, which could have prejudiced Almazan. We agree with the district court that this was a reasonable strategic decision, and we conclude the district court did not err in denying this claim.

Having reviewed Almazan's claims and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre


Hardesty


Saitta

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk