

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRES MONGE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37571

FILED

DEC 11 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.<sup>1</sup>

Appellant, Andres Monge, was tried and convicted of one count of felony drug trafficking, sentenced to life in prison, and fined \$100,000. This court affirmed that conviction on direct appeal. Monge was charged with the offense for which he was convicted after investigators discovered heroin in his gym bag during a consensual search conducted on a Greyhound bus in which Monge was a passenger.

Monge filed his post-conviction petition for writ of habeas corpus in district court, alleging several instances of ineffective assistance by his trial counsel. The district court concluded that Monge did not satisfy the prejudice prong of Strickland v. Washington<sup>2</sup> because of overwhelming evidence of guilt in the trial record. The court also concluded that, although Monge's trial counsel could have investigated the case more thoroughly, he nevertheless was effective. Accordingly, the district court denied the petition. Monge now appeals that decision. We affirm.

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<sup>1</sup>See NRS 34.575.

<sup>2</sup>466 U.S. 668 (1984).

This court reviews claims of ineffective assistance of counsel under the standard announced by Strickland v. Washington.<sup>3</sup> To establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, *i.e.*, that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.<sup>4</sup> "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of [the] trial."<sup>5</sup>

We have held that "[a] court may consider the two test elements in any order and need not consider both if the defendant makes an insufficient showing on either one."<sup>6</sup> Generally, this court will defer to the factual findings of the district court concerning claims of ineffective counsel.<sup>7</sup> However, because ineffectiveness of counsel presents mixed questions of law and fact, we will independently review Monge's claims.<sup>8</sup>

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<sup>3</sup>See Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000).

<sup>4</sup>See McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 487-89).

<sup>5</sup>Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277 (1994) (citing Strickland, 466 U.S. at 698).

<sup>6</sup>Doyle, 116 Nev. at 154, 995 P.2d at 469 (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland, 466 U.S. at 697))).

<sup>7</sup>See Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082 (1998).

<sup>8</sup>See State v. LaPena, 114 Nev. 1159, 1165-66, 968 P.2d 750, 754 (1998) (quoting State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993)).

We will also defer to a lawyer's representation of a client, and presume that counsel's questioned action was a sensible strategy to pursue.<sup>9</sup> Thus, the defendant carries the affirmative burden of establishing prejudice.<sup>10</sup>

Conflict of interest and Monge's right to testify

Monge informed his trial counsel that he wanted to testify. Relying upon Supreme Court Rule 172,<sup>11</sup> counsel advised the judge in an ex-parte meeting that he believed Monge was lying and that he could not go forward with the defense as planned.<sup>12</sup> Trial counsel requested permission to prevent Monge from testifying and to withdraw from further representation in the matter.

The district court informed Monge of the problems presented by his counsel, including a lawyer's ethical obligation not to proffer false testimony. Monge voiced understanding of his lawyer's ethical dilemma and indicated that trial counsel should continue representing him. Notwithstanding his consent, Monge now maintains in this appeal that

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<sup>9</sup>See LaPena, 114 Nev. at 1166, 968 P.2d at 754.

<sup>10</sup>See Riley, 110 Nev. at 646, 878 P.2d at 278 (citing Strickland, 466 U.S. at 693).

<sup>11</sup>SCR 172(1)(d) provides in part: "Candor toward the tribunal. 1. A lawyer shall not knowingly: . . . (d) Offer evidence that the lawyer knows to be false."

<sup>12</sup>Monge evidently wanted to testify that the gym bag in question did not belong to him. However, based upon trial counsel's comparison of underwear found in the bag and the underwear Monge was wearing, counsel concluded that Monge could not truthfully testify that he did not own the bag. This evidence was neither disclosed to the State nor used at trial.

counsel's ex-parte contact with the district court created a fatal conflict of interest. Without defining the contours of the alleged conflict of interest, Monge argues that an actual conflict existed, which relieves him of the requirement of showing prejudice.<sup>13</sup>

We agree with the district court that no impermissible conflict occurred. Even if a conflict did exist, Monge's consent that counsel remain on the case constituted a waiver of any problem that may have resulted from the ex-parte communications. Additionally, we agree that trial counsel correctly followed the ethical rules in meeting with the judge to discuss his concerns about Monge's testimony. Finally, although a defendant has a right to testify, the Sixth Amendment right to counsel does not include the right to compel counsel to knowingly assist in presenting perjured testimony.<sup>14</sup>

#### Prejudice of tribunal

Monge argues that trial counsel's ex-parte communication unfairly prejudiced the district court against him, and that trial counsel was ineffective for failing to move for an order of recusal. The district court found that SCR 172 expressly permitted counsel's conduct, and noted that the jury, rather than the court, was the finder of fact. We agree with the district court and conclude that any knowledge transmitted to it by counsel did not affect the outcome of the trial. To decide otherwise would cede the defendant the power to control trial proceedings in

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<sup>13</sup>See Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (defendant who demonstrates presence of actual conflict need not prove that lawyer's divided loyalties prejudiced the outcome of the trial).

<sup>14</sup>See Nix v. Whiteside, 475 U.S. 157 (1986).

criminal cases. Thus, Monge has failed to carry his heavy burden and demonstrate the need for the district court to recuse itself and declare a mistrial.

Counsel's conclusions

Monge contends that trial counsel created an unconstitutional conflict when he concluded that Monge was lying. This argument is meritless. Trial counsel was justified in his belief that Monge was not telling the truth regarding ownership of the bag and his prior convictions, and was obligated to make the disclosures of which Monge now complains.

Failure to investigate/call witnesses

Monge contends that two eyewitnesses, Joseph Atwell and Daniel Perez, were available to testify to corroborate his theory of the events surrounding his arrest. The record reflects that counsel did not call these witnesses because he believed they would offer perjured testimony.

The district court noted that Monge's post-conviction counsel had an opportunity for two years to subpoena Atwell and Perez to attend post-conviction proceedings to determine the substance of their testimony, but failed to do so. The district court also concluded that, without affidavits or sworn testimony, any conjecture concerning the substance of the potential witnesses' testimony was mere speculation. While recognizing that one of these witnesses may have testified that the gym bag was located across the aisle opposite Monge in an overhead bin, the district court concluded that such evidence did not contradict the State's theory of consent.

While the testimony of the potential witnesses may have had some relevance to the issue of possession of the drugs, the impact of this

speculative testimony<sup>15</sup> was slight when weighed against the testimony of three trained investigators. We conclude that counsel's refusal to call these witnesses did not create a reasonable probability that the result of the trial would have been different.

Failure to suppress evidence

The State filed a pretrial motion in limine, arguing that Monge should not be allowed to present any evidence tending to demonstrate that he did not give his consent to the search of the bag or that the State violated other constitutional rights. Trial counsel did not file an answer to the State's motion, but the district court stated that it would honor a request for a hearing at trial, outside the jury's presence, on the consent issue. Because counsel did not address the consent issue before or during trial, the district court instructed the jury that, as a matter of law, Monge consented to the search.

The district court in the writ proceedings reasoned that the drugs could not be suppressed if Monge had consented to the search, and that he would have no standing to contest the search if the bag did not belong to him. In light of this analysis, the district court concluded that there was not a reasonable likelihood that the evidence would have been excluded, thereby changing the result of the trial.<sup>16</sup> We conclude that the issue of consent is moot based upon this court's dismissal of Monge's direct

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<sup>15</sup>One of the potential witnesses was arrested on the same bus for possessing a pipe bomb.

<sup>16</sup>Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (prejudice prong of ineffective assistance claim based upon failure to file motion to suppress evidence "must be established by a showing that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial").

appeal, which concluded that sufficient evidence supported a finding that Monge “voluntarily consented to the search of his bag.”<sup>17</sup>

Language barrier

Monge argues that he did not fully comprehend the verbal request by the officers on the bus and could not fully participate in his defense. We note, however, Investigator Townsend’s testimony that Monge experienced no difficulties answering questions on the bus, and the fact that a court interpreter assisted Monge throughout his trial. Monge asserts that the interpreter spoke a different dialect from his own, which made it difficult to comprehend trial proceedings.

Monge has not asserted how this alleged language difficulty affected his defense. Additionally, the record contains no indication that he told his attorney or the trial court that he had difficulty understanding the interpreter. Thus, we conclude that this argument lacks merit.

Failure to object to reasonable doubt instruction

Monge claims that trial counsel was ineffective for not objecting to the reasonable doubt jury instruction given by the district court. This argument lacks merit. We have recently reaffirmed the constitutionality of that instruction.<sup>18</sup> Additionally, the United States

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<sup>17</sup>Monge v. State, Docket No. 27415 (Order Dismissing Appeal, May 27, 1997).


<sup>18</sup>See Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999) (citing Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996); Quillen v. State, 112 Nev. 1369, 929 P.2d 893 (1996); Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995)).


Court of Appeals for the Ninth Circuit has upheld the constitutionality of NRS 175.211(1), which formed the basis for the instruction.<sup>19</sup>

Monge has not demonstrated that the outcome of his trial would have been different but for the deficiencies of his trial counsel. Thus, he has not satisfied the prejudice prong of Strickland, as adopted by this court. Therefore, we affirm the order of the district court denying Monge's post-conviction petition for a writ of habeas corpus and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Rose

cc: Hon. Richard Wagner, District Judge  
Charles C. Diaz  
Attorney General/Carson City  
Attorney General/Ely  
Humboldt County District Attorney  
Humboldt County Clerk

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<sup>19</sup>See Noonan, 115 Nev. at 189, 980 P.2d at 640.