IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP CARMINE MIRABELLI, JR.
A/K/A PHILIP CARMAN MIRABELLI
A/K/A PHILLIP C. MIRABELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39222

FILED

AUG 19 2003

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying defendant's petition for writ of habeas corpus.

Phillip Mirabelli was convicted on four counts related to a conspiracy to rob a coin delivery truck on August 17, 1992. This appeal is from the district court's denial of a post-conviction petition for writ of habeas corpus. Mirabelli claims his trial and appellate counsel was ineffective for failing to challenge the admission of trial testimony and prior inconsistent statements by an alleged co-conspirator.

In Strickland v. Washington,[1] the United States Supreme Court enunciated the "reasonably effective assistance" standard for reviewing claims of ineffective assistance of counsel.[2] Under this standard, "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in

[1]466 U.S. 668 (1984).

[2]State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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criminal cases.'"[3] We have adopted that standard.[4] This standard also applies to claims of ineffective assistance of appellate counsel.[5]

A defendant, challenging the effectiveness of his counsel, must show "(1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency."[6] To show prejudice based on trial counsel's performance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."[7] To show prejudice from appellate counsel's performance, the defendant must "show that the neglected claim would have had a reasonable probability of success on appeal."[8]

A court deciding an ineffective assistance claim need not address counsel's performance prior to addressing prejudice. "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'"[9]

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[3]Strickland, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

[4]Love, 109 Nev. at 1138, 865 P.2d at 323 (citing Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984)).

[5]Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992) (citing Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)).

[6]Love, 109 Nev. at 1138, 865 P.2d at 323 (citing Strickland, 466 U.S. at 687).

[7]Id. at 1139, 865 P.2d at 324 (citing Strickland, 466 U.S. at 694).

[8]Duhamel, 955 F.2d at 967 (citing Heath v. Jones, 941 F.2d at 1132).

[9]Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (quoting Strickland, 466 U.S. at 697).

In this appeal, Mirabelli claims that the prosecution called Anthony Drew, Mirabelli's alleged co-conspirator, as a trial witness, "[k]nowing that he intended to lie," for the sole purpose of admitting otherwise inadmissible hearsay evidence of Drew's prior, unsworn statements, under the guise of impeachment. Mirabelli further claims that "[d]espite his knowledge of the prosecution's awareness of Drew's intent to commit perjury, Petitioner's counsel did not object to the admission of that evidence."

NRS 50.075 allows any party, including the party calling the witness, to attack the credibility of a witness. The prosecution does not need to show "damaging surprise" in order to impeach its own witness.[10] Although "'the government must not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony,'"[11] a complete review of the record in this case does not show that the prosecution knowingly elicited contradictory testimony from Drew as a subterfuge in order to admit Drew's prior inconsistent statements.

First, in a pre-trial discussion with the court, the prosecutor told the court that Drew was instructed to testify to the truth, not necessarily to testify against Mirabelli. Next, in his opening statement to the jury, the prosecutor told the jury that Anthony Drew would testify truthfully, in exchange for a plea agreement. He also stated that Drew would implicate Mirabelli as an accomplice. Further, in the Defense's

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[10]Bishop v. State, 91 Nev. 465, 466-67, 537 P.2d 1202, 1203 (1975).

[11]United States v. Gomez-Gallardo, 915 F.2d 553, 555 (9th Cir. 1990) (quoting United States v. Whitson, 587 F.2d 948, 952-53 (9th Cir. 1978)); Kuhn v. United States, 24 F.2d 910, 913 (9th Cir.), cert denied, 278 U.S. 605 (1928)).

opening statement to the jury, Mirabelli's attorney established possible motives, including the plea agreement and parole eligibility, for why Drew would testify against Mirabelli. Finally, Drew's own testimony indicates that he had not decided what he would do. Drew testified: "I'm worried for this. And, you know, I've got to be in prison. And I don't want to testify. Because I just, you know, and they came here yesterday and wanted to know what I was going to do. I told them yesterday. I said I don't know." In addition, Drew testified that the prosecutor "threatened" him just before giving testimony that he would be charged for perjury if he didn't testify truthfully.

Here, as in Atkins v. State, "[t]here was no 'subterfuge,' as [Mirabelli] asserts, and the State was completely justified in calling [Drew] to the witness stand and expecting him to testify truthfully regarding [Mirabelli's] involvement in the [crime]."[12] Therefore, Mirabelli's counsel did not create prejudice by not objecting to Drew's testimony, because any objection would likely have been overruled. Likewise, had Mirabelli's appellate counsel raised this issue on appeal, there would have been little probability of success.

NRS 50.135(2) provides, in relevant part: "Extrinsic evidence of a prior contradictory statement by a witness is inadmissible unless: . . . (b) The witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon." Further, NRS 51.035(2)(a) provides that a statement that is inconsistent with the trial statements made by a declarant, who testifies at trial, is not hearsay, if the witness is subject to cross-examination

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[12]Atkins v. State, 112 Nev. 1122, 1130, 923 P.2d 1119, 1125 (1996).

concerning the statement. Therefore, such inconsistent statements are admissible for impeachment purposes and as substantive evidence.[13]

At trial in this case, even though Drew admitted making his prior statements, the statements were inconsistent with his trial testimony. His trial testimony was that Mirabelli was not involved in the August 17, 1992, coin truck robbery. His prior statements to Detective Mesinar, Deputy District Attorney Steven Hill, and Judge Pavlikowski indicated that Mirabelli played an active role in the planning and execution of the robbery. At trial, Drew claimed that he had merely agreed with the facts as Detective Mesinar presented them to him. However, when he made his statement to Detective Mesinar, he claimed that he wanted to provide the full truth of what had happened. Thus, Drew's trial statements were clearly inconsistent with his prior statements. In addition, Drew was confronted with these contradictory statements at trial and was cross-examined regarding them. Therefore, extrinsic evidence of Drew's contradictory statements was admissible and defense counsel did not prejudice Mirabelli by not objecting to their admission.

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[13]Miranda v. State, 101 Nev. 562, 567, 707 P.2d 1121, 1124 (1985).

In conclusion, because there is no evidence that either the prosecutor or defense counsel knew Drew was going to "lie" at trial, Drew's testimony and evidence of his prior inconsistent statements were properly admitted at trial. Therefore, there was no ineffective assistance of counsel based on counsel's failure to challenge the admissibility of this evidence in trial or on direct appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Lee A. Gates, District Judge
Dominic P. Gentile, Ltd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk