

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN EDWARD WATKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40651

FILED

MAY 05 2004

ORDER OF AFFIRMANCE

JANETTE M. JELSON,
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Appellant Jonathan Edward Watkins was charged and convicted of first-degree murder and robbery. Watkins was sentenced to life with the possibility of parole for the murder and a consecutive, maximum term of 120 months for the robbery. Watkins appealed, and this court affirmed the judgment of conviction.

During the opening statements at Watkins' trial, Watkins' counsel, Paul Giese, stated:

You will hear from Jonathan Watkins, the defendant. He's going to tell you an awful lot of things, but one of the things he's going to tell you is, Yes, I'm a convicted felon. Almost everybody in this case is.

He will tell you that he was present in that room on the night in question at least once and possibility more than once. He will tell you of another black man who was there, a gentleman named Rico Smith. He will tell you another man was there, Duke Henderson.

And there may be more. There may be a lot more. It depends on who you listen to at what time. He will tell you that when he left that room for the last time Jay Bowen was alive and well.

He will tell you that he left and went home relatively early to the home of his parents. His dad, his mom will corroborate this. They'll come

in and tell you this. He went home, and the next morning at 8:30 he was here in this very courtroom appearing before this Judge.

Subsequently, Watkins elected, on the advice of Giese, not to testify. Moreover, due to health reasons, neither of Watkins' parents testified. No explanation was provided to the jury indicating why certain evidence discussed in Giese's opening statement was not presented. At trial, the district court canvassed Watkins as to whether he would take the stand. Watkins told the district court he had discussed it with his attorney and that he would not testify. Watkins never took the stand, and the evidence admitted at trial did not show that Watkins was a convicted felon.

Watkins filed a post-conviction petition for a writ of habeas corpus, alleging he was denied effective assistance of counsel based upon Giese's opening statement. Watkins testified at the habeas proceeding that he and Giese had agreed before opening statements that Watkins would take the stand. However, Watkins claims that at the close of the prosecution's case, Giese told him that he would not be testifying because Giese felt that the prosecution had not proven the case. The district court denied Watkins' post-conviction petition for a writ of habeas corpus finding that Giese's decision to give the opening statement was a proper strategic decision and not ineffective assistance of counsel.

Watkins appeals the district court's denial of his post-conviction petition for a writ of habeas corpus, alleging Giese's opening statement constituted ineffective assistance of counsel.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review."¹ A district

¹Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong.²

“To establish ineffective assistance of counsel, a claimant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense.”³ In regards to the performance prong, the claimant must show that counsel’s performance fell below an objective standard of reasonableness.⁴ The inquiry on review must be whether, in light of all the circumstances, counsel’s assistance was reasonable.⁵ “Judicial scrutiny of counsel’s performance must be highly deferential.”⁶ To fairly assess counsel’s performance, the reviewing court must make every effort to avoid the distorting effects of hindsight and to evaluate counsel’s conduct based on counsel’s perspective at the time.⁷

“Tactical decisions are virtually unchallengeable absent extraordinary circumstances.”⁸ The claimant “must overcome the

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

³Thomas v. State, 120 Nev. ____, ____, P.3d ____ (Adv. Op. No. 7, February 10, 2004).

⁴Evans, 117 Nev. at 622, 28 P.3d at 508.

⁵Strickland v. Washington, 466 U.S. 668, 688 (1984).

⁶Id. at 689.

⁷Evans, 117 Nev. at 622, 28 P.3d at 508.


⁸Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

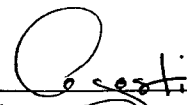
presumption that, under the circumstances, the challenged action might be considered sound trial strategy.”⁹

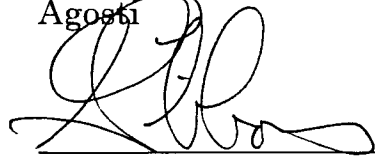
Watkins argues that it was per se ineffective assistance when Giese stated that Watkins would testify and that he was a convicted felon. Watkins does not allege that Giese rendered ineffective assistance by later advising Watkins not to testify or by not explaining to the jury why he stated Watkins would testify when he did not.¹⁰

We cannot conclude that it is per se ineffective assistance of counsel for an attorney to state during opening statements that the defendant will testify and that the defendant is a convicted felon when at the time the statement was made the defendant did intend to take the stand. There is no evidence that Giese’s statement was anything other than a reasonable strategic decision. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁹Strickland, 466 U.S. at 689 (internal citations and quotations omitted).

¹⁰Watkins did not assert this argument in his briefs or at oral argument.

cc: Hon. Peter I. Breen, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk