

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR ALLEN CAREY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41937

**FILED**

APR 21 2005

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from the district court's denial of a post-conviction petition for writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Arthur Allen Carey was convicted of four counts of robbery and one count of conspiracy, with enhancements for the use of a deadly weapon and for committing a robbery upon an elderly person. The district court sentenced Carey to four concurrent prison terms of 48 to 180 months for each robbery, all enhanced with like consecutive terms for the use of a deadly weapon. The district court also imposed two consecutive terms of 24 to 60 months on the conspiracy conviction (enhanced for criminal acts against an elderly person). The court consecutively imposed the robbery and conspiracy sentences. This court affirmed the convictions on direct appeal.<sup>1</sup>

Thereafter, Carey filed a post-conviction petition for a writ of habeas corpus in the district court, alleging that he received ineffective assistance of counsel. After conducting an evidentiary hearing, the district court denied the petition.

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<sup>1</sup>Carey v. State, Docket No. 35787 (Order of Affirmance, November 6, 2000).

Carey argues ineffective assistance of trial counsel based upon claimed failures to: (1) object to the State's improper impeachment of his alibi witness concerning drug charges and religious beliefs; (2) object to cross-examination impeachment that violated his Fifth Amendment right to remain silent; (3) take action to mitigate the impact of his prior conviction; and (4) address the tainting of eye-witness testimony.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review."<sup>2</sup> A district 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.<sup>3</sup>

Under Strickland v. Washington,<sup>4</sup> a claimant will prevail on an ineffective assistance of counsel claim if he demonstrates that: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense.<sup>5</sup> The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.<sup>6</sup>

With regard to the performance prong, the claimant must show that counsel's performance fell below an objective standard of reasonableness.<sup>7</sup> The inquiry on review must be whether, in light of all

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<sup>2</sup>Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

<sup>3</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>4</sup>466 U.S. 668 (1984).

<sup>5</sup>Evans, 117 Nev. at 622, 28 P.3d at 508.

<sup>6</sup>Strickland, 466 U.S. at 697.

<sup>7</sup>Evans, 117 Nev. at 622, 28 P.3d at 508.

the circumstances, counsel's assistance was reasonable.<sup>8</sup> "Judicial scrutiny of counsel's performance must be highly deferential."<sup>9</sup> To fairly assess counsel's performance, the reviewing court must make every effort to avoid the distorting effects of hindsight and evaluate counsel's conduct based on counsel's perspective at the time.<sup>10</sup>

"Tactical decisions are virtually unchallengeable absent extraordinary circumstances."<sup>11</sup> The claimant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"<sup>12</sup>

Failure to object to improper impeachment

Carey contends that he received ineffective assistance because his counsel, Frederick Olmstead, failed to object to the State's improper impeachment of his alibi witness, Pamela Thompson, concerning a prior drug charge and her religious beliefs. Carey argues that the use of the charge was improper because it had been dismissed and sealed, and because the prosecutor could only use a certified copy of the judgment of conviction to impeach. Carey contends that Olmstead's failure to object to the evidence and to investigate the status of the charge fell below an objective standard of reasonableness. The State argues that Olmstead

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<sup>8</sup>Strickland, 466 U.S. at 688.

<sup>9</sup>Id. at 689.

<sup>10</sup>Evans, 117 Nev. at 622, 28 P.3d at 508.

<sup>11</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), overruled on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

<sup>12</sup>Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

acted reasonably, considering the time constraints and the information before him. The State also contends that the impeachment was not inappropriate since it explored Thompson's credibility as to her respect for an oath.

A conviction of a crime punishable by imprisonment for more than one year may be used to attack the credibility of a witness.<sup>13</sup> The prosecutor may not ask about a conviction unless he or she is prepared to prove the conviction by presenting a judgment of conviction.<sup>14</sup>

Here, the state had prosecuted Thompson for being under the influence of a controlled substance. Under Nevada law, such a plea of guilty is taken without the entry of a judgment of conviction, and the accused is placed on probation after agreeing to attend a program for treatment and rehabilitation.<sup>15</sup> Upon successful completion of such a program, the district court shall discharge the accused and dismiss the proceedings.<sup>16</sup>

Discharge and dismissal restores the person discharged, in the contemplation of the law, to the status occupied before the arrest, indictment or information. He may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, information

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<sup>13</sup>NRS 50.095.

<sup>14</sup>Yllas v. State, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996); Tomarchio v. State, 99 Nev. 572, 578, 665 P.2d 804, 808 (1983); Fairman v. State, 83 Nev. 287, 289, 429 P.2d 63, 64 (1967).

<sup>15</sup>NRS 453.3363(1).

<sup>16</sup>NRS 453.3363(3).

or trial in response to an inquiry made of him for any purpose.<sup>17</sup>

Thompson successfully completed the Washoe County Drug Court Program and the district court entered an order dismissing the charge against her. A judgment of conviction was never entered. Therefore, the prosecutor improperly impeached Thompson with her guilty plea. Olmstead knew before trial that Thompson had been charged and gone through the drug court process. Thus, Olmstead should have explored the admissibility of the charge for impeachment purposes. Had he done so, he would have discovered that the charge had been dismissed prior to Carey's trial and that it could not be introduced against her. We conclude that Olmstead's performance fell below an objective standard of reasonableness when he failed to research Thompson's conviction and object to the State's use of it.

Carey also argues that the prosecution impermissibly impeached Thompson with her religious beliefs. Counsel for the State extensively questioned Thompson regarding her religious beliefs and the extent to which she adhered to the tenets of her religion. Olmstead failed to object. The State argues that Stralla attempted to show that Thompson does not respect oaths, both her religious oath and her oath in court.

"NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used. Impeachment on a collateral matter is not allowed."<sup>18</sup>

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<sup>17</sup>NRS 453.3363(4).

<sup>18</sup>Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000).

“Impeachment consists of attacking a witness’s credibility, which depends on that witness’s willingness and ability to tell the truth.”<sup>19</sup>

NRS 50.105 states, “Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.” We have not as yet been called upon to construe this provision, however, persuasive guidance is found in other jurisdictions that provide: “While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition.”<sup>20</sup> “The purpose of the rule is to guard against the prejudice which may result from disclosure of a witness’s faith.”<sup>21</sup> The “use of a witness’s religious beliefs for the purpose of enhancing or discrediting his or her credibility is a long and consistently disfavored practice.”<sup>22</sup>

We conclude that counsel for the State improperly impeached Thompson by inquiring into the possible ways in which she violated her religious oath. This impeachment violated NRS 50.085, NRS 48.035 and NRS 50.105. The questions regarding whether Thompson had committed

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<sup>19</sup>Id. at 709, 7 P.3d at 440.

<sup>20</sup>Fed. R. Evid. 610 advisory committee’s notes. This court can look to the Fed. R. Evid. for guidance in interpreting Nevada’s rules of evidence. See, e.g., Tomlinson v. State, 110 Nev. 757, 761-62, 878 P.2d 311, 313-14 (1994).

<sup>21</sup>United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980).

<sup>22</sup>Commonwealth v. Kartell, 790 N.E.2d 739, 746 (Mass. App. Ct. 2003) (internal quote omitted).

a “sin” under the tenets of her religion can only be said to tenuously relate to her character for truthfulness. Furthermore, Thompson’s religious beliefs, the tenets of her religion, and her adherence to those beliefs and tenets, are collateral as to whether she was with Carey on the night of the robbery. The evidence should have been excluded pursuant to NRS 48.035 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The probative value of whether Thompson committed a “sin” in the eyes of her church was completely irrelevant to a trial conducted in the twentieth or twenty-first century. Extracting this evidence consumed a considerable part of the cross-examination, confusing and misleading the jury. Certainly, Thompson’s religious beliefs were not at issue and were used to attack her credibility. Thus, Olmstead’s conduct fell below an objective standard of reasonableness when he failed to object to the prosecution’s line of questioning regarding Thompson’s religious beliefs.

Failure to object to claimed Fifth Amendment violations

Next, Carey contends that Olmstead provided ineffective assistance of counsel by failing to object when the State asked Carey on cross-examination why he did not tell the police of his alibi during the initial interrogation. Carey contends that the State violated his Fifth Amendment right to remain silent. The State counters that it permissibly impeached Carey with a prior inconsistent statement.

“It is well settled that the prosecution is forbidden at trial to comment upon an accused’s election to remain silent following his arrest and after he has been advised of his rights . . . .”<sup>23</sup> In Doyle v. Ohio, the United States Supreme Court held that the prosecutor’s cross-examination

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<sup>23</sup>McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986).

of the defendant as to why he did not tell the police upon his arrest that he had been set up was an improper impeachment technique, in violation of his constitutional right to remain silent.<sup>24</sup> The Court wrote, “[s]ilence in the wake of these warnings may be nothing more than the arrestee’s exercise of these Miranda rights.”<sup>25</sup> “In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.”<sup>26</sup>

But Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.<sup>27</sup>

In People v. Farley, the defendant was asked on cross-examination why he did not present his alibi during the initial police interrogation when the police asked him where he was on the night of the robbery.<sup>28</sup> The defendant responded that he did not know.<sup>29</sup> The

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<sup>24</sup>426 U.S. 610, 611 (1976).

<sup>25</sup>Id. at 617.

<sup>26</sup>Id. at 618.

<sup>27</sup>Anderson v. Charles, 447 U.S. 404, 408 (1980).

<sup>28</sup>72 Cal. Rptr. 855, 859 (Cal. Ct. App. 1968).

<sup>29</sup>Id.



California Court of Appeals concluded that the cross-examination was not improper because it was for impeachment purposes.<sup>30</sup>

We conclude that the State properly impeached Carey with his failure to mention his alibi during the initial interrogation. Carey did not invoke his Fifth Amendment right to remain silent during the interrogation. Instead, Carey voluntarily elected to comment on the crime. Therefore, it was a proper impeachment technique to inquire into why Carey did not come forward with his alibi at that time. Olmstead did not render ineffective assistance by failing to object.

Failure to address evidence concerning prior conviction

Carey also contends that he received ineffective assistance of counsel because Olmstead failed to take any action to mitigate the impact of Carey's prior conviction. Carey argues that Olmstead failed to: (1) mitigate the evidence by discussing it during his opening statements; (2) mitigate the evidence by questioning Carey about it during direct examination; (3) seek to have the evidence excluded as confusing and prejudicial pursuant to NRS 48.035; (4) object to questions regarding the length of incarceration; (5) object to the questions regarding the original charge; and (6) propose a limiting jury instruction concerning the probative value of the conviction. Carey submits that it was Olmstead's standard practice to address such matters, but he failed to do so in this case.

We conclude that it was a reasonable, tactical decision to not bring out Carey's prior convictions during the opening statement and direct examination. To the contrary, in some cases it might be deficient representation to mention prior convictions in opening statements,

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<sup>30</sup>Id.

anticipating that the defendant will testify, and then not have the defendant testify.

A prosecutor may inquire about the number and names of prior felony convictions, but “[t]he details and circumstances of the prior crimes are, of course, not appropriate subjects of inquiry.”<sup>31</sup> When not relevant to the specific litigation, it is error for the prosecutor to inquire regarding the length of incarceration from a prior conviction.<sup>32</sup> The State’s questions exceeded the permissible scope of inquiry into prior convictions; *i.e.*, the inquiries elicited information about the sentence, the length of incarceration, the original charge and the plea bargain. The purpose of these questions could only have been to show that Carey had committed a robbery before, just as he did in this case, which is prohibited under NRS 48.045. Olmstead’s failure to object to these questions fell below an objective standard of reasonableness.

In Harris v. State, this court determined that the district court erred by refusing to instruct the jury that the defendant’s prior conviction could only be considered on the issue of the defendant’s credibility and not as substantive proof of his guilt.<sup>33</sup> In this case, a reasonable attorney would have proposed an instruction limiting the jury’s use of Carey’s prior conviction. Therefore, we conclude that Olmstead’s performance also fell below an objective standard of reasonableness by failing to propose a limiting instruction.

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<sup>31</sup>Plunkett v. State, 84 Nev. 145, 147, 437 P.2d 92, 93-94 (1968).

<sup>32</sup>See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

<sup>33</sup>106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990).

### Failure to attack eye-witness testimony

Finally, Carey argues that the witnesses concerning one of the robberies were tainted when they observed an eyewitness in one of the other robbery cases identify Carey as the culprit. Carey alleges that Olmstead provided ineffective assistance by failing to address the issue in any manner.

NRS 50.155(1) provides that “at the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . . .” “The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony in light of other witnesses’ testimony, and to detect falsehood by exposing inconsistencies.”<sup>34</sup> Because the prejudice resulting from a violation of a sequestration order is difficult to prove, this court “will presume prejudice from a violation of NRS 50.155 unless the record shows that prejudice did not occur.”<sup>35</sup>

The parties do not dispute that witnesses to one of the robbery charges remained in the courtroom after the exclusionary rule was invoked and that they observed a witness to one of the other robberies identify Carey. A reasonably competent attorney would have taken action to exclude the witnesses’ testimony in these circumstances.

Carey has shown that his counsel’s performance was deficient. However, Carey must also “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

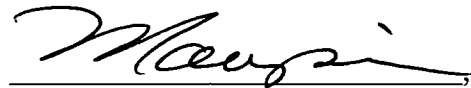
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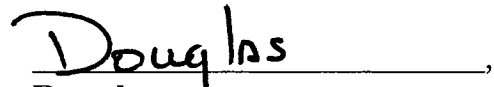
<sup>34</sup>Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

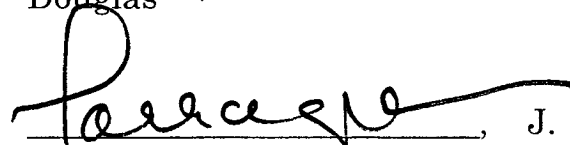
<sup>35</sup>Id.

sufficient to undermine confidence in the outcome.”<sup>36</sup> Carey has shown that his counsel’s deficient performance has undermined the confidence in the outcome. The State’s improper impeachment of the alibi witness concerning drug charges and religious beliefs, coupled with Olmstead’s failure to object to the State’s improper inquiry into prior convictions and the tainting of the eyewitnesses, undermine our confidence in the outcome of this case. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

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

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<sup>36</sup>Strickland, 466 U.S. at 694.