

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIOUS ANTOINE MAYS,

Defendant and Appellant.

C057099

(Super. Ct. No. 05F01223)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed in the above cause on May 8, 2009, is modified as follows:

On page 51, line 22, insert "et seq." after the words "section 1335."

On page 51, line 22, after "et seq." add as a footnote the following:

In a petition for rehearing, defendant argues that a prosecutor's ability to conduct a conditional examination in a

serious felony case is limited to situations where the witness's life is in jeopardy, because section 1335, subdivision (b), states: "When a defendant has been charged with a serious felony, the people . . . may . . . have a witness examined conditionally as prescribed in this chapter, if there is evidence that the life of the witness is in jeopardy."

However, the point is forfeited for failure to raise it in the trial court where the admissibility of the conditional examination was litigated under section 1336, not section 1335. Thus, Evidence Code section 353 provides as pertinent, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" "[A] trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. . . . A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial." (*People v. Partida* (2005) 37 Cal.4th 428, 431.) Defendant's assertion of a constitutional violation does not excuse the forfeiture. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628

[constitutional objections must be interposed before the trial judge in order to preserve them for appeal].)

Defendant argues there should be no forfeiture where the issue involves a lack of statutory authorization. Here, however, there was statutory authorization for the trial court's ruling. Thus, the parties litigated the matter, and the trial court granted the conditional examination, under section 1336 (fn. 7, *ante*), which authorizes a conditional examination when the People's witness is so infirm as to cause apprehension that she will be unable to attend the trial.

Defendant argues alternatively that any forfeiture resulted from ineffective assistance of counsel. To establish ineffective assistance, defendant bears the burden of showing that (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's error, it is reasonably probable that the verdict would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

Ordinarily, we do not determine claims of ineffective assistance of counsel without input from trial counsel. "If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal

unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Counsel’s failure to object to evidence (which was the ultimate purpose of the conditional examination) is a matter of trial tactics. (*People v. Lewis* (2001) 25 Cal.4th 610, 661.) Because we accord great deference to trial counsel’s tactical decisions, counsel’s failure to object on a given ground rarely provides a basis for finding ineffective assistance. (*Ibid.*) We cannot say there could be no satisfactory explanation for a failure to object on the ground of section 1335, subdivision (b), because trial counsel may have considered that provision limited to death penalty cases, a view arguably supported by *People v. Jurado* (2006) 38 Cal.4th 72, which sought to harmonize sections 1335 and 1336 and spoke of section 1335, subdivision (b), as a release from the historical prohibition against conditional examinations of prosecution witnesses in capital cases. (*Id.* at pp. 110-113.) In any event, defendant’s claim of ineffective assistance of counsel would be more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

This modification will require renumbering of subsequent footnotes.

This modification does not change the judgment.

