ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Nevada Supreme Court Case No.: 52127

District Court Case No.: C232494
District Court Dept. No.: XXIV

FILED

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APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction and Sentence in the Eighth Judicial District Court)

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I

INTRODUCTION

Appellant, NARCUS WESLEY, (hereinafter referred to as "WESLEY"), hereby repeats and re-incorporates by reference by reference all issues raised in his Opening Brief herein. Failure to address any points alleged by the State in its Answering Brief is in no way an acceptance of those arguments or a concession of viability of the State's arguments. Rather, by this Reply Brief, Appellant is attempting to reiterate and re-enforce those errors of clear constitutional magnitude which in themselves mandate reversal of WESLEY's conviction. No issues previously raised by Appellant are withdrawn or waived.

II

NARCUS WESLEY WAS DEPRIVED OF HIS RIGHT TO CONFRONT DELARIAN WILSON ON THE INCRIMINATING STATEMENTS PRESENTED TO THE JURY

It is widely recognized that the right of confrontation is a basic trial right which cannot be waived for an accused by his counsel. Don v. Nix, 886 F. 2d 203, 207 (8th Cir 1989); see also Johnson v. State, 117 Nev. 153, 17 P. 3d 1008 (Nev. 2001). Despite the State's assertions, NARCUS WESLEY's right of confrontation was unilaterally waived by his counsel throughout his trial. This "trial strategy" was never discussed with WESLEY, and he never consented to that tactic.

Not only was Delarian Wilson's guilty plea and his statement to the police admitted without objection by WESLEY's trial counsel, but numerous statements attributed to Wilson were introduced to the jury without objection by WESLEY's counsel. Those statements clearly showed Wilson's guilt to the jury, and as Wilson was a named co-defendant, WESLEY's guilt was likewise shown to the jury. WESLEY could not, and did not, have the opportunity to cross-examine, question, or

present evidence as to the lack of veracity of those statements by Wilson.

The Arizona Supreme Court has recognized that "evidence of co-defendant's guilt is no more relevant when offered by accused on issues of guilt or innocence then when it is offered by the State on same issue and is properly excluded." State v. Corrales, 641 P. 2d 1315, 131 Ariz. 411 (1982) *(emphasis added)*. "Fairness during trial is not one sided and applies to both the Defendant and the State." Sampson v. State, 121 Nev. 820, 121 P. 3d 1255 (2005), at 121 Nev. 828. It is the duty of the Judge, in this case Judge Bixler to assure that the Defendant is given a fair trial, and this was not done in the instant case.

Although the State's Answering Brief repeatedly tried to rely on the fact that most of Wilson's statements were offered by defense counsel, that point is irrelevant to the instant case. As the Nevada Supreme Court has previously held, where the Defendant's fundamental right of confrontation is implicated, defense counsel may not waive it over the Defendant's objection. DeRosa v. Dist. Ct., 115 Nev. 225, 985 P. 2d. 157 (1999), *(emphasis added)*.

The State tries to infer that NARCUS WESLEY consented to the tactics of his legal counsel since "Appellant was present during this conversation between the parties and the court and did not manifest any disagreement." (Answering Brief, page 10, lines 2-3). Just how was the Appellant supposed to "manifest" his disagreement? Appellant was never questioned by the court whether he "manifested any disagreement." Moreover, the Defendant never made any statements to the court that indicated he was in anyway in agreement with, or willing to accept, these misguided trial tactics of his legal counsel.

III

NARCUS WESLEY WAS NEVER CANVASSED BY THE COURT TO DETERMINE HIS AGREEMENT, OR LACK THEREOF, OF TRIAL COUNSEL'S IMPROPER TRIAL "STRATEGY"

In Hernandez v. State, 194 P. 3d 1235 (Nev. 2008), the Nevada Supreme Court addressed the proper procedure when a defense strategy at trial includes a confession of guilt. As the Court therein stated, "At a minimum, the District Court should canvass the Defendant outside the presence

of the State and the jury to determine whether the Defendant understands the strategy behind conceding guilt or degree of guilt to the subject charges. Additionally, the District Court must inform the Defendant that conceding guilt relieves the State of its burden to prove an offense and that the Defendant has the right to challenge the State's evidence." *Id. at 1243 (emphasis added).*

There is no dispute that Mr. WESLEY was never canvassed by the court as to whether he understood and consented to the "strategy" of his trial counsel. In fact, Mr. WESLEY was never questioned by the court as to any trial "strategy" of his counsel. Certainly, Mr. WESLEY was never advised by the court of the State's burden to prove the offenses or of his right to challenge the State's evidence. The requirements enunciated by the Court in Hernandez, supra, were totally ignored by the trial court.

By presenting the guilty plea of his co-defendant, Delarian Wilson, to the jury, in which WESLEY's involvement in the crimes for which he was on trial for was conceded, WESLEY's guilt was admitted to the jury. It is recognized that a defendant's right to a fair trial embraces his right not to be convicted, in whole or in part, upon the guilty plea of his co-conspirators. Hall v. State, 109 P 3d 499, 205 Wy. 35 (2005). That is exactly what happened to WESLEY in the instant case.

It is interesting that the only argument to this issue raised by the State in its Answering Brief was that "this issue was not preserved by Appellant for Appeal and therefore should be summarily dismissed." (Answering Brief, page 10, lines 20-21; see also, page 12, lines 1-2). Such an argument is a red herring and does not fully explain the status of Nevada law. Not only was WESLEY not asked whether he objected to his counsel's trial "strategy", (see above), but it was unrealistic to expect his trial counsel to object to their own ill fated trial strategy. A timely objection to WESLEY's own trial counsel's strategy was impossible and was not legally necessary in the instant case.

As this Court has stated in Jones v. State, 110 Nev. 730, 877 P. 2d 1052 (1994), a post conviction evidentiary hearing on a claim of ineffective assistance of counsel was not necessary where counsel's actions were a matter of record, not disputed, and were per se improper. Moreover,

the Court may address plain error on issues of constitutional dimension sua sponte. Emmons v. State, 107 Nev. 53, 61, 807 P. 2d 718, 723 (1991), see also, Sullivan v. State, 115 Nev. 383, 990 P. 2d 1258 (1999).

Trial counsel's errors in the instant case were wide spread and were clearly prejudicial to WESLEY's interest. Trial counsel's errors included, but were not limited to, admitting to the jury in opening statement that the crimes for which WESLEY was on trial for did occur and were egregious, admitting that WESLEY was present for these crimes, failing to object to incriminating evidence against WESLEY which was not legally admissible, and including WESLEY in the activities of Delarean Wilson, who had plead guilty to charges which WESLEY was on trial for. Due to the actions, or lack of action, by his trial counsel, NARCUS WESLEY had no chance before the jury. As this Court has previously held, "the cumulative affects of multiple errors may violate a defendant's right to a fair trial even though the errors are harmless individually." Evans v. State, 117 Nev 609, 28 P. 3d 498 (2001).

IV

THE PRESENTMENT OF DELARIAN WILSON'S GUILTY PLEA AGREEMENT TO THE JURY WAS PER SE IMPROPER

In Johnson v. State, 117 Nev. 153, 17 P. 3d 1008 (2001), the Nevada Supreme Court found that a defense counsel's presentment of an insanity defense against the Defendant's express objections was per se improper. In reversing the jury's conviction of second degree murder with use of a deadly weapon, the Court stated that the error was not subject to harmless error analysis because it is a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the tactical process itself. *Id. at 160.* Likewise, in Jones v. State, supra, this Court reversed a murder conviction where defense counsel conceded their client's guilt to second degree murder in an attempt to avoid a first degree murder conviction. The Court found this action to be per se improper.

Moreover, in Walker v. State, 113 Nev. 853, 944 P. 2d 762 (1997), the defendant, through counsel, sought to admit statements of a co-defendant wherein the co-defendant admitted to stabbing

the victim in the case. In denying the admission of the co-defendant's change of plea statement, the trial court ruled the statement to be inadmissible hearsay. On Appeal, the Nevada Supreme Court affirmed the actions of the trial court stating "the District Court properly decided that the change of plea and penalty hearing statements were inadmissible." *Id. at 856.*

In its Answering Brief, the State never disputed the fact that "a guilty plea or conviction of a co-defendant may not be used as substantive evidence of another defendant's guilt." See People v. Brunner, 797 P. 2d 788 (Colo. App. 1990). Rather, the State argues that "since Appellant proferred this evidence, he should now be estopped from challenging it on Appeal just because its admission did not have the intended affect on the jury." (Answering Brief, page 12, lines 3-5).

In reality, WESLEY is not challenging the admission of Delarian Wilson's statements because they did not have the intended effect on the jury. WESLEY is challenging the admissions because they never should have been allowed to be presented to the jury. The statements were inadmissible hearsay, prejudicial to the interests of WESLEY, and were per se improper. WESLEY never consented to presenting of Wilson's statements to the jury, and Judge Bixler never should have allowed their admission before the jury.

V

THE IN COURT "IDENTIFICATION" OF WESLEY TO THE JURY WAS MANIFESTLY IMPROPER

NARCUS WESLEY was never identified conclusively by any witness. Rather, he was universally referred to as a "taller-skinnier African-American." WESLEY was the only African-American subjected to an in court identification by the witnesses, and it was only his body type which was identified before the jury.

In Bias v. State, 105 Nev. 869, 784 P. 2d 963 (1989), the Nevada Supreme Court addressed the issue of in court identification. As the Court therein explained, the test of reliability involves a two fold inquiry, (1) whether the procedure is unnecessarily suggestive, and (2) if so, whether under all the circumstances the identification is reliable despite an unnecessarily suggestive identification procedure.

In the instant case, the identification of WESLEY in court was unnecessarily suggestive. WESLEY was the only African-American subject to identification. No one was present for comparison to WESLEY. He was not identified as being "taller" than anyone, or "skinnier" than anyone. He was never seen by any of the witnesses. Although they all testified that the "taller-skinner African-American" had spoken, no identification of his voice was ever attempted. There was no identification of WESLEY by any witness prior to the in court "identification". As such, under all of these circumstances, the identification of WESLEY by the witnesses in court was not reliable and could not be used as the basis for a conviction of WESLEY.

VI

THE SENTENCE IMPOSED UPON WESLEY WAS UNREASONABLE UNDER ALL CIRCUMSTANCES

In reality, WESLEY was punished for his election to seek a jury trial to establish his innocence. It is undisputed by all witnesses, the trial judge, and even the prosecuting attorneys that the "taller-skinner African-American" was a much smaller player in these crimes than was Delarian Wilson. Wilson took a plea bargain offered by the State and entered a plea to three counts of an eighteen count information. WESLEY, expecting a fair trial without his attorneys undermining his innocence, exercised his constitutional right to go to trial and due to his trial counsel's unagreed to errors, WESLEY was convicted to all eighteen counts. As a result of the jury verdicts, WESLEY, who had no prior criminal record, is slated to spend the rest of his life in prison. Delarian Wilson, the admitted major player in these crimes will spend less time in prison than will WESLEY.

In response, the State claims the WESLEY's sentence was proper because it fell within the prescribed statutory range. (Answering Brief, page 24, lines 9-10). While it is true that the sentence imposed were within the statutory range, under all circumstances involved, the sentences were cumulative and excessive. See Braunstern v. State, 118 Nev. 68, 40 P. 3d 413 (2002); Crowley v. State, 120 Nev. 38, 83 P. 3d 282 (2004).

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VII

THE DENIAL OF WESLEY'S MOTION TO SUPPRESS WAS IN ERROR SINCE HE WAS DENIED ACCESS TO LEGAL COUNSEL BEFORE QUESTIONING

It is undisputed that the search warrant which led to the arrest and questioning of NARCUS WESLEY was based upon incorrect information. The arresting officer either knew, or should have known of that fact before detaining and questioning Mr. WESLEY. (See A.A. page 169-170). Nonetheless, Mr. WESLEY was detained and questioned by the police despite the fact that his father, Narziez Wesley requested to call the family attorney before anyone talked to the police. (AA., page 226-232). Mr. WESLEY heard that request by his father and heard it refused by the police. Mr. WESLEY was then read his Miranda Rights and questioned by the police. However, Mr. WESLEY was never asked if he waived his Miranda Rights. (AA, page 199). In the hallmark case of Miranda v. Arizona, 384, U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (1966), the United States Supreme Court made it clear that as soon as an accused indicates by any means his election to remain silent or invoke his right to counsel, the police must respect his choice *(emphasis added)*. For reasons unknown, Narziez Wesley's request for an attorney before anybody was questioned by the police was refused.

In its Answering Brief, the State blindly makes the statement that "Appellant's father cannot invoke his Miranda Rights vicariously and therefore this claim is without merit and must be denied." (Answering Brief page 18, lines 22-23). The State offers no citation to support this claim. In fact, this writer can find no support in the State of Nevada to show that a child's father's request to have an attorney present before anyone in his house is questioned by the police can be ignored.

Obviously, once NARCUS WESLEY heard his father's request for an attorney before anyone was questioned was ignored, NARCUS WESLEY must have felt that any request by *him* to have an attorney present would be likewise ignored. Certainly, the spirit and intent of Miranda was ignored in this case, and any statements made by NARCUS WESLEY should have been suppressed by the court.

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VIII

CONCLUSION

Reversal of WESLEY's April 18, 2008, conviction is mandated under Nevada and Federal Constitutional Law. WESLEY was convicted as a direct result of the improper actions by his trial counsel and the judge. The jury was improperly advised of the guilty plea statements and incriminating admissions of WESLEY's co-defendant, Delarian Wilson.

WESLEY was not advised of the improper trial "strategies" of his trial counsel, and WESLEY was never afforded the opportunity to voice his disagreement with those "strategies". As the Untied States Supreme Court stated in the epic case of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), "the right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id. at 422 U.S. 819-20, 95 S. Ct. 2525.* Moreover, this Honorable Court has previously declared that "courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights. . . . . Presuming waiver from a silent record is impermissible." Raquepaw v. State, 108 Nev. 1020, 1022, 843 P. 2d 364 (1992).

Therefore, either individually or cumulatively, the gross errors which occurred in NARCUS WESLEY's trial mandate the reversal of his conviction and the remand of his case for a new trial.

DATED this 4th day of December, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. In understand that I may be subject to sanctions in the event that the accompanying brief is not in confirmative with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of December, 2009.

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 4 day of December, 2009, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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