IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman

ROBERT YBARRA, JR.,) Case No. 53053
)
Appellant,)
)
vs.)
)
E.K. McDANIEL, Warden, et al.,)
)
Respondents.)

OPPOSITION TO MOTION FOR REMAND AND

MOTION TO STRIKE

Comes now, Respondents, by and through its counsel, White Pine County District Attorney, Richard W. Sears, Esq., and moves this Court for its order denying Appellant's motion to remand and striking Appellant's motion, on the basis of the Memorandum of Points and Authorities attached, and all the pleadings and evidence contained in the court file.

Date: September 07, 2010.

RICHARD W. SEARS, ESQ.
DISTRICT ATTORNEY

SIGNED: /s/ Stephen J. Bishop
Deputy District Attorney 9761
801 Clark Street #3
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Docket 52167 Document 2010-22797

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant was convicted of the brutal beating, rape and burning murder of Nancy Griffith. The jury sentenced Appellant to death. This Court upheld both the conviction and the sentence on direct appeal. Appellant filed multiple collateral attacks on his conviction and sentence. All of these were denied.

In 2003, Appellant filed a post-conviction petition for writ of habeas corpus. In this petition, he argued his death sentence was invalid and claimed he was mentally retarded. The District Court, after considering the petition, denied relief. Appellant filed an appeal. This Court affirmed the denial in all respects, except one: this Court remanded the matter back to the District Court for an evidentiary hearing on Appellant's claims of mental retardation.

The District Court then conducted an extensive evidentiary hearing. During this hearing, the District Court reviewed, heard and considered documentary reports and testimony from multiple experts, including neuropsychologist, David Schmidt, Ph.D. Dr. Schmidt testified that Appellant was mentally retarded. The State also presented expert testimony contradicting Dr. Schmidt's claims, including records and records of expert testing done on Ybarra from 1981 showing Ybarra was not mentally retarded. The District Court rejected Dr. Schmidt's testimony and concluded Appellant failed to prove he was mentally retarded, as provided by Nevada law. Appellant filed this appeal.

The appeal was fully briefed and the case was set for oral argument on September 1, 2010. On August 30, 2010 at approximately 3:00 p.m., Appellant filed the instant motion for remand.

First, the State would note that Appellant failed to cite any case law, statute, court rule or any other legal authority that allows this case to be remanded by motion. Such failure, in and of itself, constitutes grounds for denial of his motion. *See* NRAP 27(a)(2). Appellant cites no authority to support his motion, because none exists. In fact, all applicable authority weighs against the granting of his motion.

Appellant's motion attempts to supplement the hearing record months after an adverse

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decision has issued. No appellate rule, however, permits supplementation of the record in the manner requested by Appellant. The only procedure to modify the record contemplated under the appellate rules is set forth in NRAP 10(c). NRAP 10(c) is, however, entirely inapplicable to this motion, because there is no question as to what occurred in the District Court. The record is entirely clear. Further, Appellant's own motion is based on the fact that this evidence was not presented in the District Court and NRAP 10 does not allow the record to be supplemented with new evidence. *See United States v. Walker*, 601 F.2d 1051, 1054 (9th Cir. 1979)(the federal rule equivalent of NRAP 10(c) "cannot be used to add or enlarge the record on appeal which was not before the district court"). This Court adopted the holding in *Walker* in *Asusta v. State*, Case No. 53053, in its Order Denying Motions, filed May 18, 2010.

Federal Courts have recognized an appellate court's authority to remand cases in certain circumstances. *See FTC v. Enforma Natural Prods.*, 362 F.3d 1204, 1212 (9th Cir. 2004); *Lumbermen's Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18-19 (9th Cir. 1980). Such a remand, however, is based on the insufficiency of the lower court's factual findings, not on an Appellant's failure to present evidence.

In fact, Nevada case-law suggests that the remand sought by Appellant is disfavored. In *Garcia v. Scolari's Food & Drug*, 125 Nev.Adv.Rep. 6, ___, 200 P.3d 514, 519 (2009), this Court held: "[t]he fact that a party's attorney makes what could be characterized as a poor decision with regard to what evidence to present… will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued." Further, such remand is intended to be used in those cases "where there is no evidence on the record to decide the issue." *See General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995). While it is true that *Garcia* and *Jackson* involved judicial review of the decision of an administrative agency, the Court's rationale in denying Garcia's request to remand is analogous and applicable to this case. This is not a case, like *Jackson*, where there is insufficient evidence in the record to decide this appeal; there is sufficient evidence for this Court to

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decide the matter. Rather, this is a case, like *Garcia*, where Appellant failed to present certain evidence, received an unfavorable result and now wants to present what Appellant claims is previously omitted evidence. In essence, Appellant lost in the District Court and now wants a "do-over." While such a maneuver may be appropriate for a grammar school game of kickball, it cannot be countenanced by any court of law. To hold otherwise would permit remands for new evidence in every case where the non-prevailing party was dissatisfied.

Further, filing a motion to remand, less than 48-hours prior to oral arguments patently is improper. Appellant cited Dr. Schmidt's death as the rationale for the last minute motion, but Dr. Schmidt died, at least a month prior to the filing of Appellant's motion. Such a delay in filing a motion is unreasonable. Appellant knows the State is allotted seven days to respond to all motions, but nonetheless waited until only two days prior to oral argument to file this motion. The State would submit the timing Appellant's motion suggests an improper attempt to delay the scheduled oral arguments.

But, even assuming Appellant's failure to cite any authority in support of his motion and his delay do not constitute grounds for denial and assuming that NRAP 10 somehow allows supplementation of the record, Appellant has failed to articulate sufficient grounds to remand this matter.

It appears from the motion that Appellant wishes to supplement the record with the testimony of Dr. Mack. Appellant claims that because Dr. Schmidt died, such supplementation is necessary. He also claims that the District Court "was simply wrong" in its conclusion on the Flynn Effect. Neither of these claims constitute any ground to remand this case.

First, Appellant argues that Dr. Schmidt's death requires the matter be remanded to permit Dr. Mack to provide testimony. Such a claim is without merit. If Dr. Mack's testimony is somehow different from Dr. Schmidt's testimony, then Appellant should have presented it at the evidentiary hearing. If Dr. Mack's testimony is the same as Dr. Schmidt's testimony, then any remanding this

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matter for further evidentiary proceedings will do nothing but produce duplicative and redundant testimony. Further, there is no reason that Dr. Schmidt's death justifies remanding the case. Dr. Schmidt's testimony was preserved in both audio and visual format and was also transcribed. As such, that evidence is readily available for review by this Court, as is done in every other case before this Court. Based on Appellant's argument, all cases would be subject to remand if a witness dies or otherwise becomes unavailable after giving testimony. Such a conclusion is patently unreasonable. The very reason proceedings are recorded and transcribed is to permit this Court to review the proceedings without the need for live testimony.

Appellant's motion for remand is nothing more than an attempt to have a second bite at the proverbial apple. In essence, Appellant is asking this Court to allow him a second opportunity to present evidence, which he could have already presented. Appellant did not, however, deem Dr. Mack's testimony important enough to present at the evidentiary hearing. Instead, it is only now, nearly two years later that Appellant has decided he wishes to present Dr. Mack's testimony.[1] All of the evidence, which Appellant now seeks to present on remand, was readily available at the time of the evidentiary hearing. If this evidence was truly relevant to Appellant's claims, then he should have presented it at the evidentiary hearing.

Appellant's second proffered ground for is that the District Court was wrong in its rejection of Appellant's claims based on the Flynn Effect. Every appeal claims that the District Court was, in some manner, wrong. Thus, accepting Appellant's argument as valid, then every single appeal would be subject to remand, before the record has even been reviewed by this Court. Such a conclusion is untenable. Appellant's claim that the District Court was wrong, should be reviewed by this Court, in the normal course of the appeal and in light of everything presented to the District Court in the record.

[1] The State would note that Appellant's tactic can reasonably be interpreted as the current record is insufficient to support his argument on appeal, an assertion already made in Respondent's brief and now supported by Appellant.

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It is notable that Appellant has never claimed that this newly proffered evidence was unavailable at the time of the evidentiary hearing. Nor does Appellant suggest that he was somehow precluded from presenting this evidence at the hearing. Rather, Appellant had sufficient opportunity to present evidence supporting his claims and presented expert testimony at the evidentiary hearing before the District Court. The evidentiary hearing is just that: a hearing where Appellant presents evidence. Appellant should have presented this evidence at the time allotted for presentation of the evidence; not two years later on appeal on the eve of oral argument.

The State also requests that this Court strike the motion for remand. The motion contains numerous factual assertions, which are not supported by the record and attempts to taint this Court's review, by placing, before this Court, prejudicial factual assertions not contained in the record and without allowing the State adequate time to contest the assertion. It is improper to refer to factual matters outside the record. *See State Dep't. of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 871 P.2d 331 (1994). This Court will not consider evidence not appearing in the record on appeal. *See Id* (citing *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 635 P.2d 276 (1981)) Thus, the motion should be stricken. Further, Appellant's motion, being filed less than 48 hours before oral argument is untimely and should also be stricken.

Appellant's motion is without merit, contains improper factual assertions not supported by the record and is untimely. Accordingly, the motion should be denied and/or stricken.

Date: September 07, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 07th day of September 2010. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DATED this 07th day of September, 2010.

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