ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION OF A UNIFORM RULE GOVERNING TELEPHONIC AND AUDIOVISUAL PARTICIPATION IN CIVIL, CRIMINAL AND FAMILY LAW CASE IN ALL COURT IN THE STATE OF NEVADA

Plaintiff,

ADKT No. 424.

FILED

JUL 27 2009

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This Court has permitted comments regarding a proposed change to Rule 3 which would allow testimony via video teleconferencing in criminal cases provided both sides stipulate to the teleconferencing. The proposed change has some merit but, as a practical matter, a criminal defense attorney will never stipulate to teleconferencing testimony. As such, the amendment is meaningless. Instead, the amendment should read as follows:

Rule 3. Application. This rule applies to all civil and criminal cases.

Such an amendment will permit the testimony of a witness to be made via teleconference if either party seeks to use such testimony. The amendment would particularly be valuable when an expert witness, such as a lab technician, must testify.

The proposed rule change would allow teleconferencing if both sides agree to allow such a procedure. A criminal defendant has no incentive to agree to teleconferencing testimony. A portion of any criminal defense is to make it as difficult and expensive as possible for the state to convict the defendant. One way to do that is to force the State to spend large sums of money bringing witnesses to court. This defense tactic would be unavailable if the defense stipulated to teleconferencing testimony. Put simply, a criminal defendant has nothing to gain by agreeing to teleconferencing.

The United States Supreme Court has recognized that testimony via teleconferencing does not violate the Confrontation Clause to the United States Constitution. Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157 (1990). Reducing the cost of bringing witnesses to

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court is certainly a legitimate function of any court. State v. Kent, 918 A. 2d 626, 642-32 (NJ Super. 2007):

> Consistent with those legislative aims, we believe it is appropriate to take into account the potential hardship upon third-party witnesses that may result from enforcing defendants' rights of confrontation in the post- Crawford era.
>
> The judiciary has a recognized duty to be protective of third-party witnesses who may be called upon to recount their personal knowledge in court proceedings. For example, N.J.R.E. 611, like its federal analogue F.R.E. 611, vests judges with authority to protect witnesses from "harassment," and also to "avoid needless consumption of time." N.J.R.E. 611. See, e.g., United States v. Sorrentino, 726 F.2d 876, 884-85 (1st Cir.1984) (upholding a trial judge's limitations upon defense counsel's cross-examination of a witness because it was needlessly cumulative and harassing). We also proscribe attorney conduct that is frivolous or designed to harass others. See R. 1:4-8. We further assure that fact witnesses called to court are reimbursed, albeit in modest amounts, for their travel expenses. See N.J.S.A. 22A:1-4.
>
> We therefore do not wish the administration of the confrontation rights of defendants charged with DWI violations to impose undue logistical or personal burdens upon the law enforcement personnel and third-party witnesses who are summoned to testify concerning the contents of their hearsay declarations. To the extent feasible, the time chemists spend away from their laboratories and nurses spend away from their patients should be minimized. Toward that end, we discourage the pro forma insistence that such persons appear at DWI trials to vouch for the contents of their reports, if there are no bona fide subject matters in dispute on which defense counsel intends to cross-examine them. (
>
> Emphasis added).

In DUI cases, there is typically one person who analyzed the defendant's blood to determine its alcohol content. If the defendant chooses to take a breath test, there is typically one person who calibrated the breath machine and prepared the simulator solution used to verify the breath machine was working properly. That one person almost always has multiple court appearance on the same day and time. For example, on July 9, 2009, Dana Russell, the person who calibrates the breath machine, had simultaneous court appearances in the US District Court, the Eighth Judicial District Court, and the Las Vegas Justice Court. Ms. Russell can only be in one place at a time. The practical result of those appearances was that two of the defendant's had their cases continued and Ms. Russell appeared in one court.

Ms. Russell's July 9, 2009 court schedule is not an isolated incident. When cases have to be continued because the same witness cannot be in two places at once, the taxpayers must bear the financial burden of resetting the trial, the courts must bear the burden of an

over clogged trial schedule and the defendant and State must bear the burden of resetting the trial. All of this expense could be avoided if Ms. Russell could testify via teleconference from her laboratory.

A defendant has the right to confront the witnesses against him. That right can be satisfied if the witness testifies via teleconference. The finder of fact can watch the witness testify as can all participants to the trial. Allowing teleconferencing will protect both the witness and the defendant.

If need be limitations can be placed on teleconferencing testimony. For example, in DUI cases, the teleconferencing can be limited to those witnesses described in NRS 50.315-325. Another limit could be to only allow teleconferencing if the defendant is charged with a misdemeanor violation of NRS 484.379.

CONCLUSION

The proposed rule change would not accomplish anything because it is highly unlikely that a defendant would stipulate to testimony via teleconferencing. It is far more sensible to allow teleconferencing testimony if such testimony is sought by either the State or the defendant. Such a system of teleconferencing testimony will protect both a criminal defendant and the witnesses who must appear at his trail.

DATED this 23rd day of July, 2009.

Respectfully submitted,

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