

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DUVAL MCCARTY,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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CASE NO: 58101

**SUPPLEMENTAL RESPONSE TO NEW CLAIM
RAISED IN REPLY AND AT ORAL ARGUMENT**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, RYAN J. MACDONALD, and submits this Supplemental Response. This motion is based on the following memorandum and all papers and pleadings on file herein.

Dated this 2nd day of July, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Ryan J. MacDonald
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Attorney for Respondent

SUPPLEMENTAL RESPONSE

In Appellant Jason McCarty's Reply Brief, he raises a new claim that the State did not submit McCarty's case to a Magistrate for a 48-hour probable cause evaluation and additionally asserts error based upon "Mr. McCarty's lack of presentment to a magistrate." ARB 2-5. Although McCarty styles this as simply an unexplored facet of the suppression-error claim he raised in his Opening Brief, it is important to note that this claim was not fairly raised therein. Also, it was not presented to the district court. *See* 11 ROA 2373-75. However, because this issue was the topic of discussion at oral argument despite its first appearance in a Reply Brief, the State will attempt to clear some of the confusion with the following brief supplemental response.

McCarty Was Afforded All Required Post-Arrest Procedural Protections

The practice of the Justice Courts in Clark County is to conduct separate probable cause determinations and first appearances before a Magistrate. The probable cause determination is a Constitutional requirement. The first appearance before a Magistrate is a statutory requirement. The reasons for each procedural step and the rules which apply to each step are different. In this case, McCarty was arrested on May 25, 2006, and a probable cause determination was conducted by Justice of the Peace Burr on May 27, 2006. 1 ROA 145. No "presentment" to a Magistrate is required at that stage. McCarty then had his first appearance in front

of Judge Burr on May 30, 2006. *Id.* A Criminal Complaint was then filed and McCarty was arraigned on June 7, 2006. 1 ROA 74.

The 48-hour probable-cause determination is based upon the Fourth Amendment. Its purpose is to ensure that detentions resulting from a warrantless arrest are justified. *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *County of Riverside v. McLaughlin*, the “prompt” standard in *Gerstein* was clarified to mean that a probable-cause determination must be made within 48-hours absent “a bona fide emergency or other extraordinary circumstance.” 500 U.S. 44, 57 (1991).

The United States Supreme Court has not set a constitutional limit on detaining an arrested person after probable cause has been determined. In *Gerstein*, the matter before the Court was a Florida statute that allowed an arrested person to be held without a probable cause determination for up to 30 days. The Court, in balancing the State’s interest in protecting the public with the individual’s interest in liberty, held that the statute was unconstitutional only because of the delay in verifying probable cause. However, the Court did not deem the 30-day detention itself unconstitutional so long as the arrested person received a probable cause hearing within 48 hours.

Furthermore, *Gerstein* deferred to the individual States to decide how to review probable cause. As the Court later clarified in *McLaughlin*, “the Fourth Amendment requires every State to provide prompt determinations of probable

cause, but . . . the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways.” *Id.* at 54.

The manner in which the Clark County courts currently conduct 48-hour probable cause determinations clearly meets the *Gerstein* standard.

However, a separate issue concerns an arrested person’s first appearance before a Magistrate. The law governing this procedural event is NRS 171.178, which reads, in relevant part:

1. [A] peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.
3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:
 - (a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
 - (b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.
4. When a person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith.

The purpose of NRS 171.178 is to prevent “all the evil implications of secret interrogation of persons accused of crime.” *Sheriff, Clark County v. Berman*, 99 Nev. 102, 105-06 (1983). In other words, NRS 171.178 seeks to avert secret interrogations of those accused of committing crimes. Moreover, the promptness under NRS 171.178 aids to inform the accused of their privilege against self-

incrimination. *Brown v. Justice Court*, 83 Nev. 272, 276 (1967).

While NRS 171.178 lays out certain guidelines, Nevada case law supports the presumption that there is no established constitutional limitation for detaining arrested persons after probable cause has been determined. *State v. Powell*, 113 Nev. 41 (1997).

The *Powell* decision is the result of a remand from the United States Supreme Court. This Court originally held, “The *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar [as] it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours.” *Powell v. State*, 108 Nev. 700, 705 (1992). In vacating and remanding the original *Powell* opinion, the United States Supreme Court explained that this Court was misguided in its interpretation of *McLaughlin*. *Nevada v. Powell*, 511 U.S. 79 (1994). The High Court held that judicial probable cause must be determined within 48 hours, but the 72-hour rule is a statutorily created guideline that is constitutional so long as probable cause is determined in a timely manner. On remand, this Court modified its original opinion and held that NRS 171.178(3) is only “unconstitutional in so far as it permits a probable cause determination up to 72 hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours.” 113 Nev., at 43. Thus, this Court noticeably removed the language that a 72-hour initial appearance is

unconstitutional.

CONCLUSION

Although the pertinent transcripts are not available for this Court, McCarty may only complain of plain error based on the lack of objection in the court below. On plain error review, the record, as reflected in the justice court minutes cited above, clearly reflect that McCarty's initial detention was conducted consonant with all applicable constitutional and statutory requirements. Accordingly, no plain error as to this issues exists.

Dated this 2nd day of July, 2014.

Respectfully submitted,

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BY */s/ Ryan J. MacDonald*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 2, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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RJM//ed