

● ORIGINAL ●

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 36991

FILED

JUL 30 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

APPLICATION FOR RECONSIDERATION AND MOTION FOR
LIFTING OF SANCTIONS IMPOSED

Comes now, LEE-ELIZABETH McMAHON, Deputy Special Public Defender, counsel for Appellant, DONTE JOHNSON, and moves this Honorable Court to reconsider its Order of July 18, 2001, and lift the sanction imposed therein.

This Application and Motion is based upon the Affidavits attached hereto.

DATED this 25th day of July, 2001.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By *[Signature]*

LEE-ELIZABETH McMAHON
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #1765
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316
(702) 455-6265

RECEIVED

JUL 30 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

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A F F I D A V I T

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

LEE-ELIZABETH McMAHON, having been first duly sworn, and upon information and belief, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada and the Deputy Special Public Defender who has been assigned to represent Donte Johnson on his appeal currently pending before this Honorable Court.

2. That yesterday, affiant met with Philip J. Kohn, Special Public Defender and affiant's administrator in regard to the Order of this Court issued July 18, 2001, wherein sanctions were imposed upon Deputy Special Public Defender, Dayvid J. Figler.

3. That affiant was informed by Kohn that she had been in error, that Dayvid J. Figler was not assigned to the Johnson appeal; that, in fact, your affiant had been.

4. That affiant, who had not done the docketing statement, truly believed that she was not counsel for Johnson, and deeply apologizes to this Court for representations regarding same.

5. That affiant truly thought that Mr. Figler was attorney of record when she filed the Application for Extension of Time dated February 11, 2001 in Mr. Figler's absence.

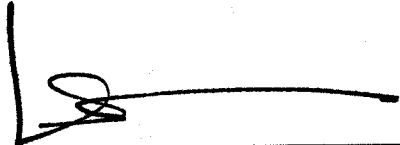
6. Further, when affiant filed the Application for Extension of Time dated May 15, 2001, she made her representations based upon her belief that she was not counsel of record.

7. That had affiant understood that she was counsel for Mr. Johnson, she would have begun work on same upon receipt of the record in December, 2000.

1 8. Affiant's misunderstanding, resultant failure to
2 process the appeal, and consequent representations to this Court
3 placed Mr. Figler in an embarrassing position and caused him harm.

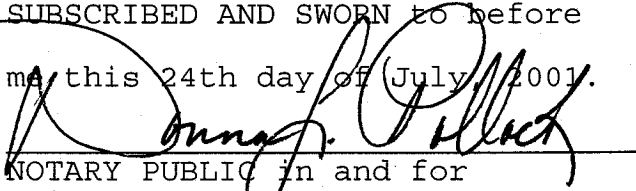
4 9. That it is not reasonable that Mr. Figler be sanctioned
5 and penalized for affiant's error.

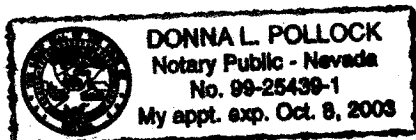
6 10. Wherefore, affiant prays that this Honorable Court will
7 reconsider its order and lift the sanctions imposed upon Mr. Figler
8 due to your affiant's error.

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LEE-ELIZABETH McMAHON

12 SUBSCRIBED AND SWORN to before
13 me this 24th day of July 2001.

14 
15 NOTARY PUBLIC in and for
16 said County and State.



A F F I D A V I T

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAYVID J. FIGLER, having been first duly sworn, and upon information and belief, deposes and states:

1. That I am an attorney duly licensed to practice law in the State of Nevada and a Deputy Special Public Defender with the Clark County Special Public Defender's Office.

2. That along with lead counsel, Joseph S. Sciscento, I represented Defendant (now Appellant) Donte Johnson at trial in the district court. Following Mr. Johnson's conviction and entry of his death sentence, I filed a Notice of Appeal and docketing statement on his behalf. The Notice of Appeal was filed on or about November 8, 2000.

3. That shortly after the Notice of Appeal was filed, I met with Mr. Sciscento, Special Public Defender Philip J. Kohn and Lee-Elizabeth McMahon. The purpose of this meeting was to discuss the potential appellate issues in this case. No other cases were discussed at this meeting. It was my understanding that Mr. Kohn assigned this case to Ms. McMahon.

4. That shortly after the Notice of Appeal was filed, Ms. McMahon was given a SCR 250 Statement of Trial Counsel which was prepared by Mr. Sciscento.

5. That neither Mr. Sciscento or I prepared a substitution of attorneys form to indicate that this case had been transferred to Ms. McMahon. It is not the custom of our office to do so for cases which are maintained within the office.

6. That it is my understanding that when the Record on

1 Appeal was received in our office, it was placed in Ms. McMahon's
2 office. I was never provided with a copy of the Record on Appeal.

3 7. That on February 21, 2001, Ms. McMahon filed an
4 Application for an Extension of Time for the filing of the Opening
5 Brief. She identified herself as the attorney of record both in the
6 application itself and in her affidavit which accompanied the
7 application. I was unaware that Ms. McMahon had filed this
8 application. Because I was not assigned to this case, I was not given
9 a copy of this Court's briefing schedule or other documents concerning
10 this appeal.

11 8. That I am now aware that this Court ordered the Opening
12 Brief to be filed by April 18, 2001. To date, I have not seen a copy
13 of this Order and I am certain that I did not personally receive a
14 copy of this Order when it was entered in February, 2001.

15 9. That I am now aware that this Court entered an Order on
16 May 9, 2001, directing "Appellant" to file the Opening Brief within
17 ten (10) days of the date of the order or show cause why sanctions
18 should not be imposed against "counsel for appellant." I did not
19 personally receive a copy of this order in May, 2001, and I was
20 unaware that this Order had been entered by the Court. It is my
21 belief that if this Order was sent to our office, it would have been
22 given to Ms. McMahon because she was the attorney assigned to this
23 case.

24 10. That I am now aware that on May 17, 2001, Ms. McMahon
25 filed a second Application for Extension of Time with this Court. In
26 her affidavit which accompanied the application, Ms. McMahon noted
27 that she received the order of this Court addressed to Dayvid Figler,
28 which was dated May 9, 2001. Although it appears that this Court's

1 order was in fact addressed to me on the envelope, I did not
2 personally receive the order. I believe that Ms. McMahon's statement
3 in her affidavit reflects the fact that she is the attorney in our
4 office who received the documents from this Court concerning this
5 case.

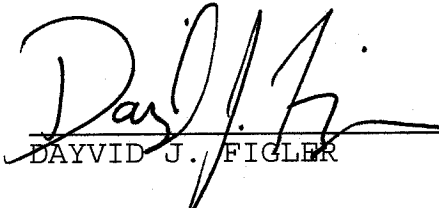
6 11. That Ms. McMahon further stated in her affidavit that
7 she "was not assigned the direct appeal herein" and that she "acquired
8 same by default when Dayvid Figler, who was assigned the case on
9 direct appeal had not begun work on same." I believe this statement
10 is inaccurate. I was never assigned to this direct appeal. Ms.
11 McMahon acquired this case because she is the attorney in our office
12 who has primary responsibility for appeals.

13 12. That Ms. McMahon stated in her affidavit that she met
14 with Mr. Kohn and requested that she not be required to be appellate
15 counsel in this case because of her case load, and that I said I could
16 not do the appeal. I believe that this declaration supports the fact
17 that I was not assigned to this appeal. Had I been assigned to this
18 appeal, there would have been no reason for Ms. McMahon to request
19 that she be relieved of responsibility for the appeal or that I be
20 assigned to it. My memory of this meeting was that sometime in May,
21 2001, Ms. McMahon requested that her overall caseload be reduced and
22 specifically that she be relieved of responsibility in this case and
23 that I be assigned to do this appeal. Mr. Kohn called me into his
24 office. Ms. McMahon and Daren Richards were also present. I
25 explained that I could not take on this appeal because of my own
26 caseload (which consisted of a few appeals and several trial cases).
27 As a result of this meeting, Ms. McMahon retained this appeal, but
28 other cases were reassigned to other attorneys in the office.

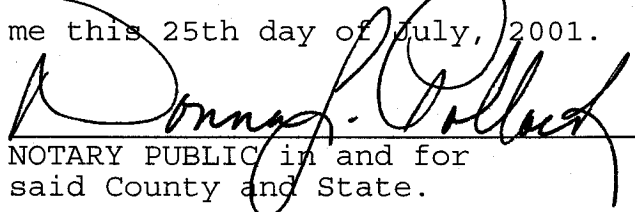
1 13. That in her affidavit, Ms. McMahon states that she was
2 "not unmindful that the Opening Brief was due before February 19,
3 2001, but that was not your affiant's responsibility, but that of Mr.
4 Figler." Again, I believe this statement reflects the fact that Ms.
5 McMahon was assigned to this appeal. Unlike Ms. McMahon, I was not
6 aware that the Opening Brief was due in February, 2001. Moreover,
7 this statement is directly contrary to Ms. McMahon statement in her
8 February 2001 affidavit, in which she declared that she was assigned
9 to this case.

10 14. That prior to this Court's Order of July 18, 2001, I
11 had not seen any of Ms. McMahon's affidavits or motions in this
12 appeal. I had no knowledge of the fact that she made representations
13 to this Court that I had been assigned to this appeal.

14 15. That on July 19, 2001, I received a copy of this
15 Court's Order imposing sanctions against me. This is when I first
16 learned of the prior Orders by this Court. This is also the first
17 time that I learned that Ms. McMahon made representations that she
18 believed that I was assigned to this appeal. Had I known of this
19 Court's Orders, I would have responded in a timely fashion and would
20 have informed this Court of the information provided in this
21 Affidavit.

22
23 
DAYVID J. FIGLER

24 SUBSCRIBED AND SWORN to before
25 me this 25th day of July, 2001.

26 
27 NOTARY PUBLIC in and for
28 said County and State.

1 RECEIPT OF A COPY of the foregoing Application for
2 Reconsideration and Motion for Lifting of Sanctions Imposed is hereby
3 acknowledged this ^{26th} day of July, 2001.

4 STEWART L. BELL
5 CLARK COUNTY DISTRICT ATTORNEY

6 By Margie English
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