

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,

Petitioner,

VS

THE STATE OF NEVADA,

Respondent.

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Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 64221

MOTION FOR JUDICIAL NOTICE OR LIMITED REMAND

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Motion to for Judicial Notice or Limited Remand. This motion is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 10th day of December, 2014.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

ARGUMENT

The State has not made any material misrepresentations of fact. Counsel for Evaristo Garcia (Appellant) exploits a gap in the record regarding the common Justice Court practice of filling the jury box with in-custody defendants in order to suggest that the State is lying to this Court. The failure of the record to contain the undisputable fact that the jury box had other defendants in it can be corrected through judicial notice or limited remand.

Appellant accuses Respondent of “making two obviously incorrect statements of fact” that are relevant to the adjudication of this appeal. (Appellant’s Reply Brief, filed December 9, 2014). The second of his complaints is that “THERE WAS NEVER A FINDING THAT ‘PUROS LOCOS’ WAS A GANG AND THE STATE NEVER HAD RELIABLE INFORMATION THAT EVARISTO GARCIA WAS IN A GANG.” *Id.* at 4 (capitalization in original). Appellant’s contention regarding factual misrepresentations on this issue reads more as a rebuttal argument than a demonstration that the State misrepresented facts to this Court. The State made the argument it did in good faith and did not make factual misrepresentations. Regardless, the record speaks for itself and this Court can determine which conclusions from the facts are correct.

However, Appellant also complains that “THERE WERE NO OTHER PEOPLE IN THE JURY BOX WHEN MS. GAMBOA SAW THE DEFENDANT

NOR DID SHE IDENTIFY HIM WHILE SITTING IN THE JURY BOX WITH OTHER DEFENDANTS.” Id. at 1 (capitalization in original). Appellant is correct when he points out that “it has *never* been established that there were ‘other in-custody defendants’ in the jury box and the Court never ruled that there were other in-custody defendants’ in the jury box.” Id. at 2 (emphasis in original). However, the record does not need to state the obvious for this Court to know the truth of the matter.

Melissa Gamboa (Gamboa) testified at the preliminary hearing regarding her identification of Appellant in the jury box:

Q. When you came into court earlier today, before you testified, did you recognize the defendant at that time?

A. Yes.

Q. And was he sitting in the same place that he’s sitting now?

A. No.

Q. Where was he sitting?

A. Right there.

MS. JIMENEZ: And, for the record, Judge, she’s pointed toward the jury box.

BY MS. JIMENEZ:

Q. In the first or second row?

A. The first row.

Q. Can you saw which seat he was in?

A. Either the first or second.

Q. And you said that you didn’t see Mr. Terry, the defense attorney, talking to him?

A. No, I didn’t.

Q. Did anybody tell you who the defendant was?

A. No.

Q. Did anybody tell you to pick that person?

A. No.

Appellant's Appendix (AA), Volume 1, page 66. Clearly implicit in this series of questions and answers was the idea that there were other people in the box.

At the October 30, 2012, motions hearing, the prosecutor argued the obvious reality that Appellant was not the only person in the box when Gamboa identified him:

Now, with respect to her in-Court identification, when she first recognized the defendant, he was not sitting at defense table. He was nowhere near Mr. Terry. It was prior to the Preliminary Hearing happening. She peeked through the window, he was sitting in the in-custody box with everybody else.

2 AA 249.

Recognizing the reality of Justice Court practice, the District Court relied upon the belief that there were other defendants in the box:

She testified under oath at a prelim that she recognized him while he was sitting in the box. Nobody had talked to her. She recognized him.

2 AA 253. Notably, Appellant was represented by the same attorney at the October 30, 2012, hearing that currently advocates for him on appeal and counsel did not challenge or dispute the prosecutor's statement or the Court's implicit conclusion that there were other defendants in the box.

Counsel did not dispute this fact because *anyone* who has practiced before Justice Court is well aware that the box is *always* filled with in-custody defendants. This Court may take judicial notice of facts that may be verified from a reliable

source such that their accuracy may not be reasonably questioned. NRS 147.130; Mack v. Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2006). Indeed, the justices of this Court may rely upon their own experience in order to take judicial notice. Alternatively, the blatantly obvious fact that Appellant was not the only person in the box can be established through a limited remand. Ryan's Express Trans. Services, Inc. v. Amador Stage Lines, Inc., 128 Nev. ___, ___, 279 P.3d 166, 172-73 (2012).

Appellant cannot seriously dispute that the box is filled with in-custody defendants during Justice Court calendars. The State submits that this fact is suitable for judicial notice. However, if this Court wishes to indulge Appellant's desire to force the judicial system to conclusively establish a fact that is beyond dispute, the State requests a limited remand so that an evidentiary hearing can be held to establish that Appellant was not alone in the box.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court take judicial notice that Appellant was not alone in the box or remand so the lower court can determine whether there were other in-custody defendants in the box.

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Dated this 10th day of December, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Jonathan E. VanBoskerck*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 10, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY /s/ j.garcia
Employee, District Attorney's Office

JEV//jg