

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

NATASHA JACKSON,

Respondent.

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CASE NO: 67071

APPELLANT'S OPENING BRIEF

**Appeal From Order Granting in Part Jackson's Pretrial
Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	3
STATEMENT OF THE ISSUES.....	3
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	9
I. THE DISTRICT COURT ERRED IN DISMISSING COUNTS 1 AND 8 WHEN THE STATE PRESENTED SLIGHT OR MARGINAL EVIDENCE THAT SHE CONSTRUCTIVELY POSSESSED A FIREARM DURING THE BURGLARIES	9
II. THE DISTRICT COURT ERRED IN DISMISSING TWO COUNTS OF BURGLARY WHEN IT ALSO FOUND THAT THE STATE PROVIDED SLIGHT OR MARGINAL EVIDENCE TO SUPPORT EACH COUNT	15
CONCLUSION	16
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Page Number:

Cases

Anderson v. State,

95 Nev. 625, 629–31, 600 P.2d 241, 243–44 (1979) 10, 11, 12, 14

Brooks v. State,

124 Nev. 203, 204–05, 180 P.3d 657, 658 (2008)..... 11, 12

Grant v. State,

117 Nev. 427, 433–34, 24 P.3d 761, 765 (2001)..... 15

Jones v. State,

111 Nev. 848, 899 P.2d 544 (1995)..... 11, 12, 14

Sheriff v. Burcham,

124 Nev. 1247, 1257, 198 P.3d 326, 332 (2008)..... 10

Sherriff v. Hodes,

96 Nev. 184, 186, 606 P.2d 178, 180 (1980)..... 10, 15

State v. White,

130 Nev. ___, ___, 330 P.3d 482, 486 (2014)..... 10, 15

Statutes

NRS 173.095(1)..... 15

NRS 193.165 11, 12

NRS 34.575(2)..... 3

Other Authorities

NRAP 4(b)(1)(B)..... 3

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Eighth Judicial District Court, Clark County**

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to NRS 34.575(2) and NRAP 4(b)(1)(B). On December 4, 2014, the District Court granted in part a pretrial writ of habeas corpus. The State filed its Notice of Appeal on December 12, 2014.

STATEMENT OF THE ISSUES

1. WHETHER THE DISTRICT COURT ERRED IN FINDING NO PROBABLE CAUSE TO BELIEVE THE DEFENDANT POSSESSED A GUN, ACTUALLY OR CONSTRUCTIVELY, DURING THE COMMISSION OF HER CRIMES
2. WHETHER THE DISTRICT COURT ERRED IN DISMISSING TWO COUNTS OF BURGLARY DESPITE FINDING PROBABLE CAUSE TO BELIEVE JACKSON COMMITTED THE CRIMES

STATEMENT OF THE CASE

On August 8, 2014, the State charged Respondent Natasha Galenn Jackson by way of Indictment with: 2 counts of Burglary While in Possession of a Firearm; 2 counts of Attempt Robbery with use of a Deadly Weapon; and 1 count each of: Murder with use of a Deadly Weapon; Attempt Murder with use of a Deadly Weapon; First Degree Kidnapping; Robbery with use of a Deadly Weapon; Burglary While Possession of a Deadly Weapon; and Attempt Invasion of the Home. 1 Record on Appeal (ROA) 1–4.

On October 6, 2014, Jackson filed a pretrial petition for writ of habeas corpus (the Petition). Id. at 193–200; 2 ROA 201–206. The State filed its return on October 24, 2014. 2 ROA 211–25. Jackson filed her reply on October 29, 2014. Id. at 231–239. On November 10, 2014, the District Court granted in part and denied in part Jackson’s Petition. Supplemental Record on Appeal (SROA) at 16–19. Specifically, the District Court dismissed entirely counts 1 and 8, charging Jackson with Burglary while in possession of a firearm, and Burglary while in possession of a deadly weapon. Id. at 16. The Order was filed December 4, 2014. 2 ROA 256–58. On December 12, 2014, the State filed its Notice of Appeal. Id. at 262–63. On February 9, 2015, this Court filed an Order Directing Briefing. The State’s Opening Brief follows.

STATEMENT OF THE FACTS

On July 29, 2014, Scott Ufert was working as a Freeway Service Patrolman for the Nevada Department of Transportation. 1 ROA 58–59. His job was to assist motorists stranded on the highway, helping with minor repairs. Id. at 59. At approximately 6:34 a.m., on July 29, 2014, Ufert came upon a car with its hazard lights on, just south of the Tropicana off ramp of highway 95. Id. at 60. Ufert pulled over approximately 50 yards behind the car, to determine whether the occupants were in need of assistance. Id.

From his service van, Ufert could see furtive movements by the car's passengers. Id. at 62. Eventually, the male occupant of the vehicle, later identified as Cody “Havoc” Winters exited, and approached Ufert. Id. at 62–63. Winters told Ufert that he had dropped his keys, which had disabled the vehicle. Id. at 63. Shortly thereafter, the female occupant of the vehicle exited, approached Ufert, and told him the same story. Id. at 64–65. The female, later identified as Jackson, told Ufert that she had a friend coming to assist her, and that they were going to walk to the next exit. Id. Ufert repeatedly warned Jackson and Winters against doing so, given that they would be forced to walk along the side of the highway. Id. at 65–66. Throughout the conversations, Jackson seemed calm and in control. Id. at 67.

After a few minutes of simulated search for the key, Winters approached Ufert, drew a pistol, pointed it at Ufert, and told him to get out of the van and turn over his phone and radio. Id. at 68. Ufert complied, trying to talk Winters into putting down the gun. Id. While Winters stood with the gun pointing at Ufert, Jackson removed her and Winters' belongings from the car, and moved them to Ufert's van. Id. at 68–69. Once the van was loaded, Ufert was forced back into the van, accompanied by Jackson and Winters. Id. at 70–71. Ufert told Jackson that he could not go further than a mile from the highway, because a GPS system on the van would trigger, indicating a problem. Id. at 72. Jackson and Winters then ordered Ufert to turn into the first neighborhood he could. Id. While they were driving, Winters demanded Ufert's full name, because he did not have his wallet with any identifying information with him. Id. at 73–74. Once Ufert complied, Jackson looked him up using her phone. Id. at 73. Jackson and Winters warned Ufert that if he reported them, they would have a friend kill him and his family. Id. at 74.

Jackson and Winters forced Ufert to pull into a residential neighborhood just off Tropicana. Id. at 75. There, they had Ufert pull over, and they exited his van, removing their belongings. Id. at 75–76. Ufert was then released, and he returned to his vehicle and left. Id. at 79. Ufert later spoke to the police, and identified Jackson

in a photo array. Id. at 80. Ufert also told the police that in addition to the gun, he saw Jackson carrying what appeared to be a machete in a sheath. Id. at 81–82.

After Ufert left, Jackson and Winters proceeded up the street. Id. at 126–27. They stopped in front of a house, and Winters told Jackson to “get ready.” Id. at 127. They approached 3930 Autumn Street, a house occupied by the Ramos family. Id. at 126–27. Dominic Ramos was awakened shortly thereafter by his mother’s screams for his help. Id. at 38. Dominic exited his room, and entered the living room, where he saw his father, Mr. Ramos, struggling with Winters, and his mother, Mrs. Ramos, fighting with Jackson. Id. at 40–41. While Mr. Ramos and Winters struggled over Winters’ gun, Jackson grabbed Mrs. Ramos by the hair, yanking her head backward, and repeatedly stabbed her in the back with a screwdriver. Id. at 40–42. While they were struggling for the gun, the gun discharged, striking Mr. Ramos. Id. at 44.

Dominic was able to force Jackson off Mrs. Ramos. Id. at 43. Winters retrieved the screwdriver Dominic forced out of Jackson’s hands, and used it to stab Mr. Ramos in the back. Id. at 47. Winters retrieved the gun, pointed it at Dominic, and demanded the car keys. Id. at 48. Dominic could not find the car keys, and began hunting through the house. Id. When he saw that the window in his bedroom was open, Dominic grabbed his little sister, and got himself and her through the window. Id. at 49. The two hid underneath a RV, hiding from Jackson and Winters. Id. at 50.

Shortly thereafter, the police responded to the scene, having been called by Dominic's sibling. Id. at 86–87. Officer William Moore was among those officers responding. Id. at 85–87. The officers received information that Jackson and Winters had fled the Ramos house, and were inside an adjacent abandoned building. Id. at 88–89. Officer Moore and his partner moved to the rear of the building, to ensure that Jackson and Winters could not escape that way. Id. Officer Williams moved a small table next to the wall surrounding the property, in order to see over it and view the building where Jackson was believed to be. Id. at 90. Over the course of the next several minutes, Officer Moore saw Jackson and Winters moving throughout the house, usually separated from one another. Id. at 91–93.

Eventually, Jackson appeared at the window at the rear of the house with Winters. Id. at 97. Jackson knelt down, and Winters appeared to point the gun at her. Id. Throughout this, Officer Moore observed Jackson and Winters talking. Id. at 98. Suddenly, Winters lowered his gun, and walked away. Id. Jackson stood up, made eye contact with Officer Moore, moved toward him. Id. at 98–99. Officer Moore and his partner reached over the wall, and helped Jackson over. Id. at 99. As soon as she was on the other side of the wall, Jackson screamed to Winters, telling him “Shoot ‘em Cody, shoot ‘em.” Id. at 100. Realizing that they had been lured into a position to be shot, Officer Moore's partner handcuffed Jackson. Id. Winters eventually

escaped to another building, where he engaged in a firefight with the police, before being shot and ultimately killed.

SUMMARY OF THE ARGUMENT

The District Court erred in concluding that the State failed to show the slight or marginal evidence needed to support an indictment for burglary while in possession of a firearm. First, while the district court implicitly concluded that possession must be actual, clear Nevada precedent supports the State's contention that the possession of a deadly weapon in this context may be constructive. Second, the district court erred by dismissing the entire burglary count—and not simply striking the enhancement—even though it found probable cause to support the charge of burglary.

ARGUMENT

I

THE DISTRICT COURT ERRED IN DISMISSING COUNTS 1 AND 8 WHEN THE STATE PRESENTED SLIGHT OR MARGINAL EVIDENCE THAT SHE CONSTRUCTIVELY POSSESSED A FIREARM DURING THE BURGLARIES

The District Court improperly dismissed counts 1 and 8 because the State produced slight or marginal evidence that Jackson constructively possessed a firearm during the burglaries. Although the District Court is correct that the State must provide evidence that Jackson possessed a firearm or deadly weapon while committing her burglaries, the District Court failed to consider the State's evidence

of constructive possession. Because the State showed the slight or marginal evidence that Jackson was aware of Winters' possession and use of the weapons, and her ability to exercise control over it, the District Court erred in dismissing counts 1 and 8.

When reviewing a District Court's decision to grant a pretrial writ of habeas corpus, this Court must "determine whether all of the evidence received at the preliminary hearing . . . establishes probable cause to believe that an offense has been committed and that the accused committed it." State v. White, 130 Nev. ___, ___, 330 P.3d 482, 486 (2014). Probable cause may be found upon a showing of slight or marginal evidence. Sherriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). "In reviewing a district court's order granting a pretrial petition for writ of habeas corpus for lack of probable cause," the Court "will not overturn the district court's order unless the district court committed substantial error." Sheriff v. Burcham, 124 Nev. 1247, 1257, 198 P.3d 326, 332 (2008). If the State presents sufficient evidence to support a reasonable inference that the defendant committed the crime with which he is charged, a district court's dismissal of that charge constitutes substantial error. Id.

In Anderson v. State, this Court set forth the test for when a defendant can be said to have constructively possessed a weapon used by a codefendant. 95 Nev. 625,

629–31, 600 P.2d 241, 243–44 (1979). The State in Anderson argued that an unarmed defendant could nonetheless be considered to have possessed a weapon when they derive the benefits from that weapon. Id. at 629–30, 200 P.2d at 243–44. This Court agreed, holding that an unarmed codefendant is subject to the deadly weapon enhancement of NRS 193.165 where they possess the weapon either constructively or actually, exclusively or jointly. Id. at 630, 200 P.2d at 244. Finally, this Court held that constructive or joint possession of a weapon occurs “where the unarmed participant has knowledge of the other offender's being armed, and where the unarmed offender has, as here, the ability to exercise control over the firearm.” Id. Importantly, this Court held that this interpretation “is consistent with [its] holdings involving interpretations of the term ‘possession.’” Id.

In Jones v. State, 111 Nev. 848, 899 P.2d 544 (1995), a defendant challenged his sentencing enhancement because he did not possess a deadly weapon. Id. at 851–52, 899 P.2d at 546. This Court reaffirmed using the Anderson test for possession, and held that Jones was in constructive possession of a weapon because he was present while his codefendants displayed firearms, and he benefitted from their deadly potential. Id. at 852–53, 899 P.2d at 546.

In contrast, in the case relied upon by the district court—Brooks v. State—this Court clarified the Anderson test in relation to the “use” of a deadly weapon

under NRS 193.165. 124 Nev. 203, 204–05, 180 P.3d 657, 658 (2008). The Court noted that the Anderson test was not suitable when applied to the “use” of a weapon under NRS 193.165 because the statutory language requires “use” rather than “possession.” Id. at 209, 180 P.3d at 661. This Court made no indication, however, that the Anderson test was no longer applicable for a determination of “possession” of a weapon.

In granting Jackson’s Petition with respect to counts 1 and 8, the District Court specifically distinguished Brooks from the instant case. SROA 16; 2 ROA 257. However, no distinction was required because Brooks simply has no application to the instant case given that it is a “use” analysis, not a “possession” analysis. This error was compounded when the District Court erroneously limited that possession analysis to actual possession. SROA 16; 2 ROA 257. In ruling thus, the District Court ignored this Court’s discussion in Brooks specifically affirming the Anderson/Jones line of cases with respect to possession analysis. See Brooks, 124 Nev. at 208-09, 180 P.3d at 660-61 (noting that “this court has cited and applied Anderson’s constructive possession test in four published decisions.”). Accordingly, that is the test the district court was required to apply in its probable cause review of the weapon enhancement when, as here, the statute requires possession.

With the proper analysis in mind, the State produced the slight or marginal evidence needed to support a finding of probable cause on the enhancement. The grand jury heard that when Ufert stopped to see if he could assist Jackson and Winters, Winters approached Ufert and pointed a gun at him. 1 ROA 68. While Jackson retrieved their belongings from their car, Winters demanded Ufert's phone and radio, and ordered him out of the van. Id. at 68–69. As Winters held Ufert at gunpoint, Jackson loaded their belongings into Ufert's van. Id. at 69. Jackson sat in the van with Ufert and Winters, who was still pointing a gun at him. Id. at 70. They demanded Ufert's name, threatening to kill him and his family if he called the cops on them. Id. at 73–75. Jackson looked up Ufert's name on her phone, so as to carry through with the threat. Id. at 73. Jackson knew that Winters carried a gun in his waistband, and that he had used it to force Ufert to cooperate. Id. at 125–27. Winters and Jackson directed Ufert to drive them to the first residential neighborhood he could. Id. at 72.

The grand jury heard that after leaving Ufert, Jackson and Winters approached the Ramos' house, and Winters told Jackson to “get ready.” Id. at 126–27. Inside the Ramos' house, while Winters struggled with Mr. Ramos, Jackson grabbed Mrs. Ramos by the hair, pulling her back and stabbing her with a screwdriver. Id. at 41–42. Jackson also admitted to helping Winters in his struggle with Mr. Ramos, as they

fought over control of Winters' gun. Id. at 129. After Winters regained control of the gun and shot Mr. Ramos, he began demanding the Ramos' car keys. Id. at 47–48. After the rest of the Ramos family escaped the house, Jackson and Winters fled to an abandoned building next door. Id. at 88–89.

The grand jury heard that during the standoff in the abandoned building, Winters was seen talking with Jackson before putting her on her knees and holding the gun to her head. Id. at 97. Jackson had conversations with Winters while she was on her knees that the police officers could not hear. Id. at 98. Winters removed the gun, and walked away. Id. Jackson exited the building, and moved toward the police officers. Id. As she approached, the officers attempted to help her over the wall at the rear of the property. Id. at 98–99. While distracted and tending to her, Jackson screamed for Winters to shoot the police. Id. at 100–01. Winters exited the building, fled to a neighboring building, and began firing at the police. Id. at 101.

With this testimony, the State presented sufficient evidence supporting a reasonable inference that Jackson knew Winters possessed the gun, and had the ability to exercise control over it, or derived a benefit from its deadly propensity. Anderson, 95 Nev. at 630, 200 P.2d at 244; see also Jones, 111 Nev. at 852–53, 899 P.2d at 546. Jackson indeed demonstrated her ability to control the use of the gun: when she told Winters to shoot at the police, he obeyed. 1 ROA 100–01. Because

the State presented the slight or minimal evidence needed for probable cause to believe that Jackson constructively possessed the gun, the District Court erred in dismissing counts 1 and 8.

II

THE DISTRICT COURT ERRED IN DISMISSING TWO COUNTS OF BURGLARY WHEN IT ALSO FOUND THAT THE STATE PROVIDED SLIGHT OR MARGINAL EVIDENCE TO SUPPORT EACH COUNT

As stated above, the determination to be made by the District Court is whether the State has produced the slight or marginal evidence needed to establish a reasonable inference that the defendant committed the charged crime. White, 130 Nev. at ___, 330 P.3d at 486; Hodes, 96 Nev. at 186, 606 P.2d at 180. Here, the District Court explicitly found that the State had met its burden on the two counts of burglary. 2 ROA 257. Because the Court limited its consideration of the deadly weapon to actual possession, it concluded that the State had not carried its burden with respect to the burglary sentencing enhancement. Id. Inexplicably, rather than striking the language regarding the deadly weapon, or allowing the State to amend its Indictment, the District Court struck counts 1 and 8 entirely.¹ Id.; SROA 19.

¹There is no reason why the district court could not have allowed amendment of the indictment. NRS 173.095(1) allows the State to amend the indictment at any time before the verdict or finding so long as no additional or different offense is charged, and the defendant's substantial rights are not prejudiced. Although normally a motion from the State is required, when the State raises amendment as an option in a return to a pretrial petition, the District Court may *sua sponte* amend the indictment. Grant v. State, 117 Nev. 427, 433–34, 24 P.3d 761, 765 (2001).

Because the district court specifically found probable cause on the burglary counts, the State contends that reversal of the dismissal of the burglary counts—with or without the weapon enhancement—is required as a matter of law. As such, should this Court decide that the District Court did not err in finding no probable cause to believe Jackson constructively possessed the firearm, it should nonetheless remand for the District Court to amend the indictment to simply read “Burglary” under counts 1 and 8.

CONCLUSION

Based upon the foregoing, the State respectfully submits that the District Court erred when it limited its consideration of possession of a firearm to actual possession, and found no probable cause to believe Jackson possessed a firearm during the burglaries. Further the State respectfully submits that the District Court erred when it dismissed counts 1 and 8 entirely, despite finding probable cause to believe Jackson committed the burglaries alleged in those counts. Therefore, the State respectfully requests this Court to reverse the District Court’s order granting in part Jackson’s Petition, and remand the matter for further proceedings.

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Dated this 24th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3,311 words and 14 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 24, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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