

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL,

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Aug 18 2016 10:12 a.m.
Case No. 16-00000
Tracie K. Hindeman
Clerk of Supreme Court

APPELLANT'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE AND
COUNTER-MOTION TO STRIKE PORTIONS OF
RESPONDENT'S ANSWERING BRIEF

COMES NOW Appellant, LUIS PIMENTEL, by and through
Deputy Public Defender William M. Waters, hereby Opposes
Respondent's Motion to Strike and counter-moves to strike
portions of Respondent's Answering Brief.

This Opposition/counter-motion is based upon the following Memorandum and all papers and pleadings on file herein.

DATED this 18th day of August, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ William M. Waters
WILLIAM M. WATERS, #9456
Deputy Public Defender
309 So. Third Street, Suite #226
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Respondent has filed a Motion to Strike portions of
3 Appellant's Reply Brief. In its Motion, Respondent asks this
4 Court to strike "offending" portions of Appellant's Reply Brief
5 (RAB) because Appellant mentioned an unpublished decision of
6 this Court and allegedly "invites this Court to look beyond the
7 record to adjudicate questions of fact[.]" Respondent's Motion
8 to Strike, p. 2.
9

10 **1. Citation to Unpublished Authority**

11 Appellant mentioned an unpublished decision in his Reply
12 Brief. ARB 3. That unpublished decision was filed in 2012.
13 Respondent asserts "Counsel for Appellant knew that it was
14 inappropriate to cite the case but decided to do so anyway
15 because he believed it supported his position. Such skullduggery
16 cannot go unchecked."¹ Respondent's Motion p. 2.
17
18

19 This Court repealed SCR 123 and amended NRAP 36 via ADKT
20 504 on November 12, 2015. Prior to its repeal, SCR 123 stated,
21 "An unpublished opinion or order of the Nevada Supreme Court
22 shall not be regarded as precedent and shall not be cited as
23 legal authority except when the opinion or order is (1) relevant
24 under the doctrines of law of the case, res judicata or
25

26
27 ¹ Although Attorney for Respondent, Jonathan Vanboskerck, chooses
28 to resort to name-calling and personal attacks when making his
argument, Appellant's Attorney will not behave in the same
manner. Instead, Appellant's Counsel will respond to
Vanboskerck's argument with a level of professionalism
Vanboskerck apparently lacks.

1 collateral estoppel; (2) relevant to a criminal or disciplinary
2 proceeding because it affects the same defendant or respondent
3 in another such proceeding; or (3) relevant to an analysis of
4 whether recommended discipline is consistent with previous
5 discipline orders appearing in the state bar publication."

6
7 Post-amendment NRAP 36(c)(2)-(3) states:

8 (2) An unpublished disposition, while
9 publicly available, does not establish
10 mandatory precedent except in a
11 subsequent stage of a case in which the
12 unpublished disposition was entered, in
13 a related case, or in any case for
14 purposes of issue or claim preclusion
15 or to establish law of the case.

16 (3) A party may cite for its persuasive
17 value, if any, an unpublished
18 disposition issued by this court on or
19 after January 1, 2016. When citing an
20 unpublished disposition to this court,
21 the party must cite an electronic
22 database, if available, and the docket
23 number and filing date in this court
24 (with the notation "unpublished
25 disposition"). A party citing an
26 unpublished disposition must serve a
27 copy of it on any party not represented
28 by counsel.

22 SCR 123's repeal and NRAP 36's amendments applied prospectively.
23 Accordingly, litigants can now cite unpublished decisions which
24 were filed on or after January 1, 2016, as persuasive authority.
25 However, as plainly stated within the rules' text, SCR 123 and
26 the pre-amendment NRAP 36 did not prohibit the mere mention of
27 an unpublished decision. The rules only prohibited the citation
28

1 to unpublished decisions as mandatory precedent or as legal
2 authority.

3 Here, while Appellant mentioned an unpublished decision
4 from 2012 in his Reply Brief, Appellant did not claim the
5 decision was mandatory precedent or legal authority supporting
6 his argument. Instead, Appellant expressly disclaimed that the
7 decision was precedent and expressly noted he was not citing it
8 as precedent. ARB 4 fn.2. Moreover, after briefly mentioning
9 the unpublished decision, Appellant specifically noted there was
10 no precedent in Nevada supporting either his or Respondent's
11 position regarding the issue and therefore, the issue was an
12 issue of first impression in Nevada. Id. at 4.

15 Based upon the aforementioned, Appellant did not violate
16 either SCR 123 or NRAP 36(c)(2)-(3). Appellant briefly
17 mentioned an unpublished decision as proof there is no precedent
18 in Nevada addressing Appellant's precise issue. Appellant did
19 not, in any way, claim this Court was bound by the unpublished
20 decision. Accordingly, Appellant respectfully requests this
21 Court deny Respondent's Motion.

23 **2. Alleged facts outside the record**

25 Respondent argues that Appellant "twice **asks this Court to**
26 **rely upon facts outside this record** in order to adjudicate
27 factual disputes." Respondent's Motion p. 3 (emphasis added).
28 Respondent claims Appellant did this when he noted "the lower

1 court likely invoked the exclusionary rule off the record and
2 that defense proffered an objection complete with a particular
3 statutory basis during an unrecorded bench conference."

4 Id. (citing ARB p.15, 16).

5
6 A. Exclusionary Rule

7 In Appellant's Opening Brief he alleged State's witness
8 Piasecki violated the exclusionary rule when she was present in
9 the courtroom and listened to other witnesses testify before she
10 testified herself. AOB 38-39. Appellant anticipated Respondent
11 would argue Appellant never asked the Court to exclude witnesses
12 per NRS 51.155. Therefore, Appellant noted "To the extent
13 Respondent may claim neither Appellant nor the court invoked the
14 exclusionary rule at the trial's commencement, the trial
15 prosecutor noted the rule was in effect." AOB 39 fn. 24 (citing
16 AA X 2251).

17
18 True to form, in its Answering Brief, Respondent claimed
19 this Court should review the exclusionary rule issue for plain
20 error because "Pimentel did not object to Piasecki's presence
21 below." RAB 33. Furthermore, "Pimentel has not cited to any
22 instance in the record where the State or Pimentel invoked the
23 exclusionary rule." Id.

24
25 In Reply, Appellant merely made the commonsense
26 pronouncement that NRS 51.155 is typically invoked before trial
27 begins as a preliminary matter and therefore this may explain
28 why there is no instance in the record explicitly demonstrating

1 who invoked the exclusionary rule. ARB 15. Appellant did not
2 state, as fact, nor ask this court to assume, that the
3 exclusionary rule had been invoked prior to trial, off the
4 record. Indeed, Appellant immediately noted the actual proof
5 that the rule was in effect was the prosecutor's acknowledgment
6 that the rule was in effect. See Id. (citing AA X 2251).
7 Accordingly, Appellant did not make a factual assertion belied
8 by the record.

10 B. Objection during unrecorded bench conference

11 Next, Respondent claims Appellant improperly argued "that
12 defense proffered an objection complete with a particular
13 statutory basis during an unrecorded bench conference."
14 Respondent's Motion p. 3.

16 In his Opening Brief Appellant argued Piasecki violated the
17 exclusionary when she was present in the courtroom and listened
18 to other witnesses testify before she testified herself. AOB
19 38-39. In its Answering Brief, Respondent argued this Court
20 should apply plain error review because Appellant did not object
21 to Piasecki's violation of the exclusionary rule. RAB 34.

23 In Reply, Appellant asserted he objected when the State
24 first asked Piasecki's to compare Appellant's answers during his
25 court-ordered evaluation to his trial testimony. ARB 16 (citing
26 AA XII 2931). Appellant also noted that he explained the basis
27 for his objection at an unrecorded bench conference. Id.
28 Finally, Appellant argued he perfected his record later outside

1 the jury's presence by noting Piasecki's testimony was improper.
2 Id. at 16(citing AA XII 2978-81).

3 Appellant did mention in his Reply Brief, "[i]t is likely
4 during the conference Appellant objected based upon NRS 50.155."
5 ARB 16. However, this suggestion was not an assertion of fact
6 or a request that this court consider a fact outside the record.
7 At most, it is commentary meant to simply express confidence in
8 Appellate Counsel's colleague who participated in trial.
9 Indeed, Appellant immediately pivoted from this commentary and
10 asserted that the record indicates Appellant later tried to
11 perfect his record regarding his earlier objection, thus
12 preserving the issue.
13
14

15 This Court can certainly disagree with Appellant that this
16 objection adequately preserved the issue for appeal. However,
17 one cannot credibly argue, as Respondent attempts to do, that
18 Appellant is asking this Court "to rely upon facts outside this
19 record in order to adjudicate factual disputes."² Accordingly,
20 this Court should deny Respondent's Motion.
21

22 *a. Counter-motion to strike*

23 Respondent commits the same transgression it complains of
24 in the instant Motion by claiming, as fact, that the State's
25 acknowledgement that the exclusionary rule was in effect was
26

27 ² Appellant's references, which Respondent finds so offensive,
28 totals two fleeting sentences within a Reply Brief totaling 40
pages and close to 7,000 words. Meanwhile, Respondent's
reference to facts outside the record comprises the heart of its
argument that the exclusionary rule had not been invoked.

1 instead a "[reference] to the exclusionary rule's purpose as the
2 basis for the objection." Id. at 34. However, at trial the
3 prosecutor never explained the aforementioned as the basis for
4 his objection. Instead, the prosecutor stated, "This violates
5 the -- this violates the exclusionary rule, Your honor. State
6 would object to the --." AA X 2251. The court then asked the
7 parties to approach the bench. Id. As noted, the bench
8 conference was unrecorded. Therefore, there is absolutely no
9 record whatsoever that the prosecutor's objection was based upon
10 "the exclusionary rule's purpose" rather than simply an
11 acknowledgment that the rule was in effect.
12

13
14 If this Court agrees with Respondent's argument, then based
15 upon the aforementioned, Respondent is also asking this court to
16 "rely upon facts outside this record in order to adjudicate
17 factual disputes." Accordingly, if this Court is inclined to
18 strike portions of Appellant's Reply Brief, it must also strike
19 the aforementioned argument in Respondent's Answering Brief.
20

21 CONCLUSION

22 Appellant did not violate any Supreme Court Rule or Rule of
23 Appellate practice which would necessitate striking any portions
24 of his Reply Brief. Appellant did not make any factual
25 assertions which were not in the record nor cite an unpublished
26 order as legal authority. Moreover, the portions of Appellant's
27 Reply Brief which Respondent finds so offensive are *de minimus*.
28 Nevertheless, if this Court disagrees and chooses to strike the

1 inconsequential portions of Appellant's Reply Brief, Appellant
2 respectfully requests this Court also strike the far more
3 consequential portion of Respondent's answering brief for the
4 same reasons Respondent asserts in the instant Motion.
5

6
7 Respectfully submitted,

8 PHILIP J. KOHN
9 CLARK COUNTY PUBLIC DEFENDER
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2 CERTIFICATE OF SERVICE

3 I hereby certify that this document was filed
4 electronically with the Nevada Supreme Court on the 18th day of
5 August, 2016. Electronic Service of the foregoing document
6 shall be made in accordance with the Master Service List as
7 follows:

8
9 ADAM LAXALT
STEVEN S. OWENS

WILLIAM M. WATERS
HOWARD S. BROOKS

10 I further certify that I served a copy of this
11 document by mailing a true and correct copy thereof, postage
12 pre-paid, addressed to:

13
14 LUIS PIMENTAL
15 NDOC No: 1144889
c/o Ely State Prison
16 P.O. Box 1989
Ely, NV 89301

17
18 BY /s/ Carrie M. Connolly
Employee, Clark County Public
19 Defender's Office
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