IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LACY L. THOMAS,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CLARK COUNTY; THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, DEPT. 17

Respondents,

and

THE STATE OF NEVADA

Real Party In Interest

Electronically Filed
Oct 12 2017 08:25 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 69074

PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and petitions this Court for rehearing in the above-styled case. This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

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Dated this 11th day of October, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

POINTS AND AUTHORITIES

On September 14, 2017, this Court filed an Opinion granting extraordinary relief and ordering the district court to dismiss the criminal Indictment below based on Double Jeopardy. Contrary to the findings of fact below, the majority concluded that the prosecutor intentionally withheld exculpatory documents which conduct was egregious and caused prejudice to Thomas which could not be cured by means short of a mistrial such that reprosecution was barred. "The court may consider rehearings in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

Instead of correctly applying the highly deferential standard of "clear error" for findings of fact as to the prosecutor's intent, this Court has simply substituted its interpretation of the facts for that of the factfinder below. Under the "clear error" standard, a reviewing court "will not reverse a lower court's finding of fact simply because [it] would have decided the [factual dispute] differently." Snyder v. Louisiana, 552 U.S. 472, 486, 128 S.Ct. 1203 (2008 (Thomas, J., dissenting) (quoting Easley v. Cromartie, 532 U.S. 234, 242, 121 S. Ct. 1452 (2001)). Rather, "a reviewing court must ask 'whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.'" Id. at 487. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Hernandez v. New York, 500 U.S. 352, 369, 111 S.Ct. 1859 (1991). There are obviously two or more ways a judge might view the evidence in this case. The view the majority has adopted is that which defense counsel has urged on appeal, while the other equally plausible view is that found by the district court judge below, argued by the prosecution on appeal, and recognized in the dissenting opinion. Where appellate judges are in such glaring disagreement about the interpretation of facts, it ought to serve as a red flag that the Court has strayed into impermissible appellate fact-finding.

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Anderson v. Bessemer City, 470 U.S. 564, 573-574, 105 S.Ct. 1504 (1985). The reviewing court oversteps the bounds of its duty if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, an appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

In large part, the majority's factual conclusion about the prosecutor's intent is impermissibly based upon a negative inference drawn for the first time on appeal from the prosecutor's failure to testify and the State's failure to introduce any evidence at the evidentiary hearing. This Court has overlooked that whether or not a negative inference may be drawn from a particular witness's failure to testify is within the sole discretion of the fact finder below, not this Court in its appellate review. Anderson, 470 U.S. at 574, 580 fn. 4. Unless the district court judge was

sua sponte required to draw the negative inference as a matter of law, this Court may not apply it for the first time on appeal to defeat the factfinder's interpretation of the evidence. By doing so, this Court is treating it as a mandatory presumption rather than a permissible inference and is conducting its own appellate fact-finding:

> [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Anderson, 470 U.S. at 575. Review of factual findings under the clearly-erroneous standard, with its deference to the trier of fact, is the rule, not the exception. Id. So long as the district court's interpretation of the facts is not illogical or implausible, its findings are entitled to deference which this Court has failed to afford. Id. at 577.

This Court has previously recognized that it does not act as a finder of fact and that factual findings of the district court are entitled to deference on appeal and will not be overturned if supported by substantial evidence. State v. Rincon, 122 Nev. 1170, 1170, 147 P.3d 233 (2006). Such deference is in recognition that "the district court is in the best position to adjudge the credibility of the witnesses and the evidence, and 'unless the court is left with the definite and firm conviction that a mistake has been committed,' this court will not second-guess the trier of fact." Id. This court also has a policy of declining to review factual issues that have neither been raised nor determined before a district judge. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981), *citing* Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d

981 (1981). Ryan's Express v. Amador Stage Lines, 128 Nev. 289, 279 P.3d 166 (2012).

In a criminal case, the ability to draw a negative inference from the State's failure to call an important witness is permissible "[b]ecause of the State's burden of proving guilt beyond a reasonable doubt." Glover v. Eighth Judicial Dist. Court of Nevada, 125 Nev. 691, 705, 220 P.3d 684 (2009). However, when a criminal defendant fails to testify or to produce evidence at trial no negative inference is permissible, "because a defendant has no burden in a criminal case" and such an inference "impermissibly shifts the burden of proof to the defense." Glover, 125 Nev. at 721 (Cherry, J., dissenting), *citing* Browning v. State, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004). The majority has overlooked that in the context of a motion to dismiss, as in the present case, it is the Defendant, not the State, who bears the burden of proving that governmental overreaching or harassment bars retrial. Oregon v. Kennedy, 456 U.S. 667, 683-684, 102 S.Ct. 2083 (1982). Although this Court has now joined those few states that believe the burden of Oregon v. Kennedy is too onerous and has adopted a more lenient standard, the burden nonetheless remains on Defendant. See State v. Kennedy, 295 Ore. 260, 276, 666 P.2d 1316 (1983). Because the State bore no burden of proof at the hearing on the motion to dismiss, it is impermissible to draw a negative inference against the State for failure to call a witness to the stand or to produce evidence. If there is a paucity of evidence in the

record below which can give rise to a negative inference at all, such must be drawn against the defense which bore the burden of proof.

The majority acknowledges that witnesses at the evidentiary hearing "directly contradicted" Mitchell's previous explanation to the district court. Opinion, p. 19. Rather than find that this created a dispute of fact for the district court to resolve, this Court simply chose to ignore Mitchell's account because he did not give sworn testimony at the evidentiary hearing. What rule of law requires an attorney to take the stand and be sworn in these circumstances? The State had no notice that an appellate court would subsequently refuse to consider the prosecutor's explanation and draw a negative inference from failing to call the prosecutor to the stand under oath. In Pool, which the majority adopts and relies upon, it says that the factfinder "may also consider the prosecutor's own explanations," without limiting it to sworn testimony. Pool v. Superior Court, 139 Ariz. 98, 108 fn9, 677 P.2d 261 (1984). The same is true in other contexts such as a Batson analysis where the trial court must consider the prosecutor's "explanation" for a peremptory challenge when discerning discriminatory intent without any requirement of the prosecutor being sworn. See e.g., McCarty v. State, 132 Nev. ___, 371 P.3d 1002, 1007 (2016). This is so because a lawyer ethically may not act as both an advocate and as a witness in a case and because attorneys are officers of the court owing a duty of candor to the tribunal.

NRPC 3.3, 3.7. In its appellate review, this Court is not at liberty to disregard facts in the record that the district court judge was legally entitled to consider.

Most courts caution, as well, that a missing-witness inference is only proper if the inference to be drawn is a "natural and reasonable one." United States v. Bramble, 680 F.2d 590, 592 (9th Cir. 1982)); see also Burgess v. United States, 142 U.S. App. D.C. 198, 440 F.2d 226, 237 (D.C. Cir. 1970) (missing witness instruction proper only when it can be said "with reasonable assurance that it would have been natural for a party to have called the absent witness but for some apprehension about his testimony"). There's nothing "natural and reasonable" about the inference this Court drew from Scott Mitchell's failure to testify, which is exactly opposite of the explanation he gave to the court. It is illogical to presume that if he had testified that he would have contradicted his previous representations:

> MR. MITCHELL: . . . I've never even heard of that exhibit. I've never seen it until a few minutes ago.

PA 12.

> THE COURT: And didn't Metro give these to you?
> MR. MITCHELL: No, Judge. Of course not.

PA 18.

> THE COURT: Okay. So did you get these, just so I – did you get these from Mr. Whiteley?
> MR. MITCHELL: No, I've never seen them. I –
> THE COURT: Not this letter, but did you get these document from Mr. Whiteley?

> MR. MITCHELL: Judge, I – I did not. Whether or not Metro has them, I honestly do not know. I have – I have never seen those. I have never heard of their existence.

PA 38. The district court judge found the prosecutor's explanation credible because of his reputation and having started in the District Attorney's office together. PA 74. Obviously, the majority does not know Scott Mitchell and his reputation for integrity as did the judge below, otherwise it never would have publicly reprimanded the prosecutor by name as it did in a published opinion without any of the Due Process protections normally required for such disciplinary action against a member of the bar. SCR 102. Such is the consequence of this Court's short-sided and inappropriate appellate fact-finding.

Furthermore, no negative inference arises unless the party has it peculiarly within his power to produce the witness as opposed to the witness being "equally available" to both parties. 2 Kenneth S. Broun et al., McCormick on Evidence § 264 (7th ed. 2013). This Court has made unwarranted factual assumptions about the predicate facts necessary for invoking a negative inference. The record is silent on these facts precisely because the State had no notice nor opportunity to rebut the inference when this Court applied it for the first time on appeal. "The burden of producing evidence of a fact cannot be met by relying on this presumption, as its effect is to give greater credence to the positive evidence of the adversary upon any issue upon which it is shown that the missing witness might have knowledge." Id.

Moreover, caution is warranted as the inference invites conjecture and ambiguity. Id. "Failure to anticipate that the inference may be invoked entails substantial possibilities of surprise," which is precisely what has happened here. Id. Modern discovery rules and disclosure procedures have largely obviated the justification and need for the inference. Id. The last several decades have witnessed a growing wariness among courts about the wisdom of the missing witness rule, however, and a number of courts have rejected it outright. See e.g., State v. Tahair, 172 Vt. 101, 106-109, 772 A.2d 1079 (2001).

After the evidentiary hearing, the factfinder below held, "I'm not convinced that there was any intentional act by the District Attorney to withhold the information. . . . I don't find this to be intentional. . . ." PA 398. While the district court judge was convinced that the detective gave the binder to Scott Mitchell, it is a huge leap for this Court to conclude that the lack of disclosure to the defense was intentional which the prosecutor knew to be improper and prejudicial and pursued for an improper purpose with indifference to the risk of mistrial, as opposed to mere legal error, negligence or mistake. See Pool, *supra*. Even defense counsel in argument below believed the evidence from the evidentiary hearing at most amounted to inexcusable negligence which would not meet the Pool standard. PA

376-77, 382 ("the records clear that it was negligent and there was no excuse for it")[1].

The prosecutor had no motive and could hope to gain no advantage by intentionally withholding information pertaining to just two of the ten counts which the defense could easily obtain from an inspection of Metro's files or directly from attorney Don Green which is what actually happened. If the prosecutor was truly aware of the documents in the ACS binder and was intentionally hiding them from the defense, it makes no sense that the prosecutor would object to their admission thereby drawing attention to the fact that the documents had not been disclosed. One would think that if a dishonest prosecutor was intentionally hiding Brady evidence from the defense in risk of his reputation and his oath of office, he could do a better job of concealment than this. The majority's reasoning is flawed by impermissible appellate fact-finding, improper burden shifting, unwarranted negative inferences, and a failure to afford deference to the findings of the district court judge below who

[1] This was also the defense position at the time of the mistrial:

> MR. ALBREGTS: I'm not accusing these two prosecutors of being involved in this. . . . And so my point is, this is a pattern apparently of Detectives Whiteley and Ford of not providing stuff that they deem is irrelevant because they're not defense attorneys. . . . these two individual prosecutors didn't do anything that is unethical or untoward . . . . PA 42-44.

was in an infinitely better position to understand and factually interpret what had actually happened below.

As for the majority's adoption of a new state-constitutional Double Jeopardy test, the dissent has already pointed out the dangers and imprudence of such a change in law. The State agrees with the dissent but also adds that the whim of the majority currently in power is a poor rationale for overruling precedent and departing from the federal constitutional standard. Oregon v. Kennedy did more than simply announce a Double Jeopardy test to which states may apply greater protections under state law. Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083 (1982). Rather, Oregon v. Kennedy rejected an interpretation of its prior case law that would permit the kind of broad test based on mere "bad faith conduct" or "harassment" which the majority now adopts. Id., clarifying U.S. v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075 (1976) and U.S. v. Tateo, 377 U.S. 463, 84 S.Ct. 1587 (1964). When Nevada adopted Oregon v. Kennedy in 1983, it also necessarily rejected a broader interpretation of Double Jeopardy and allowed cases to be retried which would now be barred under the majority's new test. See Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109 (1983). Although Oregon v. Kennedy was decided by a slim majority of the Supreme Court at the time, the test has endured for 35 years. Oregon v. Kennedy, supra. The majority has now rejected the reasoning of Oregon v. Kennedy in favor of what was then and remains today to be a minority position.

What has changed in the last 35 years to warrant such a recognition of greater protection under the state constitution Double Jeopardy Clause, other than the makeup of the Court? Just because there is a majority which now believes its wisdom superior to that of the U.S. Supreme Court, this is not sound jurisprudence for interpreting nearly identical language in the state constitution more broadly. The lack of a valid legal basis for the majority's new interpretation will subject this Opinion to being overruled by future justices who simply believe otherwise. The state constitution should stand for more than simply mirroring the beliefs and preferences of the justices who currently occupy the bench.

While states are free to provide greater protections than the Federal Constitution requires, this Court has also recognized that, "[w]hen interpreting a constitutional protection that appears in both the United States and Nevada Constitutions, we will usually defer to and follow the interpretations of the federal courts." Osburn v. State, 118 Nev. 323, 328, 44 P.3d 523 (2002). This "lockstep" doctrine is followed in a "clear majority of cases, and represents an important feature of the dual enforcement of constitutional norms." *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?* 46 Wm. & Mary L. Rev. 1499, 1502 (2005). For the average citizen, it undermines the integrity and legitimacy of the judiciary as a whole when identical language means very different things depending only upon which court jurisdiction controls.

The rationale for deferring to federal interpretation is that, "the United States Supreme Court has for a long time been engaged in a careful and thoughtful consideration of the values and liberties at stake. By contrast . . . the Nevada Supreme Court 'has only occasionally interpreted the Nevada bill of rights." *A Critique of the Harnisch Cases*, 8 Nev. L.J. at 641. Nor do individual state court justices have the years of experience that come from life tenure on the U.S. Supreme Court. Nevada is a small and relatively new state with a limited body of jurisprudence which could greatly benefit federal guidance and sound reasoning.

When Nevada has departed from the lockstep doctrine without a legitimate rationale, as the majority has done in the present case, it has met with disastrous results. For example, for 16 years the legal community had to endure an unworkable and ill-conceived attempt to provide greater protection for automobile searches under the state Constitution. State v. Harnisch, 113 Nev. 214, 931 P.2d 1359 (1997). This Court was harshly criticized, and rightly so, until new justices were elected who could correct the Court's folly:

> Given that the Fourth Amendment and Article 1, Section 18 of the Nevada Constitution use virtually identical language, independently deriving a different formulation to protect the same liberty that the United States Constitution secures—and paying for that difference with confusing rules and unpredictable, oft-litigated results—cannot be justified.

State v. Lloyd, 129 Nev. ___, 312 P.3d 467, 473 (2013). State courts should be hesitant to create different interpretations from the United States Supreme Court

when the language is the same. The prevailing view is "that state courts should display very strong deference to decisions of the Supreme Court whenever it has decided issues raised by federal provisions that are 'mirror image' provisions of corresponding state constitutional guarantees." *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 640.

As for the Double Jeopardy Clause, this Court previously strayed from the federal Blockburger "same elements" test for Double Jeopardy protection and began to use a "same conduct" approach. Jackson v. State, 128 Nev. 598, 291 P.3d 1274 (2012). The results were disastrous with years of bad law and inconsistent results which had to be overruled. Id. This Court had to self-correct itself not once, but twice. Id.; Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001). There is no evidence that the citizens of Nevada in enacting the Double Jeopardy Clause nearly identical to the federal Constitution, intended to recognize greater rights or protection. The majority proffers no explanation for diverging from federal interpretation other than they are not personally persuaded by Supreme Court's reasoning. That is not good enough.

WHEREFORE, the State requests that rehearing be granted.

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Dated this 11th day of October, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is proportionately spaced, has a typeface of 14 points, contains 3,476 words and 284 lines of text.

Dated this 11th day of October, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 89155-2212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 11, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

FRANNY FORSMAN, ESQ.
DANIEL J. ALBREGTS, ESQ.
Counsels for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

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

JUDGE MICHAEL VILLANI
Eighth Judicial District Court, Dept. 17
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

BY */s/ E. Davis*
Employee, District Attorney's Office

SSO//ed