

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Supreme Court Case No. 71516

District Court Case No.
C211162-2

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Appeal from Judgment of Conviction  
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Terrence Bowser is the Appellant in Bowser v. State, Nevada Supreme Court Docket #71516.

2. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented in the proceedings below by the Clark County Public Defender's Office, Norm Reed, Esq. and Nadia Hojjat, Esq.

RESCH LAW, PLLC d/b/a Conviction
Solutions

By: 
JAMIE J. RESCH
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I. JURISDICTION

This is an appeal from a judgment of conviction following a jury trial in State v. Bowser, Case No. C211162-2. The written judgment of conviction was filed on August 31, 2015. 6 AA 1259. A notice of appeal was never timely filed, however; the District Court granted a Petition for Writ of Habeas Corpus which directed the Clerk of Court to file an untimely notice of appeal on Bowser's behalf pursuant to NRAP 4(c). 6 AA 1268. The Clerk of Court filed a notice of appeal on Bowser's behalf on October 13, 2016. 6 AA 1276. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 177.015(3) and NRAP 4(c).

II. ROUTING STATEMENT (RULE 17)

Appellant incorporates and relies on the Routing Statement contained in the opening brief filed February 8, 2017.

III. SUPPLEMENTAL ISSUES PRESENTED FOR REVIEW

- A. Whether the sentences imposed by the District Court for Counts 4 and 6 after Bowser's retrial violated the Double Jeopardy Clause of the Nevada and/or United States Constitution.

IV. STATEMENT OF THE CASE

Appellant incorporates and relies on the Statement of the Case contained in the opening brief filed February 8, 2017.

V. STATEMENT OF FACTS

Appellant incorporates and relies on the Statement of Facts contained in the opening brief filed February 8, 2017.

VI. SUMMARY OF ARGUMENT

In addition to the arguments presented in the opening brief filed February 8, 2017, Bowser further raises the following issue: That the increase in his sentences on Counts 4 and 6 after retrial violated his state or federal rights under the Double Jeopardy Clause.

VII. ARGUMENT

A. The sentences imposed by the District Court for Counts 4 and 6 after Bowser's retrial violated the Double Jeopardy Clause of the Nevada and/or United States Constitution.

The opportunity to present the Court with this important issue is appreciated. As noted in the opening brief, Bowser was tried twice in the instant case. The first trial ended in a conviction for First Degree Murder

with Use of a Deadly Weapon and other serious offenses. 1 AA 109.

Specific to this issue, Bowser was convicted after the first trial of Count 4, Discharging Firearm Out of a Motor Vehicle, and Count 6, Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft. 1 AA 110. On Count 4, Bowser received a sentence of 24 to 60 months in state prison to run concurrent to convictions on counts one and two (Conspiracy to Commit Murder and First Degree Murder with Use of a Deadly Weapon). 1 AA 113. On Count 6, Bowser was sentenced to 12 to 60 months in state prison, and said sentence was again concurrent with any previously imposed counts. 1 AA 114.

Following the retrial, Bowser was not convicted of Conspiracy to Commit Murder, but instead was convicted of Voluntary Manslaughter with Use of a Deadly Weapon instead of murder. 6 AA 1237. However, as to Count 4, Bowser was again convicted, and this time sentenced to 48 to 120 months in state prison, with that sentence run consecutive to count two. 6 AA 1237-38. On Count 6, Bowser was sentenced to 28 to 72 months in state prison to run "concurrent with count 4," meaning it too would

effectively run consecutively to the conviction for manslaughter in count two. 6 AA 1238.

In short, the first trial featured an effective sentence of 24 to 60 months in state prison concurrent to the other convictions in counts one and two. The retrial featured an effective 48 to 120 month sentence which was consecutive to count two. Bowser would acknowledge, of course, that the overall sentence after the retrial is shorter than the life sentence imposed after the first trial. 1 AA 111. However, this Court has rejected consideration of a criminal defendant's overall sentence as determinative of whether the Double Jeopardy Clause has been violated.

The Double Jeopardy Clause of the Fifth Amendment states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Nevada Constitution is similarly worded in that "[n]o person shall be subject to be twice put in jeopardy for the same offense." Nev. Const. art. 1 § 8, cl. 1 (Double Jeopardy Clause). While these clauses jointly provide various protections, such as the well-known prohibition on retrial after an acquittal, they also provide a

protection relevant to Bowser: "When a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count." Wilson v. State, 123 Nev. 587, 594, 170 P.3d 975 (2007).

In Wilson, this Court reversed several of the defendant's convictions and remanded the matter for resentencing. The defendant received harsher sentences on resentencing. On appeal, he claimed the Double Jeopardy Clause was violated when the trial court "increased the minimum sentences associated with the possession counts and ran them consecutively with his sentence on the one remaining production count." Id. at 591.

On appeal, this Court noted the "strong double jeopardy protections" enjoyed by Nevada citizens. Id. at 592, citing Dolby v. State, 106 Nev. 63, 787 P.2d 388 (1990). In part, those strong protections were given life when this Court rejected the concept that altering sentences on resentencing would not violate double jeopardy so long as the aggregate sentence was less than that which was previously imposed. Id. at 591. That is, it was error

for the trial court to increase the individual sentences imposed on resentencing, even though the aggregate term imposed was not harsher than the original sentence structure. Id. at 596-597.

The decision in Wilson reaffirmed this Court's earlier decision in Dolby. There, following a successful motion to correct illegal sentence, a defendant was resentenced and received a harsher punishment. This Court found, however, that "[o]nce a defendant begins to serve a lawful sentence, he may not be sentenced to an increased term; to do so violates the constitutional proscription against double jeopardy." Dolby, 106 Nev. at 65. As such, "[w]hen a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count." Id., citing Chandler v. United States, 468 F.2d 834 (5th Cir. 1972).

It is noted that Dolby and Wilson dealt with resentencing proceedings and not sentencing following a retrial. However, there is no good reason to erode the double jeopardy protections provided by those cases in circumstances following a retrial. The "strong" protections provided to Nevada citizens are easily extended to situations involving retrials where

the defendant is ultimately, as here, re-convicted of at least some of the exact same offenses for which punishment was previously imposed. Any other rule would effectively grant license to District Courts to reconfigure aggregate sentences after retrial to approach the originally imposed sentence; the exact mechanism this Court held impermissible in Wilson.

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Moreover, this Court has also already addressed how double jeopardy may impact a sentencing after retrial:

The appellant contends that the sentence he is presently serving is unconstitutional since it is harsher than the sentence originally imposed and later set aside. The controlling authority on this subject is North Carolina v. Pearce, 395 U.S. 711 (1969).¹ The court noted that due process of law requires that vindictiveness against a defendant must play no part in the sentence he receives after a new trial, since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. Accordingly, whenever a more severe sentence is imposed after a new trial the reasons for doing so must affirmatively appear. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made a part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id. at 726.

Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242 (1974).

Here, Holbrook was not complied with because the reasons for increasing Bowser's sentence on retrial do not affirmatively appear in the record. In fact, the State's argument repeatedly urged the Court (in

¹ Pearce was subsequently overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

violation of Wilson) to restructure the sentence after retrial to be as long as possible: "In this case unfortunately he's going to have to be released at some point, quite soon actually, too soon." 6 AA 1215; "The facts that came out at trial demonstrate that this was nothing less than a first degree murder." 6 AA 1213. The State specifically requested longer, consecutive sentences on Counts 4 and 6, because it was the "only way" to "protect the community for as long as possible." 6 AA 1216.

The defense argument was essentially the holding from Holbrook:

We're just asking that all three counts run concurrent in this case. The counts, all six counts previously ran concurrent in this case. There was a first trial. All of the evidence was presented. All the mitigation was present. The counts ran concurrent. Nothing has changed, Your Honor. Absolutely nothing has changed from the first trial to the second trial. There is a not a single piece of new evidence."

6 AA 1218.

The trial court noted that the verdict had changed. 6 AA 1218. However, defense counsel explained that was because the limited new information which came out in the second trial was in the form of mitigating evidence. 6 AA 1218.

Defense counsel also argued that it was error to reconfigure the sentence in a manner which approached the result from the first trial:

The idea that because they come back less let's just compound everything. Let's run it all consecutive and get it as close to the first sentence as we can get, that's not the purpose of sentencing ranges. That's not what these statutes were designed for.

6 AA 1220.

Trial counsel went on to argue that it was "actually double jeopardy" to impose consecutive sentences where "[n]othing aggravating has been presented on top of the prior facts that warrants now going consecutive." 6 AA 1220.

The trial court's "reasons" for ultimately imposing consecutive sentences simply do not appear in the record. The entirety of the court's analysis is the conclusory statement "And I do consider, because it's 10 years down the road, the information we do have about what has happened in the time since." 6 AA 1234. However, there is no way of knowing what the trial court considered that led it specifically to impose consecutive and longer sentences for Counts 4 and 6, other than that the

State urged the court to do so in an effort to most closely mirror the originally imposed sentence. The record here reflects the harsher sentences were at the State's request, that no new information was available to justify a harsher sentence, and that defense counsel specifically informed the court that it should keep the concurrent structure from the first sentencing hearing.

Bowser's sentencing therefore violates the Double Jeopardy Clause two ways. First, the longer, consecutive sentences are quite clearly the trial court's way of punishing Bowser as closely to the original sentence imposed as possible – the precise tactic this Court forbade in Wilson. Harsher sentences following a retrial are not allowed in Nevada because Nevada provides strong double jeopardy protections to its citizens, and the determination of what is harsher looks to individual sentences, not the aggregate term.

Second, even if longer, consecutive sentences were constitutionally permissible following a retrial, they are unconstitutional under Holbrook unless the record shows "identifiable conduct by the defendant occurring

after the original sentence which would justify a more severe sentence.”

Holbrook, 90 Nev. at 98. The record here is completely devoid of any such conduct.

VIII. CONCLUSION

Based on the foregoing, as was the result in Holbrook, this court should reverse the conviction and sentence and remand the matter to the District Court for imposition of “the term originally imposed.” Id. at 99. For Bowser, that means a 24 to 60 month sentence on Count 4, and a 12 to 60 month sentence on Count 6, both concurrent to one another and to all other counts.

DATED this 19th day of July, 2017.

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RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon is 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.
2. I further 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 2016 in 14-point font of the Ebrima style.
3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,967 words.

DATED this 19th day of July, 2017.

RESCH LAW, PLLC d/b/a Conviction
Solutions

By: 

JAMIE J. RESCH

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 19, 2017. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
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Counsel for Respondent

ADAM P. LAXALT
Nevada Attorney General

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

An Employee of RESCH LAW, PLLC, d/b/a
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