

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE JENNIFER
TOGLIATTI, DISTRICT JUDGE

Respondents,

And

JEFFREY LYNN BAKER,

Real Party in Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO:

D.C. NO: C-14-303315-1

PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Deputy, RYAN J. MACDONALD, and submits this Petition for Writ of Mandamus. This Petition is based on the following memorandum and all papers and pleadings on file herein.

Dated this 2nd day of November, 2016.

Respectfully submitted,

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

BY */s/ Ryan J. MacDonald*

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

Whether the district court arbitrarily and capriciously abused its discretion when it denied the State's motion to admit at trial the preliminary hearing testimony of C.J. following the court's misplaced application of the Confrontation Clause and self-created category of constitutional waiver.

PROCEDURAL HISTORY

On November 14, 2014, Real Party in Interest Jeffery Baker was charged by way of Criminal Complaint with eight counts of Lewdness with a Child Under the Age of 14 and one count of Coercion Sexually Motivated. Petitioner's Appendix (PA) 3-5. On December 17, 2014, the justice court referred Baker to competency hearings. PA 15-16. On January 9, 2015, the district court found Baker competent. PA 17.

On February 6, 2015, a preliminary hearing was held. PA 18. The State questioned a single witness—Baker's cousin and victim, C.J. PA 20-43. At the conclusion of the State's case, Baker's counsel negotiated a resolution. PA 43. Baker subsequently unconditionally waived his right to a full preliminary hearing and thus also his right to his cross-examine C.J. PA 44.

On February 13, 2015, the State filed an Information charging Baker with Attempted Lewdness with a Child Under the Age of 14. PA 46-47. On February 20,

2015, after canvassing Baker, the district court refused to accept his plea of guilty and ordered the State to file an Amended Information. PA 71.

On February 27, 2015, fourteen year old C.J. committed suicide. PA 59. On March 5, 2015, the State filed an Amended Information charging Baker with eight counts of Lewdness with a Child Under the Age of 14 and one count of Coercion Sexually Motivated. PA 48-51. Baker pleaded not guilty. PA 71.

On May 11, 2015, the State filed a Motion to Admit the Preliminary Hearing Transcript of C.J. at Trial. PA 54-63. At Calendar Call on May 14, 2015, the district court vacated the trial date and ordered Baker to Competency Court for evaluation. PA 73-74.

Between May 2015 and March 2016, Baker remained in Competency Court. On April 1, 2016, Baker was found competent. PA 52-53. A Findings of Competency was filed the same day. PA 52-53.

On May 18, 2016, Baker filed an Opposition to the State's Motion to Admit the Preliminary Hearing Transcript of C.J. at Trial. PA 64-68.

At the motion hearing, the district court concluded that, although the Confrontation Clause and Nevada law only require the *opportunity* to cross-examine a witness, no "adequate opportunity to cross-examine exists when a waiver of preliminary hearing immediately after the State's direct examination of the witness occurs strictly for the purpose of negotiations ... even though the opportunity is a

procedural, not substantive guarantee.” PA 69-70. The district court then denied the State’s motion to admit C.J.’s preliminary hearing testimony and set a trial date. PA 70. This mandamus petition and accompanying stay motion follow.

ARGUMENT

I

EXTRAORDINARY RELIEF IS WARRANTED

Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within this Court’s discretion. See Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); see also State ex rel. Dep’t Transp. v. Thompson, 99 Nev. 58, 360, 662 P.2d 1338, 1339 (1983). Mandamus is the appropriate vehicle for challenging evidentiary rulings for which the State has no other remedy. See State v. Dist. Court (Armstrong), 127 Nev. 927, 931, 267 P.3d 777, 780 (2011). While “[t]he admission or exclusion of evidence rests within the district court’s sound discretion,” id., mandamus is available to control an arbitrary or capricious exercise of that discretion. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” Armstrong, 127 Nev. at 932, 267 P.3d at 780 (internal quotations omitted). Here, because the district court clearly misinterpreted the Confrontation Clause’s requirement of an opportunity to cross-examine and created a new category of waiver, it failed to properly exercise its discretion. See id. Accordingly, this Court’s intervention is warranted.

A. Under Extant Case Law, the Confrontation Clause Only Requires an Opportunity to Cross-Examine, Not Actual Cross-Examination

The district court concluded that Baker did not have an adequate opportunity to cross-examine C.J. because he waived his right to cross-examine her during the preliminary hearing. The district court cited to Chavez v. State, which specifically held that “a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford.” 125 Nev. 328, 337, 213 P.3d 476, 482 (per curiam) (citing Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)). The court then went on to describe situations where the defendant had adequate and inadequate opportunities to confront witnesses. Id. at 338-39, 213 P.3d at 483-84; see also Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (“[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”).

Accordingly, there are three steps in the Confrontation Clause analysis: (1) whether the declarant is unavailable;¹ (2) whether the statements are testimonial;² and (3) whether the defendant had a prior *adequate opportunity* for cross-

¹C.J. is unavailable pursuant to NRS 51.055 because she is “[u]nable to be present or to testify at [trial] because of death.”

²The State does not dispute C.J.’s preliminary hearing testimony is considered testimonial pursuant to Crawford. 541 U.S. at 68, 124 S. Ct. at 1374 (The Confrontation Clause “applies at a minimum to prior testimony at a preliminary hearing.”).

examination. Although this Court has instructed the district courts to “determine the adequacy of the opportunity on a case-by-case basis,” it also provided factors for the district courts to consider. Chavez, 125 Nev. at 337, 213 P.3d at 482. In determining whether the opportunity to cross-examine was adequate, this Court has instructed the district courts to look at the discovery available to the defendant at the time of the hearing and the manner in which the magistrate judge allowed the cross-examination to proceed. Chavez, 125 Nev. at 337, 213 P.3d at 482.

At the time of the preliminary hearing, Baker had received transcripts of his victims, witnesses, and his own statement. PA 61. Likewise, Baker possessed copies of the police report, Declaration of Arrest, case report, and C.J.’s mother’s voluntary, handwritten statement. PA 61. Accordingly, the discovery provided to Baker satisfied this Court’s requirements. See Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006) (finding opportunity to cross-examine exists when defendant obtained police report, which included victim statements, during discovery).

Additionally, at the conclusion of direct examination, the justice court provided Baker with an unobstructed opportunity to cross-examine C.J. PA 43. While C.J. was still on the stand, defense counsel began negotiations with the State and resolved the case. PA 43. Baker subsequently agreed and waived his right to continue the preliminary hearing and cross-examine C.J. PA 44.

Baker was clearly afforded the opportunity to cross-examine C.J., but he chose not to; therefore there was no Confrontation violation. See Hinojos-Mendoza v. People, 169 P.3d 662, 668 (Colo. 2007) (“The right to confrontation is not denied because the prosecution is allowed to present testimony which the defendant chooses not to cross-examine.”); State v. Pasqualone, 903 N.E.2d 270, 277, 121 Ohio St. 3d 186, 193 (2009) (“The decision whether to cross-examine a particular witness is a *tactical* decision ultimately controlled by a defendant's trial counsel.”).

However, the district court refused to engage in this analysis; instead it determined that Confrontation rights cannot be waived by a defendant for purposes of negotiation as justification to exclude C.J.’s testimony, permitting it to avoid the proper analysis under Nevada law.

B. The District Court’s Order is Not Based on Any Legal Authority

The district court neglected to engage in the Chavez analysis because it did not believe this Court would “find an adequate opportunity to cross-examine exists when a waiver of preliminary hearing immediately after the State’s direct examination of the witness occurs strictly for the purposes of negotiation.”³ PA 70.

In essence, the district court held that Baker lacked the opportunity to cross-examine C.J. because Baker waived his opportunity. However, this Court has never

³ The district court provided no rational or legal basis for its belief and, the State submits, undermined its own position when it affirmed that Confrontation rights are procedural, not substantive rights.

recognized the unusual category of quasi-waiver that the district court applied here. Essentially, the district court's ruling transmogrified an unconditional waiver into an equivocal one. Yet, it is well accepted that criminal defendants may unconditionally waive their constitutional rights. "A valid waiver of a fundamental constitutional right ordinarily requires an intentional relinquishment or abandonment of a known right or privilege." Gallego v. State, 117 Nev. 348, 368, 23 P.3d 227, 241 (2001), overruled on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011).

Moreover, in the context of the Confrontation Clause, implied waiver is acceptable in certain circumstances. See Crawford, 541 U.S. at 62, 124 S. Ct. at 1370 (forfeiture by wrongdoing does not run afoul of the Confrontation Clause).

Here, however, Baker's waiver was explicit and unconditional. After counsel negotiated a settlement to his case, counsel informed the justice court that, "pursuant to negotiations, Mr. Baker will *unconditionally* waive his preliminary hearing." PA 44 (emphasis added). The justice court then canvassed Baker to ensure that his waiver was freely, voluntarily, and intelligently entered. PA 44. Subsequent to the canvass, the justice court accepted Baker's waiver and bound him over to the district court. PA 44. By unconditionally waiving his right to preliminary hearing, Baker waived his constitutional right to confront the witnesses against him in that hearing.

While this Court has not addressed the specific issue of whether a defendant can waive their right to confrontation in the middle of a preliminary hearing in order

to plead guilty, other courts, including the United States Supreme Court, have found that the right of confrontation is waivable. See e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3, 129 S. Ct. 2527, 2537 n.3 (2009) (“The right to confrontation may, of course, be waived....”); Hinojos-Mendoza, 169 P.3d at 668 (“It is well-established ... that the right to confrontation can be waived.”); Stringer v. State, 241 S.W.3d 52, 56 (Tex. Ct. Crim. App. 2007) (“[F]or a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege.”); United States v. Lopez-Medina, 596 F.3d 716, 731 (10th Cir. 2010) (same).⁴

The Confrontation Clause only requires that reliability be assessed in a particular manner—through cross-examination. Crawford, 541 U.S. at 61, 124 S. Ct. at 1370. Thus, it “is a shield, not a sword.” United States v. Lopez-Medina, 596 F.3d at 732. Because Baker elected not to exercise his procedural right, it is waived. To hold otherwise would transform the confrontation right into a substantive right, where the absence of any prior cross-examination, even when strategically declined, would result in a constitutional violation.

Indeed, the district court’s application of this self-created quasi-waiver category transformed the Sixth Amendment’s requirement from a procedural

⁴ Other courts have extended the proposition that Confrontation rights can be waived and held that “waiver may be accomplished by counsel.” People v. Buie, 491 Mich. 294, 306-07, 817 N.W.2d 33, 40 (2012).

guarantee to a substantive right, in clear contradiction of established precedent. See Crawford, 541 U.S. at 61, 124 S. Ct. at 1370 (Confrontation “is a procedural rather than a substantive guarantee.”); see also Chavez, 125 Nev. at 337, 213 P.3d at 483 (same); Flores v. State, 121 Nev. 706, 714, 120 P.3d 1170, 1176 (2005) (same). Therefore, the district court’s rationale cannot support its decision to ignore extant Nevada and federal law and arbitrarily qualify an unconditional waiver of a right. Further, there is no basis to conclude that Baker conditioned his waiver in any way.

CONCLUSION

The district court in this case excluded C.J.’s preliminary hearing testimony without engaging in the required Confrontation Clause analysis. This was an arbitrary and capricious act without any basis in the law, warranting extraordinary intervention by this Court. Accordingly, the State requests that this Court stay the proceedings in district court, order an answer, and grant this petition for a writ of mandamus directing the district court to vacate its exclusion order.

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Dated this 2nd day of November, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ Ryan J. MacDonald*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 2, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

MIKE FELICIANO
Deputy Public Defender

RYAN J. MACDONALD
Deputy District Attorney

I further certify that service of the above and foregoing was made this 2nd day of November, 2016, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JUDGE JENNIFER TOGLIATTI
Eighth Judicial District Court, Dept. IX
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BY /s/ j. garcia
Employee, District Attorney's Office