IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

JOHN THOMAS KEPHART,

Respondent.

_____/

No. 72481

RESPONSE TO ORDER TO SHOW CAUSE

This Court has directed Appellant, the State of Nevada, to show cause why this appeal should not be dismissed. The Order characterizes the appeal as being from an order granting a motion to suppress, and mentions that the time for appeal ran from the date the district court orally granted the motion. The problem is that there never was any motion that was properly characterized as a "motion to suppress."

A "motion to suppress" is a motion seeking to exclude evidence on the grounds that it was obtained unlawfully and is therefore subject to the exclusionary rule. *State v. Shade*, 110 Nev. 57, 867 P.2d 393 (1994). The instant motion was not such a motion. Instead, this is an appeal from an order ruling that prior convictions, to be used to enhance the charge of

domestic battery, did not meet constitutional muster. *See* Exhibit A, [Proposed] Order Granting Motion to Suppress. The motion had nothing to do with any rule of search and seizure and should not have been captioned as a motion to suppress. Likewise, the district court should not have captioned the Order as one granting a motion to suppress, and this Court should not have treated this appeal as an appeal from an order granting a motion to suppress.

The instant appeal is more akin to an order granting a motion to dismiss. An order dismissing part of an Information is an appealable order. *State v. Kosek,* 112 Nev. 244, 911 P.2d 1196 (1996). Such an appeal must be filed within 30 days of the order granting the motion to dismiss and the instant Notice of Appeal was filed well within that time limit.

The State had filed an Information alleging felony domestic battery. The charge was a felony by virtue of the prior convictions. *See* NRS 200.485(1)(c). The district court ruled that the charge in the Information would not be considered by a jury or by the district court. That is clearly an order granting a motion to dismiss.

There is another reason why this appeal should not be dismissed. Even if the order was indeed granting a motion to suppress, this Court

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should overrule *State v. Braidy*, 104 Nev. 669, 671, 765 P.2d 187, 188 (1988). In that case, this Court held that the time to appeal from an order granting a motion to suppress runs from the oral order, not some subsequent written order. However, it is not always clear when a court has actually ruled. For instance, in this case, according to the clerk's minutes, the district court purportedly granted the motion, but then indicated that there would be a subsequent written order, and that the prosecution would have the opportunity to object to that order. *See* Exhibit B, the clerk's minutes from the motion to suppress hearing. The minutes also revealed the court had considered, but not decided, whether the district court ought to retain jurisdiction or remand to the justice court. That would seem to indicate that the oral pronouncement was not considered final by the district court judge and was subject to modification, and perhaps even to reversal. Indeed, the Court might note that even the written order purporting to grant the motion is itself captioned as a "proposed" order. A rule requiring the State to appeal from an oral pronouncement tentatively granting a motion, or to forever waive the right to review, will result in the sort of piecemeal litigation that this Court has condemned in other circumstances. In general, there should clearly be a final order, no longer subject to reconsideration, before there is the right to appeal. In addition,

the Court might note that the pendency of an appeal, from a tentative oral ruling, would seem to preclude the district court from reconsidering. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1381 (1987). That rule seems unwise. Instead, the Court should rule that the appeal should be from the written order granting the motion and until the Court enters a written order, it remains free to reconsider its initial ruling.

An appeal from an oral ruling has yet another disadvantage. That is, if the subsequent written order corrects an error, or makes contrary findings, that would result in disarray. That problem resulted in a ruling from one court: "An oral denial does not constitute an order denying the motion. An order must be in writing. It must be signed by the judge. And the motion is pending until such time as a signed written order granting or denying it is made." *State v. New*, 28 N.W.2d 522, 523 (N.D., 1947).

There is a sort of a middle ground. That is, this Court could rule that an oral pronouncement granting a motion to suppress is an appealable order unless the district court indicates an intent to enter a written order. In that case, the appealable event would be entry of the written order. That was the result in *Hughey v. City of Hayward*, 24 Cal. App. 4th 206, 30 Cal. Rptr. 2d 678 (1994). The Court ruled that ordinarily the minute order is the appealable event, "unless such minute order as entered expressly

directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order." *Id*., 24 Cal. App. 4th at 208.

As a practical matter, the presentation and ruling in open court may not reflect the court's final ruling. As in this case, a court might desire additional time to think about the issues. Thus, this Court should rule that, even if this was an appeal from an order granting a motion to suppress, when the court directed preparation of a proposed order, and indicated that the State would have time to make objections to the proposed order, the tentative oral ruling was not the appealable event.

DATED: April 13, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

EXHIBIT A

EXHIBIT A

IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA,IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JOHN THOMAS KEPHART,

Defendant.

_____/

Case No. CR16-0298

Dept. No. 7

[PROPOSED] ORDER GRANTING MOTION TO SUPPRESS

This matter came before the Court on February 13, 2017. The Court has considered the record, the Defendant's *Objection to Admission of Prior Convictions as a Felony Enhancement and Motion to Dismiss*, filed January 12, 2017, the State's written response thereto, and all subsequent replies, responses, and oral arguments from both parties at the hearing.

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Background

Mr. Kephart was convicted of a misdemeanor First Domestic Battery on May 19, 2010 for an offense that occurred on or about November 28, 2009 in Humboldt County, Nevada, pursuant to negotiations. Mr. Kephart was represented by counsel and signed an *Admonishment of Rights*.

Mr. Kephart was convicted of another misdemeanor First Domestic Battery on July 29, 2010 also in Humboldt County, Nevada, pursuant to negotiations for an offense that occurred on or about June 3, 2010. During the proceedings in this case, Mr. Kephart represented himself in proper person, negotiated directly with the State and entered his plea and was sentenced as a proper person without counsel. The available record relating to the July 29, 2017 conviction includes the Complaint, a Judgment of Conviction and minutes which are not a verbatim account of what was said, but instead briefly summarize the various proceedings and actions held throughout the case.

The instant case was first brought against Mr. Kephart in Sparks Justice Court by way of a Complaint filed on September 30, 2015 alleging one count of Domestic Battery by Strangulation. Mr. Kephart was represented by private counsel. An Amended Criminal Complaint was filed in Sparks Justice Court on December 2, 2015, adding a second count of Domestic Battery, a felony, for having been previously convicted of two other Domestic Battery offenses within seven (7) years. A Preliminary Hearing was set for February 3, 2016 and was dismissed by the State without prejudice on February 3, 2016 due to the absence of witnesses.

The State then sought prosecution via a Grand Jury Indictment. The Grand Jury indicted Mr. Kephart on Count I: Domestic Battery by Strangulation and Count II: Third Domestic Battery. On May 11, 2016, the Court appointed the Washoe County Public Defender's Office to represent Mr. Kephart, after he previously appeared in court without counsel. Negotiations in the case were unsuccessful and a jury trial was set for January 17, 2017.

On January 11, 2017, the State filed an Information Superseding Indictment, charging Mr. Kephart with the one count of Domestic Battery, a violation of NRS 33.018, NRS 200.485, and NRS 200.481, dropping the element of strangulation and now prosecuting as a felony solely due to the two prior Humboldt County Domestic Battery convictions mentioned above.

On January 12, 2017, Mr. Kephart, by and through counsel, filed an *Objection to Admission of Prior Convictions as a Felony Enhancement and Motion to Dismiss*. Mr. Kephart requested the Court deny the admission of the prior domestic battery convictions from Union Justice Court, Humboldt County, Nevada, for felony enhancement purposes.

On January 17, 2017, before the jury was seated, the Court orally addressed the Defendant's objection to the prior Humboldt County convictions. The Court found it had jurisdiction to preside over the case regardless of whether a guilty verdict would ultimately result in a misdemeanor or a felony conviction. This Court did not dismiss the case and further held the issue of enhancement based on prior convictions is a sentencing issue and may be moot if Mr. Kephart is

acquitted. As such, this Court gave the State leave to respond to the Defendant's motion in the event of a guilty verdict.

The trial concluded on or about January 19, 2017, wherein a jury found Mr. Kephart guilty of Domestic Battery.

On January 25, 2017, the State filed its *Response to Objection to Admission of Prior Convictions as a Felony Enhancement and Motion to Dismiss.* The Mr. Kephart filed his *Reply* and the matter was submitted for consideration on February 8, 2017. A hearing on the matter was held on February 13, 2017.

Discussion

It is the finding of this Court that to admit Mr. Kephart' s prior 2010 Domestic Battery convictions from Humboldt County, Nevada to enhance his instant conviction to felony would offend the spirit of constitutional principles of Due Process and Notice in accordance with Nevada Supreme Court precedence in the line of cases relating to *State v. Smith*, 105 Nev. 293, 298, 774 P.2d 1037, 1040 (1989) and *Speer v. State*, 116 Nev. 677, 5 P.3d 1063 (2000).

The records demonstrate Mr. Kephart was convicted for two prior Domestic Battery offenses in 2010. Both Judgments clearly show that each of those convictions is within three months of each other and both are entered as "First Domestic Battery" convictions. The record also establishes both 2010 Domestic Battery convictions were for offenses that occurred within seven years of the instant offense. The question in dispute is whether the second Domestic Battery conviction in 2010 was specifically negotiated by the parties as a misdemeanor

"First Domestic Battery" for enhancement purposes; meaning there was an agreement that a subsequent Domestic Battery within seven years would only be enhanced to a misdemeanor Second Domestic Battery rather than a felony.

In his motion, Mr. Kephart argued that, under *Smith v. State,* a conviction is not admissible as an enhancement if the conviction was the result of negotiations. Mr. Kephart asserted that his prior Domestic Batter convictions may not be used to enhance a the current conviction "to a felony where the second conviction was obtained pursuant to a guilty plea agreement specifically permitting the defendant to enter a plea of guilty to first offense... and limiting the use of the conviction for enhancement purposes." *Speer v. State*, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).

Moreover, at the hearing on February 13, 2017, Mr. Kephart testified under oath that he was not on notice that the next Domestic Battery conviction would result in a felony, with mandatory prison time. In this way, he further asserts, that a felony enhancement contradicts his understanding of the prior plea negotiations.

The State responded in opposition that the above rule does not apply where there is no plea agreement explicitly limiting the use of the prior conviction for enhancement purposes. *Id.* at 679-80. State argues Mr. Kephart signed an *Admonishment of Rights* as part of his July 29, 2010 plea, which put him on notice that his July 29, 2010 conviction would be used for enhancement purposes. For the reasons stated below and because Mr. Kephart was representing himself in proper person when he signed the *Admonishment of Rights* for his July 29, 2010

plea, this Court rejects the State's argument that Mr. Kephart was sufficiently put on notice that his July 29, 2010 conviction would be used for felony enhancement purposes.

This Court recognizes the rule created by the *Smith* and *Speer* line of cases is not applicable in the absence of a plea agreement limiting the use of the prior as an enhancement. The Nevada Supreme Court opined, "Our decisions in *Crist, Perry* and *Smith* were based solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto." *Speer v. State*, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000). Also, this Court's understanding of the Nevada Supreme Court's decisions are that, once the State demonstrates evidence regarding the parties' specific negotiations for future enhancements, the burden shifts to the defendant to show it wasn't going to be used for the purposes of a felony enhancement. The purpose behind this is to ensure the State complies with negotiated agreements not to use a specific prior for a felony enhancement.

In Kephart's case, there is not a record to indicate one way or the other. We don't have a transcript, which is not the defendant's fault. Both the Deputy District Attorney for Washoe County and the Deputy Public Defender for Washoe County in the instant case contacted the court in Humboldt County, Nevada in an attempt to obtain a transcript and/or a recording of the hearing related to the July 29, 2010 Domestic Battery conviction. Humboldt County informed both parties that there were neither transcripts nor recordings.

What we have are two prior 2010 misdemeanor judgments within a few months of each other that clearly indicate "First Domestic Battery." We also have the June 4, 2010 *Criminal Complaint,* which serves as the basis for the July 29,

2010 conviction. In that *Criminal Complaint*, the prior conviction is notably crossed out in both the title and body of the document. The court record sufficiently provides enough evidence suggesting the parties were fully aware of the prior May 19, 2010 conviction prior to allowing Mr. Kephart to plead to a First Domestic Battery on July 29, 2010.

As previously noted, Mr. Kephart was not represented by counsel on July 29, 2010, and there was no written plea agreement prepared. Had there been a written plea agreement, this decision would have been an easy call, but there wasn't one. This Court observes that proper person Defendants do not typically prepare plea agreements. What tends to happen is that the Defendant shows up, the State negotiates with him and says something to the effect of, "Look, we'll let you plead to a first. You'll get the first punishment, not the second punishment." Then, the Clerk puts something in front of the Defendant to sign, he signs it. However, the Defendant is not represented by counsel, so nobody's really telling him what any of it means. This is where this Court has a hard time with using the July 29, 2010 conviction for felony enhancement purposes.

Based upon the foregoing reasons, the Court hereby GRANTS Defendant's motion to exclude the prior First Domestic Battery convictions for felony enhancement purposes.

IT IS SO ORDERED

Dated this 27th day of February, 2017.

William G. Maddox
DISTRICT JUDGE

EXHIBIT B

EXHIBIT B

F I L E D
Electronically
CR16-0298
2017-02-21 11:52:30 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5958874

CASE NO. CR16-0298

STATE OF NEVADA
vs
JOHN THOMAS KEPHART

02/13/2017
HONORABLE
WILLIAM A. MADDOX
DEPT. NO. 8
M. Conway (Clerk)
R. Walker (Reporter)

APPEARANCES-HEARING CONTINUED TO

MOTION TO SUPPRESS

Deputy District Attorney Michael Bolenbaker represented the State.
Deputy Public Defender Christine Brady was present on behalf of the Defendant.
Defendant Kephart was present, out of custody.

Counsel Brady addressed the Court and presented a procedural history of the case at bar and reviewed the Information Superseding Indictment charging a third domestic battery. Counsel Brady presented argument in support of a jurisdictional issue as to whether or not this is a third domestic battery. Counsel Brady presented argument that the second domestic battery to which he pled, that actually occurred prior to the first one to which he pled, does not constitute a valid second domestic batter for enhancement purposes pursuant to the negotiations.

Counsel Bolenbaker addressed the Court and presented argument supporting the State's contention that the Defendant signed a waiver (in his prior domestic battery case(s)) that specifically says that this conviction and any other conviction can be used against him to enhance. Counsel argued that the record clearly shows that there was no proof issue necessarily on the charge; it was simply a matter of an inability to actually prove up the prior offense to make it a second. Counsel argued that is why it was reduced down to a first, not for enhancement purposes but merely for penalty purposes. Counsel Bolenbaker marked for identification two unpublished opinions, Ex: 1: ***Kapetan v State, 126 Nev. 729*** and Ex 2: ***Tosh v. State, 385.***
Copies were provided to all parties.
Respective counsel advised the Court that they attempted to, but were unable to get, transcripts from the Defendant's prior hearings at the misdemeanor lower court level.
Court and counsel reviewed exhibits 1 and 2, the Criminal Complaint filed June 4, 2010, and the Judgment of Conviction.
Counsel Bolenbaker provided further argument.
Counsel Brady provided further argument.
Counsel Brady called ***JOHN THOMAS KEPHART***, who was sworn and testified under direct examination.
Counsel Bolenbaker conducted cross-examination.
The Court questioned Defendant Kephart.
Counsel Brady conducted re-direct examination. Counsel Bolenbaker conducted re-cross examination.
Defendant Kephart was excused.

COURT ORDERED: Motion to Suppress Prior Convictions (to be used for enhancement purposes): GRANTED.

Court and counsel discussed the timeline for the State to file an appeal from this decision. Counsel Bolenbaker indicated that he is not certain if the State would appeal this decision.

Court and counsel discussed whether sentencing should be remanded to Justice Court, if the matter should be sentenced by the District Court and reviewed potential supervision and alternative sentencing options.

COURT ORDERED: Counsel Brady to prepare and email the Order to Court and Counsel Bolenbaker. Upon receipt of the proposed Order, Counsel Bolenbaker will have five days to object to any content/language.

after session note
Remand to Justice Court and/or sentencing date not determined at this time.

HEARING

CR16-0298 STATE OF NEVADA vs. JOHN THOMAS KEPHART
State of Nevada: Deputy District Attorney Michael Bolenbaker
Defendant: Deputy Public Defender Christine Brady

HEARING: Motion to Suppress
Heard before the Honorable William A. Maddox

Case No: **CR16-0298** Dept. No: **D7** Clerk: **M. Conway** Date: **02/13/2017**

Exhibit No.	Party	**Description**	Marked	Offered	Admitted
1	State	Copy of unpublished Disposition ***Kapetan v. State, 126 Nev. 729***	02/13/2017		
2	State	Copy of unpublished Disposition ***Tosh v. State 385 P.3d 607***	02/13/2017		

Print Date: 2/21/2017

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on April 13, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

/s/ DESTINEE ALLEN
DESTINEE ALLEN