

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO:

Electronically Filed
Jun 20 2018 10:54 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
72829

**OPPOSITION TO MOTION TO REMAND FOR AN EVIDENTIARY
HEARING TO RECONSTRUCT THE RECORD OR ALTERNATIVELY
FOR ORDER ALLOWING THE USE OF AFFIDAVITS / DECLARATIONS**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Opposition to Motion to Remand for an Evidentiary Hearing to Reconstruct the Record or Alternatively for Order Allowing the Use of Affidavits / Declarations. This opposition is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 20th day of June, 2018.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

ARGUMENT

Appellant's attempt to "clarify" the record through misusing Rule 10(c) of the Nevada Rules of Appellate Procedure (NRAP) is improper because the rule simply does not stretch that far. NRAP 10(c) is meant to ensure that the record accurately reflects what transpired below, not to add information that was never placed in the record.

"The trial court record consists of the papers and exhibits filed in the district court, the transcripts of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk." Nevada Rules of Appellate Procedure (NRAP) Rule 10(a). To be appropriately included in the record on appeal "[a]ll documents ... shall bear the file-stamp of the district court clerk, clearly showing the date the document was filed in the proceeding below." NRAP 30(c)(1). Further, appellate courts may not consider matters outside the record. Carson Ready Mix, Inc. v. First National Bank of Nevada, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We have no power to look outside of the record of a case. We have consistently recognized this limitation.") (Quotation marks and internal citations omitted).

Initially, Appellant contends that the lower court failed to comply with NRAP 10(c) because the judge who adjudicated his motion to reconstruct the record did not preside over the trial. Appellant's strained interpretation of the rule is flatly erroneous. (Appellant's Motion Seeking an Order Allowing

Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and his Trial Attorneys, filed June 18, 2018, p. 6). NRAP 10(c) says that “[i]f any difference arises about whether the trial court record truly discloses what occurred in the *district court*, the difference shall be submitted to and settled by *that court*[.]” (Emphasis added). Any disputes about the record are to be addressed not to the judge who actually heard the trial but to the district court. Appellant’s request to reconstruct the record below was adjudicated in compliance with this rule because it was decided by the District Court.

As to Appellant’s demand to use affidavits or declarations or for an evidentiary hearing to reconstruct the record, Appellant is really attempting to *change* the record so that he can create additional appellate claims for relief. (Appellant’s Motion Seeking an Order Allowing Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and his Trial Attorneys, filed June 18, 2018, p. 10). The purpose of NRAP 10(c) is to settle disputes about whether the record accurately reflects what happened below, not to allow a party to add new information to the record. See, U.S. v. Elizalde-Adame, 262 F.3d 637, 640 (7th Cir. 2001) (motion to

supplement record “with letters exchanged between her attorney and the attorney for the government during plea negotiations which discussed the preservation of her right to appeal the suppression motion” properly denied because “[t]he purpose of Rule 10(e) is to ensure that the record on appeal accurately reflects the proceedings in the trial court”); United States v. Walker, 601 F.2d 1051, 1054 (9th Cir. 1979) (federal rule equivalent of NRAP 10(c) “cannot be used to add to or enlarge the record on appeal to include material which was not before the district court” as such the government could not enlarge the record to show that a particular individual had “been returned to custody”).

Appellant concedes that the record is silent. (Appellant’s Motion Seeking an Order Allowing Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and his Trial Attorneys, filed June 18, 2018, p. 8). That is the trial record. Appellant can raise any appellant issues he wants to, but he is limited to that record and cannot add to it.¹ This Court will need to decide whether that record, or the lack

¹ Appellant previews at least one of these issues when he argues that “[t]he process of responding to jury notes as used by the trial court and the Marshal in this case conflicts with NRS 175.451.” (Appellant’s Motion Seeking an Order Allowing Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and his Trial Attorneys, filed June 18, 2018, p. 8). Respondent does not address the substance

thereof, warrants reversal or whether any error is harmless. See, Preciado v. State, 130 Nev. ___, ___, 318 P.3d 716, 178 (Nev. 2018) (error in failing to record bench conferences did not warrant reversal); Daniels v. State, 119 Nev. 498, 507-08, 78 P.3d 890, 897 (Nev. 2003) (error in failing to record bench conferences did not warrant reversal).

Further, Appellant's attempt to misuse NRAP 10(c) is unwarranted since the proper method for adjudicating a claim that new information not in the record requires a change in outcome is a motion for a new trial pursuant to NRS 176.515. The adjudication of such a motion is a final appealable order. Vest v. State, 120 Nev. 669, 670-71, 98 P.3d 996, 996-97 (Nev. 2004); Layton v. State, 89 Nev. 252, 254, 510 P.2d 864, 864 (1973). Indeed, the various affidavits and declarations that Appellant wants to add to this record were likely filed with the lower court in the context of his motion for a new trial and could be appropriately reviewed by this Court on appeal from the denial of that motion. (Appellant's Motion Seeking an Order Allowing Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and

of this claim because whether the issue is meritorious is not relevant to whether NRAP 10(c) permits him to add to the record. Respondent will address the lack of merit to this claim once Appellant has fully pled it in his Opening Brief. However, Respondent requests leave of court to supplement this opposition to address this claim if this Court concludes that such a pleading is necessary to adjudicate Appellant's NRAP 10(c) requests.

his Trial Attorneys, filed June 18, 2018, p. 4; Order Denying Defendant's Motion for New Trial and Defendant's Motion to Reconstruct the Record, filed May 4, 2018, attached as Exhibit G to Appellant's Motion Seeking an Order Allowing Reconstruction of the Record and Remand Back to District Court for an Evidentiary Hearing; or an Order Allowing Use of Affidavits and Declarations Presented to the District Court from the Jurors, the Investigators, and his Trial Attorneys, filed June 18, 2018). Any claims related to information outside this record may potentially be legitimately reviewed in Appellant's appeal from the denial of his motion for a new trial under Nevada Supreme Court Case Number 72829.

CONCLUSION

For the foregoing reasons, the State respectfully that Appellant's motion be denied.

Dated this 20th day of June, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P.O. Box 552212
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 June 20, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

SHARON G. DICKINSON
Deputy Public Defender

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

BY /s/ J. Garcia
Employee, District Attorney's Office

JEV//jg