

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER,

Petitioner/Appellant,

vs.

TIMOTHY FILSON, et al.,

Respondents/Respondents.


Supreme Court No. 73444

District Court Case No. C117513

(Death Penalty Case)

FILED

JAN 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

**SUPPLEMENTAL RESPONSE TO REPLY TO
OPPOSITION TO MOTION TO DISMISS APPEAL**

William Witter files this Supplemental Response to Reply to Opposition to Motion to Dismiss Appeal in Docket No. 73444. He bases this Supplemental Response on the attached Points and Authorities and the entire file in this matter.

DATED this 12th day of December, 2017.

Respectfully submitted,

/s/ David Anthony

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18-01437

POINTS AND AUTHORITIES

I. INTRODUCTION

Witter appeals from a Third Amended Judgment convicting him of first-degree murder and sentencing him to death. In its motion to dismiss, the State argues Witter is not an aggrieved party and therefore lacks standing to appeal. In his opposition, Witter demonstrates he is an aggrieved party and thus has standing to appeal. In its reply, the State argues for the first time that the law of the case doctrine and retroactivity rules suggest the Court should dismiss Witter's appeal. However, the Court cannot consider the State's arguments raised for the first time in its reply. Moreover, neither the law of the case doctrine nor retroactivity rules require dismissal.

II. THE COURT SHOULD DENY THE MOTION TO DISMISS

As an initial matter, the State fails to reconcile its position that Witter is not aggrieved with the fact that the Third Amended Judgment convicted him of first-degree murder and sentenced him to death. Instead, the State appears to have abandoned its position and adopted new arguments that the law of the case doctrine and retroactivity rules

require the Court to dismiss Witter's appeal. As discussed below, neither the law of the case doctrine nor the retroactivity rules require dismissal.

A. Because the State Raised the Law of the Case and Retroactivity Rules in its Reply Only, the Court Should Not Consider Them

A reply "must be limited to answering any new matter set forth in the opposing brief." Nev. R. App. P. 28; see State v. Bennett, 119 Nev. 589, 608, 81 P.3d 1, 13 (2003). The State argues the law of the case doctrine and retroactivity rules require the Court to dismiss Witter's appeal. However, neither the law of the case nor retroactivity rules comprise "matter set forth in the opposing brief." Nev. R. App. P. 28. The State raised these arguments for the first time in its reply brief. In addition, the State never raised these arguments in the district court or motion to dismiss. Accordingly, the Court should decline to consider the law of the case doctrine and retroactivity rules.

B. The Law of the Case Doctrine Neither Defeats Jurisdiction Nor Does it Apply

"[T]he law of the case doctrine is not a jurisdictional rule." Hsu v. Cty. of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007). The law of the case doctrine "merely expresses the practice of courts generally to refuse

to reopen what has been decided[:] [it is] not a limit to their power.” Id. at 630, 173 P.3d at 728. The State argues because “this Court treated Witter’s original judgment as final and ruled upon the merits of his direct appeal,” the law of the case doctrine requires the Court to dismiss Witter’s appeal. Reply at 2. However, while the State may assert the law of the case doctrine later as a defense for an issue that has been decided already, the law of the case doctrine fails to provide a basis for dismissing Witter’s appeal. Moreover, the only issue raised in the State’s motion to dismiss is the Court’s jurisdiction over Witter’s appeal and the State has never argued that has been decided before. In fact, the Court has yet to decide jurisdiction over Witter’s appeal in Docket No. 73444. Accordingly, the law of the case doctrine neither applies nor does it involve this Court’s jurisdiction.

C. Retroactivity Exceeds the Scope of a Motion to Dismiss

“If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss.” Nev. R. App. P. 14(f) (emphasis added). Nevada Rules of Appellate Procedure contemplate a motion to dismiss for jurisdictional issues, not for merits disputes falling within the scope of an opposing brief. See id.

The State argues the district court relied on Slaatte v. State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013) in entering the Third Amended Judgment. The State argues the district court should not have applied Slaatte retroactively because Slaatte announced a prospective rule and the law in effect at the time of Witter's direct appeal in 1996 would prohibit the district court from entering the Third Amended Judgment. The State relies on four cases in which this Court affirmed convictions but reversed or remanded for district courts to specify uncertain restitution amounts. Reply at 2; see Washington v. State, 112 Nev. 1067, 922 P.2d 547 (1996); Roe v. State, 112 Nev. 733, 917 P.2d 959, (1996); Botts v. State, 109 Nev. 567, 854 P.2d 856 (1993).

However, Slaatte's retroactivity does not matter because retroactivity issues do not bear on jurisdiction. Moreover, the procedure for specifying uncertain restitution amounts in Slaatte and the four cases the State advances resulted in the same outcome—a non-final judgment. Regardless of whether a court finds an uncertain restitution amount and consequently: (1) dismisses an appeal for lack of jurisdiction like in Slaatte; or (2) reverses or remands to specify restitution, the judgment is non-final. In either situation, it is clear that the judgments of conviction

are not final. See Washington, 112 Nev. at 1075, 922 P.2d at 552 (remanding “for resentencing”); Roe, 112 Nev. at 736, 917 P.2d at 961 (remanding “so that the district court can determine a specific dollar amount of restitution”); Botts, 109 Nev. at 569, 854 P.2d at 858 (remanding for the resentencing). Accordingly, Slaatte’s purported retroactivity issues do not support dismissal before merits briefing nor does it resolve jurisdiction.

III. CONCLUSION

Witter requests that this Court deny the State’s Motion to Dismiss Appeal.

DATED this 12th day of December, 2017.

Respectfully submitted,

/s/ David Anthony

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