

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 CHRISTOPHER ROBERT)
4 KELLER)

Electronically Filed
Jan 11 2018 08:07 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 Appellant,)
6 Vs.)

Supreme Court Case No. 73871
District Court Case No. C-16-312717-1

7 THE STATE OF NEVADA)
8)
9 Defendant.)

10 **APPELLANT'S OPENING BRIEF**

TABLE OF CONTENTS

Table of Authorities	3
Disclosure Statement Pursuant to NRAP 26.1	4
Routing Statement	5
Statement of Facts	6
Points & Authorities	7
Conclusion	13
Attorney's Certificate (NRAP 28)	14

TABLE OF AUTHORITIES

<i>Carroll v. United States</i> , 267 U.S. 132, 45 S. Ct. 280, (1925)	10
<i>Coleman v. State</i> , 321 P.3d 901 (Nev. 2014)	11
<i>Draper v. United States</i> , 358 U.S. 307, 79 S. Ct. (1959)	10
<i>Jones v. Nevada</i> , 2016 Nev. Dist. LEXIS 586	7
NRS 51.035	11
<i>Young v. State</i> , 120 Nev. 963, 102 P.3d 572 (2004)	7

1 CHRISTOPHER ROBERT)
2 KELLER)

3 Appellant,)
4 Vs.)

5 THE STATE OF NEVADA)
6 Defendant.)


Supreme Court Case No. 72994
District Court Case No. C318747

7 **DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

8
9 The undersigned counsel of record certifies that the following are persons and
10 entities as described in NRAP 26.1(a), and must be disclosed. These
11 representations are made in order that the judges of this court may evaluate
12 possible disqualification or recusal:
13

14 Christopher Keller was represented at trial by Kenneth G. Frizzell, III, Esq.
15 The trial was conducted before the Honorable William Kephart. The State was
16 represented by Mathew Bunnett, Esq. and Michael Dickerson, Esq. To the best of
17 Counsel's knowledge, neither he nor Appellant, nor the prosecuting attorneys
18 own more than 10% of the stock of any publically held company. The
19 undersigned is the only law firm who has appeared on behalf of Mr. Keller.
20

21 Dated January 10, 2018.

22
23 
Kenneth G. Frizzell, III, Esq.

24 Law Offices of Kenneth G. Frizzell, III

25 619 S. 6th Street, Las Vegas, NV 89101

Phone : (702) 366-1230 Fax : (702) 384-9961

ROUTING STATEMENT PURSUANT TO NRAP 28(a)(5)

This is an appeal from a jury verdict of guilty to the charges of trafficking in a controlled substance, possession of a controlled substance, marijuana greater than one ounce, possession of a controlled substance with intent to sell (4 counts: methamphetamine, heroin, cocaine, marijuana), and possession of a firearm by a prohibited person, 2 counts.

Pursuant to Nevada Rule of Appellant Procedure 17(b)(1), the conviction of the Category A felony indicates this matter is presumptively retained by the Supreme Court and not assigned to the Court of Appeals and will be heard by the Supreme Court of Nevada and not the Court of Appeals.

Dated January 10, 2018.

~~Kenneth G. Frizzell, III, Esq.~~

Law Offices of Kenneth G. Frizzell, III

619 S. 6th Street, Las Vegas, NV 89101

Phone : (702) 366-1230

Fax : (702) 384-9961

STATEMENT OF FACTS

The instant case began on January 28, 2016 when Officer D. Lopez, LVMPD No. 9806 is alleged to have witnessed Appellant Christopher Keller commit several minor traffic violations, specifically making a left turn onto Lamb Blvd. from Sunrise Ave. at a high rate of speed, pull directly into the center lane following said turn, and having a non-operational taillight. Officer Lopez testified that Appellant's driving was indicative of someone trying to avoid the police. Appellant's Appendix, hereafter AA, pp. 28-34. Per Officer Lopez's testimony, Appellant turned into his parking space and jumped from his vehicle, causing Officer Lopez to believe he may flee and immediately place him into handcuffs. AA 39-41.

During this vehicle stop, Officer Lopez and Officer Henry, a backup officer, heard five (5) gunshots in the immediately vicinity of the traffic stop. AA 49-51. The shooter was never found, the target of the shots was never found and no shell casings were located. AA 52. The State argued that these gunshots were a diversion or distraction to stop Officer Lopez from investigating Appellant. AA 63.

Appellant filed a motion to suppress based on the illegal seizure following the questionable stop. AA 81-91. This Motion was denied. AA 103. Christopher proceeded to trial and was convicted on March 10, 2017. Due to Christopher's record he was adjudicated guilty under the habitual criminal statute and sentenced to life with a minimum of parole eligibility after twenty years. AA 67-70.

1 **THE DISTRICT COURT ERRED IN NOT ALLOWING A**
2 **CONTINUANCE AND TO ALLOW AMY FELICIANO, ESQ. TO**
3 **SUBSTITUTE IN AS COUNSEL**

4 Trial before a jury began on March 6, 2016. This matter had been set for
5 trial six times before going to trial. AA 7. However, before trial began, Appellant
6 and Attorney Kenneth G. Frizzell and Appellant had a breakdown in
7 communication. AA 15. indeed, Appellant even filed a bar complaint against
8 attorney Frizzell. Immediately before the trial, attorney Frizzell went to Clark
9 County Detention Center to visit with Appellant. This visit lasted less than five
10 minutes because Appellant informed Frizzell that he had retained new counsel,
11 specifically Amy Feliciano. AA 15. Trial began on March 6, 2016; Feliciano was
12 retained sometime in February but had medical issues herself as well as her
13 family which delayed her in obtaining a file. AA 6. Feliciano truthfully stated
14 that she could not be prepared to proceed to trial on March 6, 2016. This means
15 Appellant was represented at the District Court level by an attorney with whom
16 he had no meaningful communication and against whom he had filed a bar
17 complaint. This is reversible error.

18
19 **POINTS & AUTHORITIES**

20 A denial of a continuance is reviewed for an abuse of discretion. *Young v.*
21 *State*, 120 Nev. 963, 102 P.3d 572 (2004). Three factors are to considered when
22 denying a motion to continue: 1. The extent of the conflict, 2. The adequacy of
23 the inquiry and 3. The timeliness of the request. *Jones v. Nev.*, 2016 Nev. Dist.
24 LEXIS 586. In *Jones*, the defendant elected to pursue an insanity defense,
25 however, his public defender appeared to have abandoned the insanity defense at

1 the beginning of trial and changed the defendant's plea to not guilty. Jones'
2 attorney claimed there was no factual basis for an insanity defense. The failure of
3 this attorney to present an insanity defense was sufficient evidence to the
4 Supreme Court of Nevada to show an irreconcilable conflict; as such, the
5 defendant in Jones was entitled to another lawyer and a continuance.

6 When reviewed against the test in *Jones*, Appellant Keller should have
7 been granted a continuance. Keller's mother had retained private counsel
8 (attorney Kenneth Frizzell is appointed and paid by the State) and done so in a
9 timely fashion. AA 7-8. However, attorney Feliciano had serious medical issues;
10 specifically she began to have seizures. Attorney Feliciano also had to place her
11 minor son in the care of a mental health facility in Las Vegas—no attorney could
12 be expected to prepare for jury trial under such circumstances. AA 6. Appellant
13 should not be punished for the unfortunate circumstances of retained counsel.

14 When considering the extent of the conflict; evidence of a bar complaint
15 and a breakdown in communication is sufficient to show that Appellant was
16 deserving of other counsel. It is also clear that Appellant wished to file multiple
17 other motions, although the contents of these motions are not known. AA 15.

18 The District Court forced the instant matter to trial because it was trying to
19 "move cases" and it "had availability" to hear the case. AA 8. The congestion of
20 the courts, the need for speedy resolution, even the crowding of local jails is not
21 considered material in *Jones*. A defendant's right to a fair trial exceeds the
22 District Court's need to clear its calendar. Furthermore, there are 32 district court
23 judges currently on the bench in Clark County and a great many more senior
24 judges able and willing to hear Mr. Keller's case. Had the District Court truly
25

1 needed to clear its calendar, the proper course of action was to delegate; not allow
2 Mr. Keller to receive the equivalent of a life sentence while being denied his own
3 retained lawyer. Due to the Court's unwillingness to continue the trial and allow
4 attorney Amy Feliciano to substitute as counsel, this matter should be remanded
5 for a new trial.

6 **THE DISTRICT COURT ERRED IN NOT SUPPRESSING ANY**
7 **EVIDENCE OBTAINED FROM APPELLANT'S HOME**

8 At the outset of trial, Appellant claimed that the police violated the Fourth
9 Amendment by assuming that because drugs were found in Appellant's car, more
10 drugs or evidence of trafficking was to be located in the residence. AA 16-21.
11 Specifically, Counsel for Appellant asked how the State made the jump from the
12 car to the home without any statements from Appellant or additional evidence.
13 AA 17-18. The State's response was that because Appellant allegedly had
14 different types of drugs and cash, he was obviously a dealer, and therefore he
15 likely had drugs in his home. AA 20. This overbroad misinterpretation of the
16 Fourth Amendment would allow the police to call a judge any time and ask for a
17 warrant against a suspected dealer; similar to the despised "general warrant" that
18 the Fourth Amendment was designed to prevent. In the present case, the State
19 made an assumption on an assumption. The State assumed Keller was a drug
20 dealer, and it assumed there would be drugs in his residence.

22 The Fourth Amendment to the United States Constitution provides: "the
23 right of the people to be secure in their persons, houses, papers, and effects,
24 against unreasonable searches and seizures, shall not be violated, and no Warrants
25 shall issue, but upon probable cause, supported by Oath or affirmation, and

1 particularly describing the place to be searched, and the persons or things to be
2 seized.

3 Similarly, the Nevada Constitution states: The right of the people to be
4 secure in their persons, houses, papers and effects against unreasonable seizures
5 and searches shall not be violated; and no warrant shall issue but on probable
6 cause, supported by Oath or Affirmation, particularly describing the place or
7 places to be searched, and the person or persons, and thing or things to be seized.

8 It is well established that arrests and searches must be based upon probable cause.

9 *Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959).

10 "Probable cause" requires that law enforcement officials have trustworthy facts
11 and circumstances which would cause a person of reasonable caution to believe
12 that it is more likely than not that the specific items to be searched for will be
13 found in the location sought. *Carroll v. United States*, 267 U.S. 132, 45 S. Ct.
14 280, 69 L. Ed. 543 (1925). An unsupported assumption that Appellant was a drug
15 dealer followed by a second assumption that he must have drugs in his home does
16 not satisfy the stringent test of *Carroll* and subsequent case law requiring
17 specificity and probable cause before making the jump from car to home. Because
18 the State failed to justify its warrant and an objection to said warrant was lodged
19 and preserved, this Court should reverse Mr. Keller's conviction based on the
20 improper warrant issued upon assumptions.

21
22 ///

23 ///

24 ///

25 ///

1 **THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN**
2 **IT ALLOWED PHONE CONVERSATIONS FROM THE JAIL**
3 **ADMITTED DESPITE HEARSAY OBJECTIONS**

4 Outside the presence of the jury, attorney Kenneth Frizzell objected to
5 playing redacted recordings from the jail, wherein a female caller admits to
6 shooting off some shots to distract the officers shortly after the vehicle stop that
7 lead to Appellant's arrest. AA 54-55. The State suggested these phone calls were
8 "adoptive admissions" and used to show a consciousness of guilt on the part of
9 Appellant. AA 56. This is reversible error.

10 Hearsay is an out-of-court statement "offered in evidence to prove the truth
11 of the matter asserted." NRS 51.035. The State sought to admit evidence of the
12 corroborating shooter to show that Appellant was a drug dealer and working in
13 conjunction with others. The evidence of a shooter was offered for the truth of
14 the matter asserted.

15 The State will likely argue that Appellant's agreement with the proffered
16 statement shows his agreement with the same, and he therefore agreed against his
17 own interest. A statement against interest is a valid hearsay exception; however,
18 the State fell far short of the criteria for hearsay exceptions. According to
19 *Coleman v. State*, 321 P.3d 901 (Nev. 2014), an excited utterance must be:
20

- 21 (a) so far contrary to the pecuniary or proprietary interest of the declarant;
22 (b) So far tended to subject the declarant to civil or criminal liability;
23 (c) So far tended to render invalid a claim by the declarant against another; or
24
25

1 (d) So far tended to make the declarant an object of hatred, ridicule or social
2 disapproval, that a reasonable person in the position of the declarant would not
3 have made the statement unless the declarant believed it to be true.

4 As stated above, the caller was unidentified. There are many reasons why a
5 male inmate would wish to agree with or otherwise entertain a female caller.
6 Acknowledging the shots would not subject to Appellant to additional liability
7 unless a conspiracy was alleged, which it was not. Consenting to the firing of
8 shots (which hit nothing) would not subject Appellant to any ridicule or hatred or
9 otherwise place him at a disadvantage. According to *Coleman, supra*,
10 acknowledging someone's illegal activity in one's behalf is insufficient to
11 validate a hearsay exception. The hearsay exceptions in *Coleman* consisted of
12 another person admitting to felony child neglect.
13
14
15

16 Hearsay errors are evaluated for harmless error. In the present case,
17 showing that Appellant somehow acquiesced to the illegal firing of a gun to
18 distract investigating officers is not harmless. The contested hearsay statements
19 allowed the jury to believe that Appellant was a large scale drug dealer with
20 cooperating accomplices, armed and willing to shoot, and otherwise find the
21 Appellant guilty without adequate proof.
22

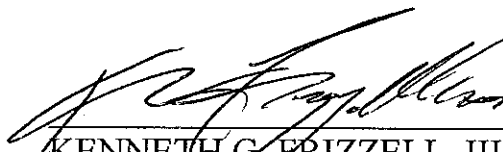
23 ///

24 ///

CONCLUSION

The District Court made three reversible errors. Specifically, Appellant was denied a fair trial by the District Court when said Court forced this matter to trial despite the presence of a paid, private attorney willing to substitute in upon the granting of a brief continuance. Secondly, the District Court committed reversible error when it failed to suppress the drugs, paraphernalia, and weapons found inside Appellant's home. The Court effectively authorized an assumption based on an assumption for a warrant. Finally, the Court erred in allowing hearsay statements of jailhouse recordings which implicated Appellant in being complacent with a distraction shooting. Each of these errors in and of itself warrants reversal, should this Court disagree it should look to the cumulative effect of these errors and remand this matter to the District Court for a new trial.

Dated January 10, 2018.



KENNETH G. FRIZZELL, III, ESQ.

Nevada Bar No. 6303

Law Offices of Kenneth G. Frizzell, III

619 S. Sixth Street

Las Vegas, NV 89101

Phone: 702.366.1230

Facsimile: 702.384.9961

ATTORNEYS FOR APPELLANT

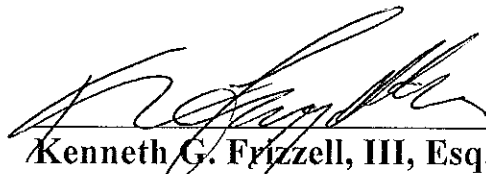
CHRISTOPHER R. KELLER

ATTORNEY'S CERTIFICATE

Kenneth G. Frizzell, III, Esq., certifies that he has read the foregoing brief and that to the best of his knowledge, the information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Kenneth G. Frizzell, III, Esq. represents that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and that this Brief complies with the page limitation of Rule 32(a)(4)-(6) in that it is 15 pages long and the text of the brief contains 2,655 words. This Brief was prepared in MS Word, 2014 edition, in 14 point Times New Roman Font.

Dated January 10, 2018.



Kenneth G. Frizzell, III, Esq.
Law Offices of Kenneth G. Frizzell, III
619 S. 6th Street, Las Vegas, NV 89101
Phone : (702) 366-1230
Fax : (702) 384-9961