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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WARREN, JR.,

Petitioner,

vs.

**EIGHTH JUDICIAL DISTRICT
COURT JUDGE, THE
HONORABLE RICHARD SCOTTI,**

Respondents,

and

THE STATE OF NEVADA,

Real Parties in Interest.

Supreme Court No. 73963
District Court No. C-17-323608-A
Dept. No. 2

**SUPPLEMENTAL APPENDIX IN
SUPPORT OF PETITION FOR
WRIT OF CERTIORARI OR, IN
THE ALTERNATIVE, WRIT OF
PROHIBITION, OR IN THE
ALTERNATIVE WRIT OF
MANDAMUS,**

INDEX TO SUPPLEMENTAL APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on SEPTEMBER 14, 2017 a true and accurate copy of this
SUPPLEMENTAL APPENDIX OF RECORD was served on the following,

BY ELECTRONIC FILING TO

Jacob Villani, Chief Deputy District Attorney
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BY HAND DELIVERY TO

The Honorable Richard Scotti
200 Lewis Ave., 11th Floor, Dept. 2
Las Vegas NV 89101

Dated: 9/14/17

/s/ JONELL THOMAS

JONELL THOMAS
Chief Deputy Special Public Defender



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3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA,) CASE #: C-17-323608-A
9)
10 Plaintiff,) DEPT. II
11)
12 vs.)
13 JOSEPH WARREN, JR.,)
14 Defendant.)

15 BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE
16 THURSDAY, AUGUST 17, 2017

17 *RECORDER'S TRANSCRIPT OF PROCEEDINGS:*
18 **APPEAL FROM LOWER COURT**
19

20 APPEARANCES:

21 For the State:

JACOB VILLANI, ESQ.
Chief Deputy District Attorney

22 For the Defendant:

23 JONELL THOMAS, ESQ.
24 MELINDA E. SIMPKINS, ESQ.
Deputy Special Public Defenders

25 RECORDED BY: DALYNE EASLEY, COURT RECORDER

1 THURSDAY, AUGUST 17, 2017; 9:16 A.M.

2 * * * * *

3 THE COURT: State versus Joseph Warren, C323608. This might take a
4 little bit of time but we'll go ahead and do it. Why don't you guys come
5 forward.

6 MR. VILLANI: And, Your Honor, I'm more than happy to cede time to
7 other attorneys if they're ready. I know this might --

8 THE COURT: That's okay. We'll go ahead and handle this one, so,
9 appearances first.

10 MR. VILLANI: Morning, Your Honor, Jake Villani on behalf of the State.

11 MS. THOMAS: Good morning, Your Honor, JoNell Thomas and Melinda
12 Simpkins on behalf of Mr. Warren.

13 THE COURT: Great. So, I've read everything. There's several issues
14 here. Let's try to deal with them one at a time because some of the initial
15 issues might be dispositive.

16 The first, I don't need to hear any further argument, on the first
17 issue Defendant argues that Judge Cadish -- well, first of all, this is an appeal
18 from the justice court determination that there was insufficient evidence to bind
19 over the Defendant after the preliminary hearing on the theory that hearsay
20 evidence is not admissible at a preliminary hearing except for very limited
21 instances. The justice court judge basically took the position that the statute
22 authorizing the admissibility of hearsay in those limited instances was intended
23 to curtail the other common law and statutory exceptions to the hearsay rule.

24 Before I get to that issue, Defendant argues that Judge Cadish
25 already resolved the issue presented here. I don't think that's correct. What

1 happened is after the preliminary hearing determination by Judge Bennett, I
2 believe, the District Attorney sought an Information by affidavit and requested
3 from Judge Cadish that that be granted. Judge Cadish, according to the
4 minutes that I reviewed, Judge Cadish held that hearsay testimony by a
5 detective is not sufficient under NRS 173.035 which is the statute authorizing
6 Information by affidavit. But Judge Cadish did not rule that hearsay is
7 inadmissible in a preliminary hearing and she did not interpret the statute that is
8 at issue here. At least not based on the minutes, which is statute NRS
9 171.196(6).

10 So, I believe that it wasn't resolved. It's not binding, anything that
11 Judge Cadish said in connection with that proceeding, is not binding on the
12 Court. I don't want hear argument on that.

13 The next issue is Defendant argues that the State has already
14 agreed to dismiss this case. And I looked at the transcript, Exhibit B, to the
15 answering brief at page 5. It does seem that Ms. Hojjat did represent to Judge
16 Cadish --

17 MR. VILLANI: No, Judge Lippis, it was.

18 THE COURT: Oh, Judge Lippis, okay, yes that was a time at the hearing
19 on waiver of the preliminary hearing in front of Judge Lippis. Attorney Hojjat
20 said, quote, if Judge Cadish does not allow for an Information by affidavit to be
21 filed, which she didn't, then that case, referring to this case before me, will be
22 dismissed. And then Judge Cadish asked you, Mr. Villani, if that was correct
23 and you agreed.

24 MR. VILLANI: That's correct.

25 THE COURT: Is this moot now before me?

1 MR. VILLANI: No. And Your Honor, here's the situation. I've always
2 retained, and part of the negotiations was that I would retain, the right to
3 appeal this decision. That was quite a convoluted statement of what the
4 negotiations were because there was a lot of if, then, ors along those lines. I
5 can say that was a misstatement. And the evidence that was a misstatement,
6 Your Honor, is that this case is not included in the GPA as a case to be
7 dismissed.

8 Now, I will represent to Your Honor that after your ruling, if Your
9 Honor does indeed rule in the State's favor, I do have an agreement with the
10 defense to go down and I will not proceed further with this case. The reason --

11 THE COURT: Why does it matter? Why do I need to rule then? It seems
12 --

13 MR. VILLANI: Well because the case is still active. That is not part of his
14 guilty plea agreement. He hasn't been sentenced on anything so if he --

15 THE COURT: So he might try to withdraw his plea --

16 MR. VILLANI: Correct.

17 THE COURT: -- and then this could be relevant.

18 MR. VILLANI: That is our concern.

19 THE COURT: Alright. So, I did see some indicia that the parties intended
20 for me to go ahead and make a ruling even though it might become moot
21 because on page 5 of that transcript Ms. Hojjat said, Judge Scotti's ruling will
22 not affect this. And it's suggesting that she anticipated that I was gonna go
23 ahead and rule in any event and so they wanted my ruling on record because it
24 might become -- it might still be relevant under some circumstances.

25 So, let me hear the rest of your argument then we'll hear from the

1 State on that.

2 MR. VILLANI: Sure. The only reason this isn't included in the GPA is just
3 that, is that we had an agreement. I was going to retain the right to appeal this
4 decision and to get an actual district court ruling on whether or not Judge
5 Bennett-Haron's order was appropriate or whether it was abuse of discretion.

6 THE COURT: So, if I could hear from the defense on that limited issue.

7 MS. THOMAS: Your Honor, that is the definition of an advisory opinion.
8 There has to be an actual case or controversy for this Court to have
9 constitutional jurisdiction to hear this case. The State has acknowledged that
10 no matter what you decide here it's dismissing these charges in this case
11 against the Defendant. If they want to pursue this legal issue in another case
12 where there's a live controversy then they should do it.

13 Certainly, there was never any agreement in this case or in this
14 transcript in the other case that if Judge Cadish denied relief that the State
15 would be able to go to this Court and get relief and that that -- I don't even
16 think that the parties could stipulate to that but they didn't stipulate to that.
17 The Constitution demands a live case or controversy. It's a jurisdictional
18 prerequisite. I don't think the parties can even stipulate that away. The fact is
19 no matter what you decide here, these charges are gone. So what I --

20 THE COURT: Well, not necessarily. The Defendant could always -- so
21 here's what I'm gonna rule. I think there is a live case or controversy that's
22 pending. It's the case that was in front of -- the justice court case in front of
23 Judge Bennett that has been appealed to me. There is a live case or
24 controversy in that case. There has not been an order of dismissal by any
25 judge. In that case there's not been a stipulation for dismissal filed or a

1 representation in that case by any of the parties that that case is to be
2 dismissed, so it's still a live case. It's a valid case or controversy.

3 It's not a situation where I'm rendering a mere advisory opinion
4 because there is an actual active issue as to whether the lower court judge
5 erred. And it's not entirely moot because the Defendant has not yet been
6 sentenced. There's not a final judgment in the other case. So, and he could
7 still withdraw -- he could still seek to withdraw his plea.

8 MS. THOMAS: He doesn't have any grounds to withdraw his plea.

9 THE COURT: Well, I don't know, I'm not gonna address that. So, I'm
10 gonna move on. I am going to resolve this.

11 MS. THOMAS: Your Honor, I would respectfully request that we delay
12 these proceedings until after sentencing in the other case. Our client has
13 entered a guilty plea pursuant to negotiations. Those are spelled out in the
14 transcript. If the State disagreed with what they said and agreed to in open
15 court this is not the way of backtracking on that. The State, as officers of the
16 court, went to the justice court, agreed to the representations of Ms. Hojjat.
17 Our client entered into a negotiation with that promise that this case would be
18 dismissed.

19 THE COURT: Yea, but that wasn't before me. So, and I don't --

20 MS. THOMAS: But it involved the State, it involved the same Defendant.
21 So I'm going to ask that you postpone ruling in this case until after sentencing
22 in the other case.

23 THE COURT: Yea, I'm gonna respectfully disagree with that. I think I
24 need to move forward and just resolve it and then you guys can move forward
25 in enforcing whatever GPA you have in the other case; alright?

1 So, let's get to the actual merits of the appeal. The State appealed,
2 so let's hear from the State first.

3 MR. VILLANI: And, Your Honor, this all has to do with Judge Bennett-
4 Haron's interpretation of 171.196(6). This was a legislative amendment that
5 was added back in, I think, it was the 2015 maybe 2016 legislative session
6 that was well publicized and well understood by all parties to the extent that
7 the justice court, the defense attorneys down in justice court, were sending a
8 letter out. All of the JFPs weighed in on it, there was a lot of lobbying going on
9 on both sides.

10 THE COURT: Right.

11 MR. VILLANI: The initial purpose of this bill was to allow all hearsay in
12 just like other jurisdictions do. In other words, we put our lead detective up
13 there and he gives the breakdown of all the interviews and what happened in
14 the case and probable cause is decided based upon that. The bill went back
15 and forth and ultimately resulted in what you see before you as 171.196.

16 Judge Bennett-Haron's interpretation of 171.196 basically read it to
17 the exclusion of all other statutes, which is not allowed, and she also read it to
18 an absurd result, which is also not allowed. Basically she's reading the statute
19 to say that you can only introduce victim hearsay of any kind, whether it be an
20 exception or not an exception, in the case the defendant is charged with one of
21 the three enumerated felonies under 171.196(a), (b), and (c), which cannot
22 stand under any analysis, Your Honor, whether you read this statute on its face,
23 whether you read this statute under the legislative history. It can't stand. It's
24 obviously referring to hearsay without another exception, not all hearsay. And
25 that's essentially our basis.

1 And if you read Judge Bennett-Haron's order she acknowledges --

2 THE COURT: I read the order.

3 MR. VILLANI: She acknowledges that without this new statutory
4 language we get up on probable cause. She acknowledges that the nurse's
5 statements fell under the statements for purposes of medical diagnosis or
6 treatment. She acknowledges that the 911 call falls under either presence
7 sense impression or excited utterance.

8 THE COURT: Yea, I read all that. In fact, she pretty much acknowledged
9 that absent 171.196(6) in her interpretation of that provision there would be
10 probable cause. She pretty much acknowledged that.

11 MR. VILLANI: Correct. And that's the crux of our argument, Your Honor.

12 THE COURT: Alright, let me hear from Defense.

13 MS. THOMAS: Your Honor, the State elected to go to the legislature and
14 open the can of worms regarding the hearsay issue and the legislature said, we
15 disagree with you, we are not allowing all hearsay. And in fact, we're going to
16 amend the statute allowing admissibility of evidence in circumstances involving
17 statements from an alleged victim to only allow them in in these circumstances.
18 That's the --

19 THE COURT: Doesn't it seem a little bit incongruent with public policy
20 and logic to not allow any hearsay at a preliminary hearing even though that
21 hearsay would be allowed at the trial court level?

22 MS. THOMAS: No, Your Honor.

23 THE COURT: I mean, isn't that kind of, I mean, turning the whole system
24 upside down where it's much harder to find probable cause to bind over than it
25 would be to convict.

1 MS. THOMAS: Your Honor, first of all if we're gonna start looking at the
2 NRS from the perspective of --

3 THE COURT: I got to consider public policy.

4 MS. THOMAS: -- what do we think public policy is good for we can
5 rewrite the whole code. That is not the standard of how to evaluate a statute.
6 We look first at the plain language of the statute, what does it say? That is the
7 intent. And the legislature certainly has the prerogative to say the threshold for
8 admissibility of evidence at a preliminary hearing is so low that if the State can't
9 get its act together enough to bring in a victim to testify then why would we
10 bound someone over to district court? It's a very --

11 THE COURT: So, dying declarations, presence sense impression,
12 admissions of the party; none of that's gonna come in at preliminary hearing?

13 MS. THOMAS: Statements from a victim. The statute is limited to
14 statements from an alleged victim.

15 THE COURT: The 911 call?

16 MS. THOMAS: That 911 call was not authenticated. There's no name.
17 There's nothing in that call that ties our client to that events.

18 THE COURT: But you're saying even if it was authenticated a 911 call
19 can never be used at a preliminary hearing to establish slight or marginal
20 evidence, is your position?

21 MS. THOMAS: If it involves the statements of an alleged victim it's not
22 my position it's the statute.

23 THE COURT: Okay.

24 MS. THOMAS: The statute says only if. The State provides no
25 alternative meaning in writing that statute that makes any sense. The fact that

1 they went up there asking for the rule then the legislature shut them down and
2 said no, doesn't justify their reading of the statute. The statute says only if. It
3 means only if.

4 THE COURT: Well, it does use the language only if.

5 Alright, Mr. Villani, how do you get around the only if language?

6 MR. VILLANI: Just briefly, Your Honor. You kind of hit it on the head
7 there; dying declaration, right? So somebody is murdered. Their last words out
8 of their mouth are Joe Smith murdered me and it's the defense's position that
9 there's no way that comes in. So, all murders under those circumstances
10 where there's one other witness who heard who did it; done, we can't proceed
11 on. And that's the absurdity of it.

12 The only if refers to hearsay, just as it states. Hearsay with an
13 exception is not noted in there. It doesn't say hearsay even if there is another
14 exception, it says hearsay. And what they're asking you to do, again, is read
15 the statute to the exclusion of 600 years of common law, case law regarding
16 hearsay, which can't be done.

17 THE COURT: So, I heard enough. You got to look at the legislative
18 history here because if you look at the face of 171.196(6) in a vacuum it does
19 seem to support Defendant's position. But you can't look at it in a vacuum you
20 got to look at it in the context of NRS Chapter 51 which sets forth numerous
21 instances in which there are exceptions to the hearsay rule.

22 So, NRS Chapter 51 combined with NRS 171.196(6) creates a
23 patent ambiguity. The Court has to resolve that patent ambiguity. To resolve
24 that ambiguity I must look at avoiding an absurd or unreasonable result, I have
25 to avoid -- I have to make a ruling that's consistent with public policy, and I

1 have to look at the legislative history to try to determine what the parties
2 intended.

3 If you look at the legislative history here, the goal of this statute
4 was ultimately to, at least a significant goal of the statute was to reduce the
5 times when the victims would have to face their accuser at the preliminary
6 hearing without violating the confrontation clause. That was the underlying
7 goal. So the goal was to expand not to contract the instances in which hearsay
8 would be allowed in a preliminary hearing. So knowing that, that's the goal.
9 The most logical, reasonable and non-absurd way of reading 171.196(6) is to
10 read it as such: That hearsay evidence, and here I would interlineate that would
11 not otherwise be admissible under NRS Chapter 51, and then the rest of the
12 language is consisting of a statement made by the alleged victim is only
13 admissible if. And then it lists certain types of hearsay.

14 So what subpart 6 is attempting to do is add additional instances
15 where hearsay is admissible. It's not intended to eliminate all instances in
16 which hearsay can be used at a preliminary hearing. I find that would be
17 absurd, it's against public policy, it's inconsistent with the legislative history
18 and the purpose of the bill.

19 So, I am finding that under NRS 171.196(6) that provision did not
20 bar the introduction of the hearsay in this particular case; that would be the
21 detective's recounting of the victim's statement or the 911 call. That evidence
22 is admissible in a preliminary hearing. Based thereon, I'm finding that there was
23 probable cause to bind over the Defendant and I'm overruling the justice court's
24 decision; alright?

25 MR. VILLANI: So, this will be reversed and remanded to the justice court,

1 Your Honor?

2 THE COURT: Reversed and remanded, and the State is to prepare the
3 order.

4 MR. VILLANI: Thank you, Your Honor.

5 MS. THOMAS: Your Honor, I'd ask for a stay, please. As we indicated
6 earlier, two weeks ago, we do intend to file a writ with the Nevada Supreme
7 Court. I would like to also pursue this issue on a writ and respectfully request a
8 stay of the Court's order.

9 THE COURT: I'm gonna deny that. I think given that you guys have
10 worked this out hopefully there seems like there's no need for a stay in this
11 case because you already have a GPA. And unless something happens down
12 the road if there is a circumstance where the Defendant needs to withdraw his
13 plea then there might be circumstances in which a stay is warranted or needed.
14 I don't see any necessity for a stay. I don't see any prejudice to the defense in
15 the Court not granting a stay at this time; okay?

16 MR. VILLANI: Thank you, Your Honor.

17 THE COURT: So, I'm denying that.

18 [Proceedings concluded, 9:33 A.M.]

19 * * * * *

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video proceedings in the above-entitled case to the best of my ability.

22 
23 DALYNE EASLEY
24 Court Recorder
25