

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO:

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court
72829

**OPPOSITION TO MOTION FOR REMAND OR ALTERNATIVELY
REVERSAL OF CONVICTION**

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 for Remand or Alternatively Reversal of Conviction. 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 2nd day of July, 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 demand for summary reversal of his conviction is premature and is an inappropriate attempt to subvert the appellate process. Appellant's motion should be denied as his claims should be adjudicated through the appellate process.

Appellant contends that he was entitled to have the judge who presided over his trial decide his motion for a new trial. (Appellant's Motion Seeking an Order Remanding Case Back to District Court for a Decision by the Trial Judge Alternatively Motion to Dismiss Alfred Harvey's Conviction, filed June 29, 2018, p. 2-6). The remedy Appellant presents to this Court is remand for adjudication of his motion for a new trial by the trial judge or for a reversal of his conviction. Id. The primary difficulty with Appellant's position is that these are questions that should be adjudicated through the appellate briefing and oral argument process. Appellant is essentially asking this Court to decide the substance of his appeal by motion, something this Court generally declines to do. See, NRAP 27(c)(2) ("... a justice or judge ... may act alone on any motion but may not dismiss or otherwise determine an appeal"); Witter v. State, Nevada Supreme Court Case Number 73444, Order Denying Motion to Dismiss and Reinstating Briefing, filed February 23, 2018, p. 1 ("Respondent's motion to dismiss the appeal for lack of jurisdiction is denied at this time. However, the parties may discuss in their briefs, the issues raised, in particular the issues related to the law of the case doctrine and the

implication of this court's decision Slaate v. State, 129 Nev. 219, 298 P.3d 1170 (2013)").

The cautious approach taken by this Court is justified because this Court has not had the benefit of exhaustive briefing and review of the record. For instance, while Appellant maintains without citation to the record that "Alfred asked that Judge Bixler decide the motion[,]" whether that alleged request was sufficient to preserve the issue remains to be seen. (Appellant's Motion Seeking an Order Remanding Case Back to District Court for a Decision by the Trial Judge Alternatively Motion to Dismiss Alfred Harvey's Conviction, filed June 29, 2018, p. 3). If Appellant failed to properly preserve this issue, his complaint is waived and is thus reviewable only for plain error. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

Even if properly preserved, it is arguable whether the two statutes cited by Appellant support his position. NRS 175.101 is not relevant since it is limited to circumstances where a trial judge becomes unavailable. Appellant says that the lower court made a record that Judge Bixler did not remember the note at issue, not that he was unavailable. (Appellant's Motion Seeking an Order Remanding Case Back to District Court for a Decision by the Trial Judge Alternatively Motion to

Dismiss Alfred Harvey's Conviction, filed June 29, 2018, p. 4). More importantly, NRS 176.515 is the statutory basis for requesting a new trial and it is silent on whether the judge who presided over the trial must decide a motion for new trial. NRS 176.515 merely refers to "the court." Importantly, this Court has already rejected similar attempts to tie judicial actions to a particular person instead of a judicial office. Dieudonne v. State, 127 Nev. 1, 5-8, 245 P.3d 1202, 1205-07 (Nev. 2011) (no due process right to be sentenced by the same judge who accepted a defendant's guilty plea).

As such, this Court should reject what amounts to a request for summary judgment from an appellate court. This Court should be given the benefit of full briefing and oral argument before it is asked to impose a rule that would fundamentally alter the requirements of NRS 176.515 in every case where a motion for new trial is made.

CONCLUSION

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

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Dated this 2nd day of July, 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 July 2, 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