IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW LEON MOULTRIE,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Case No.: 65390

APPELLANT MATTHEW LEON MOULTRIE'S
FAST TRACK STATEMENT

1. Name of party filing this fast track statement: Matthew Leon Moultrie, appellant/defendant.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement: CHRIS ARABIA, Law Offices of Chris Arabia, PC, 601 S. 10th St., Suite 107, Las Vegas, NV 89101, (702) 701-4391.

3. Name, law firm address, and telephone number of appellate counsel if different from trial counsel: N/A.

4. Judicial district, county, and district court docket number of lower court proceedings: Fifth Judicial District, Esmeralda County, Case No. CR-12-832

5. Name of judge issuing decision, judgment, or order appealed from: District Judge Robert Lane.

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last? N/A.

7. Conviction(s) appealed from: Count 1, Possession of Controlled Substance with Intent to Sell, in violation of NRS 453.337, a category D felony.

8. Sentence for each count: Nineteen to 48 months in prison, suspended, placement on probation for 5 years.

9. Date district court announced decision, sentence, or order appealed from: November 19, 2013.

10. Date of entry of written judgment or order appealed from: March 4, 2014.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A.

11. If this appeal is from an order granting or denying a petition for writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court: N/A.

(a) Specify whether service was by delivery or mail:

12. If the time for filing the notice of appeal was tolled by a post-judgment motion: N/A.

(a) specify the type of motion, and the date of filing of the motion:

(b) date of entry of written order resolving motion:

13. Date notice of appeal filed: April 2, 2014.

14. Specify statute or rule governing the time limit for filing the notice of appeal, e.g. N.R.A.P. 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other: NRAP 4(b).

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from: NRS 177.015, NRS 174.035(3).

16. Specify the nature of disposition below e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.: Judgment upon guilty plea with preservation of right to appeal under NRS 174.035.

17. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings): none known.

18. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants): none known.

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which you are aware, which raise the same issues you intend to raise in this appeal: none known.

20. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript): Procedural history is incorporated into the statement of facts presented in paragraph 21 immediately below.

21. Statement of facts. Briefly set forth the facts material to the issues on appeal:

Appellant/Defendant Matthew Leon Moultrie ("Moultrie") was charged via criminal complaint with "possession of controlled substance with intent to sell, in violation of NRS 453.337, **a category "C" felony**." (Appellant's Appendix pp. 1-2, hereinafter "AA 1-2"). [Emphasis added.] A preliminary hearing was held on March 21, 2012. (AA 17-57). At the beginning of the preliminary hearing, the Justice Court reiterated that the charged offense was **"a category C felony."** (AA 19). [Emphasis added.]

Deputy Kirkland testified at the preliminary hearing about a traffic stop (for lack of daytime headlights) on a vehicle in which Moultrie was a passenger. After the driver came back free of wants and warrants, Kirkland asked for permission to search the vehicle and claims to have received permission from the driver. (AA 22-25). Kirkland testified that he had encountered Moultrie during a different traffic stop a few weeks earlier. (AA 25). On cross-examination, Kirkland testified that during that earlier stop, he had searched Moultrie and found no contraband. (AA 36).

The defense objected when Kirkland began to testify about what he found inside a backpack during the vehicle search in the instant case. (AA 26).

Following an argument about consent to search the vehicle, the Court moved on to the search of the backpack:

> THE COURT: The vehicle only. We're now moved on to the backpack. Did he ask – it's your question but **he needed permission to get in the backpack.** That's not the vehicle so if you can get on to that, you can go forward. (AA 30). [Emphasis added.]

After a brief recess, the state questioned Deputy Kirkland about a backpack that he allegedly found in the vehicle and about a small black bag allegedly found inside the backpack. The defense objected to testimony regarding the backpack. The Justice Court noted the objection but allowed the questioning to continue. Deputy Kirkland testified that he recovered other containers inside the small black bag and also allegedly recovered $50 cash, drug paraphernalia, and a crystalline substance. (AA 31-32).

Kirkland testified that upon finding the alleged contraband in the backpack, he immediately placed Moultrie in handcuffs because the backpack had been behind Moultrie in the vehicle:

> Q: And why did you place [Moultrie] in handcuffs?
>
> A: The backpack had – was sitting right behind him, where he was sitting…. (AA 32).

Clearly, Deputy Kirkland thought, during the search prior to finding alleged contraband, that the backpack was the property of Moultrie.

There was no testimony or other evidence suggesting that Kirkland thought anyone other than Moultrie might have owned the backpack; there is certainly no evidence that he asked about ownership prior to searching it and no evidence that Moultrie ever consented to the search. Kirkland and Moultrie also later (after handcuffing) discussed the items allegedly recovered from the backpack. (AA PHT 32-33).

There was no testimony from Kirkland that he had received any consent from Moultrie to search the backpack.

According to the testimony of Sergeant Phillips, Moultrie later allegedly admitted that the crystalline substance in the backpack was his. (AA 43).

After Moultrie was taken into custody, Kirkland released the vehicle to the driver, who then left to go to work. (AA 35).

The state offered no evidence to establish that Moultrie had a prior conviction for possession of a controlled substance with intent to sell.

The state offered no evidence to establish that Moultrie gave consent to search his backpack, from which contraband was allegedly recovered.

After the close of evidence, the defense requested a discharge. One of the bases for the request was the lack of consent to search. (AA 54). Another of the

bases was the lack of any evidence to establish a first-offense when the state charged a category C felony, a second offense. (AA 55).

The state tried unsuccessfully to amend the complaint—after the close of evidence and after admitting, "I don't have any evidence of priors." (AA 56).

The Justice Court discharged Moultrie. (AA 56).

After the discharge, the state voiced nary an objection to the Justice Court's decision and expressed no intention to appeal the Justice Court's decision. (AA 56). The state did not appeal.

Sixty-three days later, on May 23, 2012, the State filed a motion for leave to file an information by affidavit *charging Moultrie with possession of a controlled substance with intent to sell, a category D felony instead of the category C felony that it had charged in the criminal complaint*. (AA 3-60, 59-60). **The state's motion mentioned no good cause for the 63-day lapse.**

On July 2, 2012, the District Court granted the state's motion to file an information by affidavit. (AA 82-88). The District Court found that the Justice Court "ERRED BY DENYING THE STATE'S MOTION TO AMEND THE INFORMATION." (AA 85-86). The District Court found that the passage of 63 days from the time of preliminary hearing to the state's filing in District Court did not prejudice the defendant and therefore the state could proceed. (AA 86-87). The District Court did not address the issue of whether there was consent to search

Moultrie's backpack; the state did not raise the issue in its motion and thus the defense also did not address it in its opposition.

On July 5, 2012, the state filed the information alleging possession with intent in violation of NRS 453.337, a category D felony. (AA 89-90).

On November 19, 2013, the parties entered into a conditional guilty plea agreement that expressly preserved Moultrie's right to appeal under NRS 174.035(3). (AA 91-97). As reflected in the Judgment of Conviction filed on March 4, 2014, the District Court sentenced Moultrie to 19-48 months imprisonment, suspended, with 5 years of probation. (AA 103-104).

This timely filed appeal follows.

22. Issues on appeal. State concisely the principal issue(s) in this appeal:

I. Whether the District Court erred in granting the state's motion for leave to file an information by affidavit when the state filed the motion 63 days after the preliminary hearing.

II. Whether the District Court erred in granting the state's motion for leave to file an information by affidavit based on "egregious error" when the state charged 2nd offense possession of controlled substance with intent to sell but offered no evidence of any 1st offense, and the Justice Court discharged Moultrie.

III. Whether the Justice Court's discharge constituted "egregious error" when the police obtained a general consent to look in the vehicle from a third-party, the police knew the backpack in the searched vehicle belonged to Moultrie, Moultrie did not consent to any search, and there was no evidence of the third-party's apparent authority to consent to the search of the backpack.

23. Legal argument, including authorities:

I. THE DISTRICT COURT ERRED BY GRANTING THE STATE LEAVE TO FILE AN INFORMATION BY AFFIDAVIT WHEN THE STATE WAITED 63 DAYS AFTER THE PRELIMINARY HEARING TO TO FILE THE MOTION FOR LEAVE AND PROPOSED INFORMATION, 48 DAYS MORE THAN THE 15-DAYS PROVIDED IN NRS 173.035

NRS 173.035 mandates that the information **"shall be filed within 15 days after the holding or waiver of the preliminary hearing."** [Emphasis added.]

NRS 178.556(1) provides that the District Court may dismiss an information that is not filed within 15 days after the preliminary examination.

The Nevada Supreme Court has ruled that ***minor*** violations of the 15-day rule do not require dismissal if the defendant is unable to show prejudice. Berry v. Sheriff, 93 Nev. 557, 559 (1977) (**4-day** delay deemed insufficient to compel dismissal where no prejudice shown); Thompson v. State, 86 Nev. 682, 683 (**9-day** delay held insufficient where no prejudice shown).

In the instant case, the preliminary hearing took place on March 21, 2012. (AA PHT). The state filed its motion for leave to file an information by affidavit on May 23, 2012. (AA 3, 3-60, 59-60).

Despite the clear 15-day rule in NRS 178.556(1), ***63 days*** passed from the time of the preliminary hearing to the time of the state's filing of its motion and proposed information. This is nothing like the trivial delays in Berry and Thompson; *the 48-day violation of the 15-day rule in the instant case is more than 3.5 times greater than the Berry and Thompson delays* ***combined.***

The District Court held that denial of the state's motion would be improper absent Moultrie showing actual prejudice and to support this ruling the Court cited Mello v. State, 93 Nev. 662, 664, 572 P.2d 533, 534 (1977). (AA 86-87). However, Mello dealt with a speedy trial issue and the decision specifies that court scheduling issues were the primary culprit in causing delay. Id. at 663. In the instant case, the District Court did not address the apparent lack of good cause for the state's delay.

The District Court also did not address the minor nature of the delays at issue in Berry and Thompson; the court simply skipped over the triviality of the delays. The limited exceptions created by Berry and Thompson seem designed to prevent denial/dismissal when the inevitable foibles of the judicial system (such as calendar issues and scheduling (judges, lawyers, witnesses, etc.)) cause minor delays such as the delays in Berry and Thompson.

By omitting the trivial nature of the Berry and Thompson delays and grafting the speedy trial rule in Mello onto the issue of an untimely filed information, the District Court seems to have adopted a holding that eliminates any timeliness requirement from NRS 178.556(1) absent the defendant showing actual prejudice. **Even without any showing of good cause by the state, the District Court allowed the state a 48-day delay, a delay 3.5 times greater than the Berry and Thompson delays combined.**

In effect, the District Court airbrushed the timeliness requirement out of NRS 178.556(1). The District Court contravened Nevada Law and this Honorable Court should reverse.

II. THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION FOR LEAVE TO FILE AN INFORMATION BY AFFIDAVIT BASED ON "EGREGIOUS ERROR" BECAUSE THE STATE CHARGED 2ND OFFENSE POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL BUT OFFERED *NO* EVIDENCE OF ANY 1ST OFFENSE; THE JUSTICE COURT'S DISCHARGE WAS PROPER

NRS 453.337 provides in pertinent part:

> 2. Unless a greater penalty is provided in NRS 453.3385, 453.339 or 453.3395, a person who violates this section shall be punished:
> (a) For the first offense, for a category D felony as provided in NRS 193.130.
>
> (b) ***For a second offense,*** or if, in the case of a first conviction of violating this section, the offender has previously been convicted of a felony under the Uniform Controlled Substances Act or of an offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a felony under the Uniform Controlled Substances Act, ***for a category C felony as provided in NRS 193.130.*** [Emphases added.]

The sole count of the criminal complaint alleged in pertinent part:

> **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL,** in violation of NRS 453.337, *a category C felony*…. (AA 1).
> [Bold Original, Italics and Underline Added.]

The Nevada Supreme Court has held with respect to the requirements at preliminary hearing in the non-status enhancement/priors context:

> In fact, we have expressly held that while ***the State must substantiate the existence of the offenses at the preliminary hearing,*** the constitutional validity of the prior convictions is not for the Justice Court to determine. Parsons v. State, 116 Nev. 928, 936, 10 P.3d 836, 841 (2000), cited in Hobbs v. State, 251 P.3d 177, 182 (2011). [Emphases added.]

Hobbs dealt with felony domestic battery enhancement while Parsons dealt with felony DUI enhancement. Id.

The law is clear that "**the State must substantiate the existence of the offenses at the preliminary hearing.**" Id. [Emphasis added.]

In the instant case, the criminal complaint charged Moultrie with a category C felony, which is a second offense under NRS 453.337. (AA 1-2). At the preliminary hearing, the Justice Court confirmed in open court that the charge was a C felony (without correction from the state). (AA PHT 2-3).

Despite the law as elucidated in Hobbs and Parsons, the state offered nothing to substantiate the existence of the prior offense at the preliminary hearing. Given that failure, the Justice Court properly declined to bind the case over based on the lack of even slight or marginal evidence of the necessary prior offense. *Under the circumstances of the instant case, the assertion of egregious error is preposterous.*

It is worth noting that the prosecutor only tried to amend after the defense cited the lack of substantiation of the prior's existence during the defense's closing statement. The prosecutor himself conceded just prior to the discharge, "I don't have any evidence of any priors." (AA 56).

In finding for the state on this issue, the District Court asserted, "THE JUSTICE COURT ALSO ERRED BY DENYING THE STATE'S MOTION TO AMEND THE INFORMATION." (AA 85). The District Court cited the law pertaining to the amendment of ***an information***, described the state as having sought to amend ***the information***—at the preliminary hearing, and held that the *Justice Court* should have allowed the state to amend ***the information***. (AA 85-86). The District Court did not mention that the attempted amendment came after the close of evidence and only after the defense raised the issue in its closing.

Unfortunately, the District Court's analysis of this issue is inapposite. It relies on the law governing the amendment of an *information*, a document that does not come into existence until after a case is out of the Justice Court's jurisdiction. *In the instant case, the District Court alleged that the Justice Court did something it could not possibly have done with respect to a document that could not possibly have existed.*

The Justice Court's task in the instant case was to assess whether the state demonstrated that there was probable cause to believe that Moultrie

committed the charged offense. NRS 171.206. The state failed to meet its burden, so the Justice Court discharged. That is not an error.

III. THE DISTRICT COURT ERRED IN FINDING EGREGIOUS ERROR BECAUSE WHILE THE POLICE ALLEGEDLY OBTAINED A THIRD-PARTY'S CONSENT TO LOOK IN THE VEHICLE, THE POLICE KNEW THE BACKPACK BELONGED TO MOULTRIE, MOULTRIE NEVER CONSENTED, AND THERE WAS NO EVIDENCE OF APPARENT OR ACTUAL AUTHORITY OF THE THIRD-PARTY TO CONSENT

The state carries the burden of showing valid third-party consent to a search. Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793 (1990). A showing of express consent from the property owner is sufficient. Valid consent can also be present if the police officer reasonably believes that the third-party giving the purported consent has the authority to consent ("apparent authority"). Id. at 188. Finally, a showing of joint access and shared use or control over the subject of the search can validate third-party consent through "actual authority." United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988 (1974); State v. Taylor, 114 Nev. 1071, 1079 (1998).

Courts in the Federal 9th Circuit, other Federal Circuits, and various State systems have found that a third-party's consent to search a vehicle does not confer proper authority to search a bag belonging to a defendant. *See e.g.* United States v. Welch, 4 F.3d 761 (9th Cir. 1993) (third-party consent to search rental car did not properly extend to defendant's purse) (overruled on other

grounds in United States v. Kim, 105 F.3d 1579 (1997)); United States v. Infante-Ruiz, 13 F.3d 498 (1st. Cir. 1994) (passenger's briefcase not covered by driver's consent to search vehicle); United States v. Jaras, 86 F.3d 383 (5th Cir. 1996) (when police knew suitcase was defendant's, search based on third-party driver's consent to search vehicle was invalid even though defendant did not object to search); State v. Suazo, 133 N.J. 315, 627 A.2d 1074 (1993) (when passenger claimed ownership of bag, driver's consent to search vehicle did not provide grounds for search of bag even in absence of objection from passenger).

Additionally, the 9th Circuit has also held, "when the police intentionally bypass a suspect who is present and known by them to possess a superior privacy interest, the validity of third party consent is less certain." United States v. Impink, 728 F.2d 1228, 1234 (9th Cir. 1984).

In the instant case, Deputy Kirkland testified that he sought and received permission to search the vehicle from the driver. (AA 22-25) There was no mention of any consent of any kind from Moultrie.

Kirkland did not, by his own testimony, ever entertain any reasonable belief that the driver had "apparent authority" (as contemplated by Rodriguez) to give valid third-party consent. *Kirkland testified that upon finding the alleged contraband in the backpack, he immediately placed Moultrie in*

handcuffs because the backpack had been behind Moultrie in the vehicle, i.e. Kirkland's belief was that the backpack belonged to Moultrie:

> **Q: And why did you place [Moultrie] in handcuffs?**
> **A: The backpack had – was sitting right behind him, where he was sitting…. (AA 32). [Emphasis added.]**

Confirming that the backpack was Moultrie's, Kirkland and Moultrie later discussed the contents of the backpack (AA 32-33); Moultrie later confirmed ownership to another officer. (AA 43).

With respect to "actual authority" as contemplated by Matlock and applied to similar factual scenarios in Welch (9th Circuit), Infante-Ruiz, Jaras, and Suazo (bags in those cases recovered from vehicle belonged to defendant and subsequent searches based on third-party consent held invalid), **the purported third-party consent given by the driver to search Moultrie's backpack was invalid.**

Additionally, Kirkland intentionally bypassed Moultrie and relied solely on the third-party's consent. Under Impink, the intentional bypass further erodes the validity of the search.

The search of the backpack was not a valid consent search. Any fruits derived therefrom were properly disallowed and the state did not appeal. Therefore, the Justice Court ruled correctly and committed no error.

24. Preservation of issues. State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue:

There was no trial. Moultrie preserved his right to appeal as provided in NRS 174.035. Moultrie objected to the search during the preliminary hearing. Moultrie filed an opposition to the state's motion for leave to file an information by affidavit.

25. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: Yes.

If so, explain: The State's abuse of the egregious error provision and substantial failure to comply with time limits under the law both constitute improper burdens on the citizenry.

VERIFICATION

I recognize that pursuant to N.R.A.P.3C I am responsible for filing a timely fast track appeal and/or reply and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast tract appeal and/or reply, or failing to raise material issues or arguments in the fast track appeal and/or reply, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track reply is true and complete to the best of my knowledge, information, and belief.

DATED this 23rd day of June, 2014.

/s/
CHRIS ARABIA,Esq.
Nevada Bar #9749
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Attorney for Appellant Moultrie

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

[x] This brief had been prepared in a proportionally spaced typeface using __Times New Roman font_____ in __14-point_____; or

[ ] This brief has been prepared in a monospaced typeface using Corel WordPerfect X4 with 10 characters per inch, Courier New 12-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionally spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[x] Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of

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the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of June, 2014.

/s/
CHRIS ARABIA, Esq.
Nevada Bar #9749

IN THE SUPREME COURT OF THE STATE OF NEVADA
A F F I R M A T I O N – NRS 239B.030

The undersigned does hereby affirm that the preceding document, APPELLANT'S FAST TRACK STATEMENT filed in case number 65390 does **NOT** contain the social security number of any person.

DATED this 23rd day of June, 2014

/s/
CHRIS ARABIA, Esq.
Nevada Bar #9749

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 23rd, 2014. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert Glennen, District Attorney, Esmeralda County

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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Matthew Moultrie
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Elko, NV

/s/
CHRIS ARABIA, Esq.