ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW LEON MOULTRIE, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 65390

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF ESMERALDA, THE HONORABLE ROBERT LANE PRESIDING

FAST TRACK RESPONSE

1. Name of party filing this fast track response:

THE STATE OF NEVADA

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Robert E. Glennen III, Esmeralda County DA, P.O. Box 339, Goldfield, NV 89013.

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

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently

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pending before this Court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement: No changes.

6. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the Appellant's fast track statement:

This case originates in a traffic stop performed by the Esmeralda County Sheriff s Office on December 11, 2011. (Appx. 17). During the stop, a deputy received permission to search the vehicle (Appx. 22), and allegedly discovered methamphetamine belonging to the Defendant, a passenger in the vehicle. (Appx. 31, 32, 44).

The Justice of the Peace upheld a hearsay objection to prevent the deputy from testifying about whether he received consent to search the vehicle the Defendant was riding in, then based the refusal to bind defendant over on that hearsay objection. (Appx. 24, 56). Additionally, although the State filed the charge as a second offense, it was unable to provide evidence of a prior conviction at the preliminary hearing. The State moved to amend the Complaint to conform to the evidence to charge PCS for Sale, first offense, which the court refused. (Appx. 56).

On the basis of the hearsay objection and the State's failure to prove a prior conviction, the Justice of the Peace discharged the Defendant and dismissed the charge. (Appx. 56).

7. Issues on appeal. State concisely the principal issue(s) in this appeal: 1) it was untimely, being filed outside the statutory fifteen day window; 2) the information filed by the State alleges a Class D Felony first offense rather than a Class C Felony second offense (which was originally charged); and 3) the Justice of the Peace did not commit egregious error when the hearsay objection was upheld.

8. Legal argument, including authorities.

1. THE STATE'S DELAY IN FILING IN THE DISTRICT COURT DOES NOT VIOLATE NRS 173.035, AND HAS NOT PREJUDICED THE DEFENDANT

NRS 173.035 states, in pertinent part:

> 2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute **or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information**, and process must forthwith be issued thereon. The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction.
>
> 3. The information must be filed within 15 days after

> the holding or waiver of the preliminary examination. Each information must set forth the crime committed according to the facts.

(emphasis added). NRS 173.035(3), by its very language, cannot require the filing of Information by Affidavit within 15 days. It merely requires 15 days after the 'holding or waiver' of the preliminary hearing, but does not mention any specific time after 'discharge', as here occurred. Information by Affidavit requires 'prior court approval' before it can even be filed. Court approval requires a Motion, Opposition and Court Hearing beforehand. Thus, NRS 173.035(3) cannot apply to Informations by Affidavit under NRS 173.035(2).

Under NRS 173.035, a request from the State to file an information by affidavit made after the expiration of more than 15 days should be denied by a District Court if the Defendant is prejudiced by the delay. Beny v. Sheriff of Clark County, 93 Nev. 557, 558, 571 P.2d 109, 110 (1977). To warrant denial of the State's motion, the Defendant's showing of prejudice must be actual and will not be satisfied by speculation about what could have happened if the State had not delayed. Mello v. State, 93 Nev. 662, 664, 572 P.2d 533, 534 (1977).

The Defendant's first allegation of prejudice is that he has not been active in defending his case during the State's period of delay because he thought the case was finished. Crucially, however, the Defendant does not explain to the Court exactly what

he could have been doing during the 63 day delay that he is unable to do now. The prejudice complained of is speculative and does not warrant denial of the State's motion. The Defendant also alleges that he is prejudiced by the delay since he is not a resident of Esmeralda County; however, it is unclear how this makes the State's delay prejudicial. Whether the Defendant was charged 63 days ago or today he still will have to travel to Esmeralda County and be subject to any attendant inconveniences. The Defendant's last allegation of prejudice is that he has not been able to consult with counsel during the delay because he did not know he was going to be re-charged; however, Defendant will have adequate time to consult with his counsel prior to trial.

2. THE HEARSAY ERROR IN THE JUSTICE COURT WAS SUFFICIENTLY EGREGIOUS TO PERMIT THE STATE TO FILE AN INFORMATION BY AFFIDAVIT

The primary procedure for trying a defendant in District Court for felonies and gross misdemeanors is through preliminary hearing and bindover in the Justice Court. However, if a Defendant is discharged in the preliminary hearing, or if he waives his preliminary hearing, the State may file an information by affidavit in the District Court if that Court grants permission to do so. NRS 173.035(2).

The Nevada Supreme Court has held that the State should only be permitted to proceed on an information filed by affidavit to correct egregious error committed by the Justice Court, not to

overcome deficiencies in the presentation of evidence at a preliminary hearing. State v. District Court, 114 Nev. 739, 741-42, 964 P.2d 48, 49 (1998). Thus, where the State fails to demonstrate probable cause as to one of the elements of the charged offense and a defendant is discharged, it may not attempt to recharge the defendant in the District Court. Cranford v. Smart, 92 Nev. 89, 89, 545 P.2d 1162, 1163 (1976).

Unfortunately, "egregious" error has not been defined by the Nevada Supreme Court, nor are there many examples of what is egregious error in Nevada case law. Other jurisdictions have equated egregious error with plain error, which is generally defined as an error so significant that it affects the substantial rights of the parties. Ex parte Taylor, 666 So.2d 73, 84 (Ala. 1995). Actions to correct plain or egregious error should only be employed when a miscarriage of justice would likely occur otherwise. Id.; see also Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

The District Court held that the Justice Court's decision to uphold a hearsay objection raised by the Defendant to the co-defendant driver's consent to search the vehicle was wrong, and was egregious error. It is well established law that a statement of consent to search given to police is not hearsay if offered for the purpose of explaining why an officer believed he had consent to search the vehicle. See NRS 51.035 (defining hearsay

as a statement offered for the truth of the matter asserted); see also State v. Hodges, 672 S.E.2d 724, 73 126 (NC Ct. App. 2009) ("...[the statement of consent] was used to explain why [the Officer] believed he could conduct the search of the vehicle and proceeded to search the vehicle ...[and] was not hearsay as it was admitted to explain his subsequent conduct.").

The Justice of the Peace erred when it upheld the hearsay objection to the Officer's statements about why he chose to search the vehicle in this case. The Defendant's statement of consent was admissible to explain the officer's subsequent conduct and to establish simply that the statement was made. Id. As such the statement of consent was not hearsay and should have been admitted.

A plainly erroneous ruling on the rules of evidence which prevented the Justice of the Peace from binding the case over was held by the District Court as egregious error. Thus, the State's right to proceed in a criminal matter was substantially affected and filing an information by affidavit is the appropriate remedy.

3. THE JUSTICE COURT ALSO ERRED EGREGIOUSLY BY DENYING THE STATE'S MOTION TO AMEND THE INFORMATION

An information may be amended at any time prior to a verdict at trial so long as no additional or different offenses are alleged and the substantial rights of the defendant are not affected. NRS 173.095(1) (1995). Amendment to conform charges to

the evidence is allowed if it does not change the theory of prosecution or negate the method of defense, even during jury trial. State v. District Court, 116 Nev. 374, 377, 997 P.2d 126, 129 (2000); Green v. State, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978).

In this case, the State sought to amend its complaint to remove the repeat offender element of the charges to conform to the proof (or lack thereof) during the preliminary hearing. Since the Defendant was not even in a trial and there was no verdict to be given, the State should have been permitted to amend the information. The Justice of the Peace denied the motion to amend and then discharged the Defendant because, among other things, the State had not proven that the Defendant was a repeat offender. This was an egregious error, and warranted the District Court's order permitting the State to proceed by affidavit. The State presented sufficient evidence to establish probable cause as to all the elements of a first offense possession with intent to sell charge and it should have been permitted to proceed on that charge.

9. Preservation of issues. State concisely your response to appellant's position concerning the preservation of issues on appeal: N/A.

VERIFICATION

1. I hereby certify that this fast track response 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:

[ ] This fast track response has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in [state font size and name of type style]; or

[X] This fast track response has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[ ] Proportionately 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 __10__ pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, 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 response is true and complete to the best of my knowledge, information and belief.

SUBMITTED this 11th day of August, 2014.

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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I am an agent or employee of the above attorney, and that on the 12 day of August, 2014, I served the above and foregoing FAST TRACK RESPONSE by depositing a copy in the United States mails, postage prepaid, addressed to the following persons or parties at their last known addresses as indicated below:

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