ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

RENARD T. POLK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 39457

FILED

DEC 18 2002

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CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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FACTUAL MATTERS

The State in it's rendition of facts takes great literary license with the testimony of the witnesses, adding to the testimony in some places and changing the testimony in other places. The story sounds good, but unfortunately, is not supported by the testimony, and is often, understandably, not supported by references to the record. POLK is therefore compelled to point out the most egregious of the misstatements of fact made by the State.

The State indicates that POLK, after shutting the bathroom door, "ordered Jahala to lie on the ground". (Ans. Br. p. 2) There is no testimony that POLK "ordered" Jahala to do anything and certainly it was a floor not the "ground" in the bathroom. The State then incorrectly informs the Court that POLK put his penis into her "butt hole". (Ans. Brf. p. 3) The testimony from Jahala was that POLK tried to put it in "but it wouldn't go". (2 AA 65)

The fictionalization by the State continues as the Answering Brief claims that POLK had "difficulties performing", licked her anus to "increase his sexual gratification", and that Jahala was "intimidated and scared" of POLK, that she built "up enough courage" to tell him that it was hurting and finally that the "pain of having her brother's penis in her anus was unbearable for Jahala". (Ans. Br. p. 3) The testimony of Jahala does not support any of the above statements. Her testimony alleged that POLK had trouble with

penetration and attempted to lubricate by licking her anus. (2 AA 64-65) She did not testify that she was intimidated and scared nor that she was in "unbearable" pain. The jury obviously was able to understand the testimony as the verdict on the January, 1999 incident with Jahala was for Attempt Sexual Assault and not for Sexual Assault. (1 APP 19)

The State goes on to indicate that "upon hearing this news, Defendant let his sister get up from the floor." (Ans. Br. p. 3) There was no "news" about unbearable pain but rather that after POLK sat on the toilet she "told him no and then it was over". (2 AA 66) This is a far cry from the spin the State attempts to put on the testimony.

With respect to the March 13, 1999 alleged incident involving Anna, the State writes that Anna "and her sisters were planning a trip to the store". (Ans. Br. p. 3). In fact Anna testified that POLK asked her sisters to go to the store and that "all three" of them didn't need to go. (2 AA 96) The State's description of the alleged events involving Anna once again take on the quality of a cheap dime store fictional novel with statements such as Anna "could not bear the pain", "she begged and pleaded for Defendant to stop" but POLK "was determined and did not want to hear Anna complain anymore". (Ans. Br. p. 3) There is absolutely no testimony in the record that supports such editorialization of the facts.

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ARGUMENT

I.

THE STATE IMPROPERLY ELICITED TESTIMONY OF PRIOR CRIMINAL ACTS OF POLK WITHOUT A MOTION OR EVIDENTIARY HEARING

The State correctly points out that there was a failure of contemporaneous objection by trial counsel to the introduction of evidence of illegal drug use by POLK. This failure by trial counsel should not excuse the conduct of the prosecutor in intentionally eliciting the testimony during the cross-examination of POLK. The prosecutors were not inexperienced, and should have known better than to have asked the questions without having sought approval from the trial court.

The State incorrectly claims that POLK'S attorney continually claimed that POLK did not remember things because he was high or drunk. (Ans. Br. p. 6) The State, however, fails to cite to a single time were defense counsel made such an argument or statement to the jury. There was simply no such "continual claim" and therefore POLK did not open the door to the evidence of illegal drug use at an early age. An improper reference to prior criminal conduct is a violation of Due Process under the Fourteenth Amendment and is reversible error unless it was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

The State also seems to claim that POLK opened the door for the admission of the testimony, but fails to inform the

Court that the testimony was all elicited by the State, not by POLK. The State thus improperly opened the door and then argues that its own misconduct allows the admission of the remaining testimony.

The two areas of examination by defense counsel cited by the State have nothing to do with POLK'S illegal use of drugs in the ninth grade. Susan Sims testified that POLK was a great student and did not have any mental problems. (2 APP to 259-60) POLK does not understand how the State could possibly claim that this testimony opened the door to POLK'S illegal drug use. Likewise, the direct examination of POLK concerning his attempted suicide did not address drug usage as a factor.

The State cannot get around the fact that the testimony elicited about POLK'S drug usage was improper under NRS 48.045(2). Instead, the State complains that defense counsel failed to object or somehow opened the door to the admission of the evidence. These two claims are without persuasive merit and show the merit to POLK'S argument. The testimony was improperly elicited and prejudicial necessitating reversal of the conviction.

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II.

THE STATE IMPROPERLY INQUIRED
CONCERNING POLK'S PLEA IN THE CASE

The State initially claims that POLK failed to properly preserve this issue for appeal. The record, however, shows that POLK did indeed preserve the record by seeking a mistrial from the District Court. While the complaints of trial counsel at the time of the examination were general and not specific, objections were indeed raised to questions about the failure of POLK to plead not guilty by reason of insanity. The next morning a motion for mistrial was made and denied by the District Court. Upon review these actions by defense counsel were more than sufficient to preserve the issue for appellate scrutiny.

The State does not understand, or intentionally avoids, the issue concerning the violation of POLK'S attorney-client privilege. It does not matter that defense counsel indicated to the Court in pre-trial proceedings that he was considering proceeding with an insanity defense as a result of a recent ruling by this Court. The violation occurred when the State inquired into why POLK did not enter a plea of not guilty by reason of insanity. (2 APP 292-93) In fact the State pushed POLK to the point that he had to indicate that it was his "lawyer's choice" not to enter the insanity plea. (2 APP 292)

The actions of the prosecutors in the case at bar is similar to what transpired in Manley v. State, 115 Nev. 114,

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121-122, 979 P.2d 703 (1999) wherein this Court stated:

> "Although the attorney-client privilege has been termed merely a rule of evidence and not a constitutional right, government interference with the attorney-client relationship may implicate Sixth Amendment rights. Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985) (citing Weatherford v. Bursey, 429 U.S. 545 (1977)"

By inquiring into the decision whether to pursue a defense of insanity as opposed to any other defense prosecutors were asking about defense decisions and communications that implicated POLK'S Sixth Amendment rights. The fact that defense counsel rejected an insanity defense based on reports and communications that were not part of the record should not have been the subject of inquiry by the prosecution. Defense counsel was then left with no way to respond or rebut the implication left by the State's improper questions. The only viable remedy for this violation of Due Process and the Sixth Amendment right to counsel is a reversal of the conviction.

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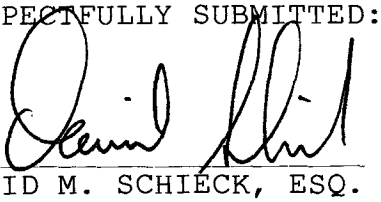
CONCLUSION

Based on the authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of RENARD T. POLK and remand the matter to District Court for a new trial.

Dated this 15 day of December, 2002.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 15 day of December, 2002.

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 16 day of December, 2002, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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