Nevada Supreme Court

State of Nevada, Plaintiff

v.

Anthony Barr, Appellant

Docket Number 78295

Appellant's Reply Brief

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Jeannie Hua, Esq., Attorney of record for Appellant, Anthony Barr

Clark County District Attorney's Office for the State of Nevada

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Argument

I. Trial Court erred by failing to continue Appellant's sentencing and lacked jurisdiction to resentence Appellant

State cited to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222 (1984) and argued that there was no basis to continue Appellant's sentencing because Appellant's claims of mistakes in the PSI were unsupported. (Respondent's Answering Brief, p. 17). However, Hargrove applied to appeals on denials of evidentiary hearings for Post Conviction Writ of Habeas Corpus, a civil proceeding with different standards of proof. Hargrove does not apply. Further, it was the State who opposed the request for continuance and not giving Appellant and counsel the opportunity to go over the PSI prior to sentencing or to investigate and correct any mistakes. Now the State is arguing an outcome the State created by opposing a continuance to simply allow Appellant to understand and to have trial counsel investigate and correct mistakes in the PSI.

The State also argued that trial court can correct clerical error at a resentencing. (Respondent's Answering Brief, p. 20). However, "generally, the district court lacks jurisdiction to modify a sentence after the defendant has begun serving it." Bryant v. State, 435 P.3d 1230, *quoting* Staley v. State, 106 Nev. 75, 79, 787 P.2d 396, 398 (1990), overruled on other grounds by Hodges v. State, 119

Nev. 479, 78 P.3d 67 (2003). Sentencing Appellant for Counts 3 and 4 and failing to sentence Appellant on Count 22 is more than clerical error. Further, since State argued that the sentences given to Appellant weren't illegal, (Respondent's Answering Brief p. 16), the second exception to resentencing Appellant in trial court doesn't apply. "While the district court may correct an illegal sentence or clerical errors in the judgement at any time, NRS 176.555, 176.565 […] The district court only had jurisdiction to modify the sentence if it was based on a mistake of fact about Bryan's criminal history that worked to his extreme detriment." Id. Here, the trial court error wasn't based on Appellant's criminal history so NRS 176.565 doesn't apply. The proper forum was to allow Appellant to appeal and to have this Court rule upon Appellant's sentencing in trial court.

II. Trial Court erred by failing to sever the four robberies

State argued that the four robberies were properly tried together because they showed common scheme or plan. (Respondent Answering Brief p. 24). The State claimed that the robberies showed a common scheme or plan because it was impossible for law enforcement to testify as to the steps of their investigation that lead to identification of Appellant and codefendant without referring to all four robberies. However, law enforcement officers were not eyewitnesses to the robberies. Eyewitnesses material to each robbery were able to testify to each robbery without referring to other robberies. Law enforcement witnesses were

peripheral witnesses who testified to the investigation. The State had highlighted their eyewitness testimonies when referring to eyewitness identification of Appellant and Codefendant. (Respondent Answering Brief p. 26). The State further argued that the robberies apply under the common scheme and plan exception because of the distinct characteristics each robberies shared. (Respondent Answering Brief, p. 24). However, the actions the State cited are commonalities to every robbery where individual(s) enter a bank, communicate with employee(s), show and/or imply threat(s) and leave. The fact that the suspects were African Americans in each robbery is not distinct enough to set them apart from other robberies by other people in the greater Las Vegas area. The State went onto argue that Tabish Court "explained that even when there are prejudice issues in a misjoinder, they may not apply to both crimes when the issue of guilt is close as to only one of the crimes." First, the State failed to cite the page it claimed the holding contained. Second, even if prejudice didn't apply to both, it nevertheless applied to the one with less evidence. State's claim is contrary to a case cited by the State, Rimer v. State, 131 Nev. 307, 323, 351 P.3d 697 (2015), where joinder is prejudicial if (2) evidence of guilt on one count may "spillover" to other counts, and lead to a conviction on those other counts even though the spillover evidence would have been inadmissible at a separate trial." (Respondent's Answering Brief,

p. 25). How can there be not be a spillover effect if the issue of guilt is close as to one crime and not the other?

The State went on to argue that the evidentiary value outweighed any prejudice from the joinder. (Respondent Answering Brief p. 25). However, between eyewitness testimonies at trial where they were able to testify to the robberies they witnessed without referring to other robberies and the fact that there was video recordings of each robbery, the evidentiary value of the existence of other robberies are minimal at best when weighed against the prejudice resulting from the joinder of offenses.

III. The trial court erred by failing to sever Codefendant's charged from Appellant's charges

The State argued that there was no prejudice from the Codefendant and Appellant tried together. (Respondent's Answering Brief p. 31). The State argued that there was no prejudice from Appellant being forced to have the jury hear Codefendant's robbery along with robberies Appellant was charged with because the guilt against the Codefendant was strong. However, the whole point of severance of defendants is to avoid guilt by association. The fact that evidence against Codefendant's single robbery was strong illustrates that the prejudice was all the more evident. If Codefendant was obviously capable of robbing a bank, the fact that Appellant was surveyed to be in Codefendant's company taints the jury's

perspective and paints the Appellant as a robber just like the Codefendant. If the Codefendant was up to no good, neither could Appellant. The State went onto argue that there was no prejudice because the detectives identified Appellant as a suspect first. (Respondent's Answering Brief p. 31). However, the order of investigation has no relevance to how much evidence is against Codefendant in a case that Appellant had nothing to do with but was forced to be tried with along with Appellant's unrelated charges.

Conclusion

Appellant respectfully request this Court to consider reversing his convictions and remanding the case back to trial court for retrial or resentencing.

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 for Mac, version 12.3.6 (130206) in 14 point Times New Roman style;

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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 a reference to the page and volume number, if any, of 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 10th day of March, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 10th day of March, 2020, pursuant to NRAP 25(a)(2)(A)(vi), I electronically transmitted to the court's electronic filing system consistent with NRFCR 8 to

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Dated this 10th day of March, 2020