

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,)
)
 Appellant,)
)
 vs.)
)
 THE STATE OF NEVADA,)
)
 Respondent.)

Electronically Filed
Jul 05 2018 03:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 75911

**APPELLANT’S REPLY TO STATE’S OPPOSITION TO
DEFENDANT’S MOTION SEEKING AN ORDER REMANDING
CASE BACK TO DISTRICT COURT FOR A DECISION BY THE
TRIAL JUDGE ALTERNATIVELY MOTION TO DISMISS
CONVICTION.**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 27 asks this Court to remand his case back to district court for hearing before Alfred’s trial judge, Judge Bixler. Alternatively, Alfred asks Court reverse his conviction. This Motion is based on Points and Authorities, Exhibits, and documents on file in this case.

DATED this 5th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Chief Deputy Public Defender

POINTS AND AUTHORITIES

In its Opposition, State claims NRS 175.101 is not relevant because it is limited to circumstances where a judge is unavailable; and, here, Judge Bixler was available. Oppo:2-3. However, NRS 175.101 supports Alfred's argument that Judge Bixler should have decided his motions because NRS 175.101 limits the ability of a non-trial judge to decide post-verdict motions and sentencing.

While *Dieudonne v. State*, 127 Nev. 1, 5-8 (2011) holds that a criminal defendant does not have an absolute right to be sentenced by the same judge who took his plea, it does not address NRS 175.101 for good reason. Oppo:3. NRS 175.101 discusses the right to have a trial or substitute judge decide matters *after verdict* and has nothing to do with a conviction obtained through plea negotiations. Accordingly, *Dieudonne* is not relevant.

State also contends that any non-trial judge may decide a motion for a new trial because NRS 176.515 does not specifically state that the trial judge should make the decision. However, under statutory analysis, the omission of this specific wording does not lead to State's claimed result.

Statutes are interpreted in a manner to give effect to the Legislature's intent. *McNeill v. State*, 375 P.3d 1022, 1025 (2016). Court determines the Legislature's intent by examining the plain meaning of the words of the

statute. *Id.* If the words are clear and unambiguous, the Court will go no further. *Id.*; *Nay v. State*, 123 Nev. 326, 331 (2007). Court construes the words as a whole so “not [to] be read in a way that would render words or phrases superfluous or make a provision nugatory.” *Mangarella v. State*, 117 Nev. 130, 133 (2001) quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990).

NRS 176.515 uses terminology to indicate the motion for a new trial must be heard by the trial judge, when saying: “the court” and “[i]f trial was by the court...”. The fact that the Legislature did not say “any court” supports the finding the Legislature intended that a NRS 176.515 motion would be decided by the trial judge.

Moreover, Court presumes the Legislature enacted NRS 176.515 “with full knowledge of existing statutes relating to the same subject.” *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005). NRS 176.515 and NRS 175.101 were both enacted in 1967. Thus, the Legislature knew the limitations placed on a substitute or non-trial judge in NRS 175.101 when enacting NRS 176.515. Because Legislature did not put any contrary language in NRS 176.515, it is clear that the Legislature wanted the trial judge to decide after-verdict NRS 176.515 motions.

Finally, it makes common sense that a trial judge would decision after-verdict motions because the trial judge is familiar with the facts and issues of the trial and could therefore do an adequate evaluation of the evidence.

Yet State claims a remand back or dismissal are premature because the appellate process should proceed. Oppo:1. However, the remand back is necessary for an *adequate* appellate record.

Here, the non-trial judge never indicated he read the trial transcript or that he was familiar with the facts and issues in the trial. The non-trial judge made limited findings, contending the jury note was not newly discovered evidence and Judge Bixler did not remember the note or whether or not it was presented to the attorneys. The non-trial judge did not ask his Marshall to explain what happened with the jury note or what he said verbally to the jury. Without reading the trial transcript and district court documents on file, the non-trial judge simply said he found the typed response of the top of the jury note was a proper and legal response. However, the response discussed evidence and the jury note was a question about the law. While the non-trial judge found Alfred failed to show a different result would have been probable, the non-trial judge knew little of the facts to reach that determination and refused to allow an evidentiary hearing for Alfred to

present facts. Therefore, this case needs to be remanded for Judge Bixler to hear the motion and decide whether Alfred is entitled to an evidentiary hearing so that he may obtain adequate appellate review.

State cites the unpublished order in Case NO. 73444 - a decision involving State's motion to dismiss an appeal when claiming the Court lacked jurisdiction. Because an adequate record was available for the Court to decide that issue during the appellate process, Court denied State's motion. Here, Alfred is without an adequate appellate record and seeks to enforce NRS 175.101 in order to obtain an adequate record or a dismissal.

But State claims Alfred did not ask for Judge Bixler to decide the motions. Oppo:2. Clearly, State has not read Alfred's briefing attached as Exhibits A, C, D, E in his original motion and *Exhibit AA* attached in this Reply.

Finally, NRAP 27 (c)(2) does not prohibit Alfred's request for a remand back or dismissal but indicates a decision for dismissal must be made by more than one justice.

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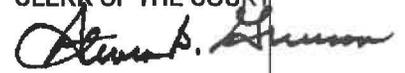
In view of the above, Alfred asks the Court remand his case to district court for an evidentiary hearing before Judge Bixler to allow Judge Bixler decide his motion for a new trial or for Court to reverse his conviction.

DATED this 5th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Chief Deputy Public Defender
309 S. Third Street, #226
Las Vegas, NV 89101

EXHIBIT AA



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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

ALFRED HARVEY,
Defendant.

CASE#: C-16-314260-1
DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE
MONDAY, APRIL 16, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO NRS
176.515 BASED ON GROUNDS OF NEWLY DISCOVERED
EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND
DECISION BY TRIAL JUDGE
DEFENDANT'S MOTION TO RECONSTRUCT THE RECORDS AND
MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS
MATTER**

APPEARANCES:

For the State: BRYAN S. SCHWARTZ, ESQ.
Deputy District Attorney

For the Defendant: SHARON G. DICKINSON, ESQ.
JASMIN D. SPELLS, ESQ.
Deputy Public Defenders

RECORDED BY: GINA VILLANI, COURT RECORDER

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Las Vegas, Nevada, Monday, April 16, 2018

[Hearing began at 8:02 a.m.]

THE COURT: C314260, Alfred Harvey.

MS. DICKINSON: Good morning, Your Honor, Sharon Dickinson from the Public Defender's Office. I'm waiting for Jasmine Spells. She was the trial attorney.

THE COURT: Who?

MS. DICKINSON: Jasmine Spells. She was the trial attorney.

THE COURT: All right. Okay.

MS. DICKINSON: If we could wait until she gets here.

[Hearing trailed at 8:03 a.m.]

[Hearing recalled at 8:32 a.m.]

THE COURT: C314260, Alfred Harvey.

MS. SPELLS: Good morning, Your Honor, Jasmine Spells and Sharon Dickinson on behalf of Mr. Harvey, who is not present but in custody in NDOC, we'd ask that his presence be waived.

THE COURT: Okay.

MR. SCHWARTZ: And, Your Honor, I hadn't had a chance to respond to their motion. I'll get it filed today. I know that they were going to request that the trial judge actually hear the motion. The State's position on that is --

THE COURT: He's a senior judge now; he's not the trial judge.

MR. SCHWARTZ: So the State's position is we'll submit it to

1 you on the --

2 THE COURT: All right.

3 MS. SPELLS: And, Your Honor, we are asking that the Court
4 set this at a time that Judge Bixler can hear -- we do understand that
5 Judge Bixler is a senior judge at this time. This case was heavily
6 litigated, we were originally in front of Judge Miley, who heard most of
7 the motions, decided most of the motions, and made those records. But
8 the issue that we're dealing with now is very pertinent to exactly what
9 occurred during the trial and we were sent here from overflow, Your
10 Honor --

11 THE COURT: What the question to the jury, is that what you
12 wanted -- you want that issue of, is that what you're talking about?

13 MS. SPELLS: Yes, Your Honor, as well as perfecting the
14 record. Because Judge Bixler was the one who would have been most
15 intimately familiar with the facts and circumstances of that because he
16 would have been the judge proceeding over the trial.

17 THE COURT: I talked to Judge Bixler about this and Bixler
18 doesn't remember. If the question -- the question was something to the
19 effect that the jury asked a question about the definition of --

20 MR. SCHWARTZ: Robbery.

21 THE COURT: -- the robbery; is that correct?

22 MR. SCHWARTZ: Yes.

23 MS. SPELLS: Yes, force or violence. Specifically --

24 THE COURT: Force or violence.

25 MS. SPELLS: Force or violence.

1 THE COURT: And then -- and there is a notation at the top of
2 the paper that says, the Court is not at liberty to supplement the
3 evidence.

4 MS. DICKINSON: Correct.

5 MS. SPELLS: Yes.

6 THE COURT: And your position is that you didn't discuss this
7 at all?

8 MS. SPELLS: Our position is that we never seen the
9 question, we were unaware of it, and --

10 THE COURT: Had you been in trial right now and that
11 question came up, what would the response likely be?

12 MS. SPELLS: Your Honor, we would have had a number of
13 responses, which is what we detailed in our motion. Specifically, we
14 would have asked that certain jury instructions be presented, additionally
15 we would have asked to --

16 THE COURT: Now, the jury is deliberating when they came
17 up with this -- this -- is the Court at liberty to supplement the jury
18 instructions? No.

19 MS. SPELLS: Yes, Your Honor, the Court is at liberty given
20 the --

21 THE COURT: No, they're not.

22 MS. SPELLS: Respectfully, Your Honor, I disagree given the
23 jury instructions that were given to the jury specifically which are
24 enumerated in our motion. Additionally, we are at liberty to answer
25 certain questions. We can at least refer them to jury instructions that

1 were already given and that was one of the things that we argued in our
2 motion.

3 So there are a lot of different arguments, Your Honor. We
4 would like an opportunity to review the State's response and then again
5 respond additionally before the Court makes any ruling.

6 But our concern is that --

7 THE COURT: Well, they submitted it. And my position is
8 this --

9 MS. SPELLS: Your Honor, they're asking for time to file --

10 THE COURT: Do you want to respond?

11 MR. SCHWARTZ: Well, what I was saying, Your Honor, is we
12 submitted who was going to hear the motion, that's what I was saying,
13 Your Honor.

14 I'll -- I'd be happy to orally argue it right now, if you --

15 THE COURT: No, if you want to -- if you want to file --

16 MR. SCHWARTZ: I can --

17 THE COURT: -- something written.

18 MR. SCHWARTZ: Yeah.

19 THE COURT: At this point I am not inclined to grant it,
20 because if you had come -- if we were in trial and that question came up,
21 then what happens is, normally, the judge calls the attorneys and both
22 attorneys agree that the Court is not at liberty to supplement the jury
23 instructions and would send the jury back that letter.

24 That's exactly what is on that paper. I've reviewed this with a
25 few other judges and they all agree that this should be denied. But I will

1 let the State respond.

2 MR. SCHWARTZ: Thank you, Your Honor.

3 MS. SPELLS: And we'd like an opportunity to file a response
4 to their opposition, Your Honor.

5 THE COURT: That's fine.

6 MR. SCHWARTZ: Your Honor, I'll have my response filed
7 today.

8 THE COURT: All right.

9 MS. DICKINSON: Your Honor, I'll probably need till Friday or
10 Monday to file --

11 THE COURT: Two weeks.

12 THE CLERK: April 30th.

13 THE COURT: Make sure all your papers -- and send copies
14 to the Court for courtesy.

15 MR. SCHWARTZ: Yes, Your Honor. Thank you.

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17 [Hearing concluded at 8:37 a.m.]

18 * * * * *

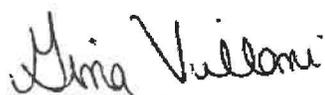
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

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Gina Villani
Court Recorder/Transcriber

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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

ALFRED HARVEY
NDOC No. 1174900
c/o Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89018

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office