

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Electronically Filed
Case No. 72829
Jul 26 2018 09:05 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT’S MOTION TO RECONSIDER ORDER DENYING
RECONSTRUCTION OF THE RECORD AND REMAND BACK TO
DISTRICT COURT FOR AN EVIDENTIARY HEARING; OR AN
ORDER ALLOWING USE OF AFFIDAVITS AND DECLARATIONS
PRESENTED TO THE DISTRICT COURT FROM THE JURORS,
THE INVESTIGATORS, AND HIS TRIAL ATTORNEYS.**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 10(c) and NRAP 27 asks this Court to reconsider its order issued on July 25, 2018 denying his motion seeking remanded to district court for an evidentiary hearing before trial judge, Judge Bixler. Alternatively, Alfred requests an order allowing him to use the declarations and affidavits he obtained from jurors, the investigator, and trial attorneys in his appeal. This Motion is based on Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 25th of July, 2018.

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

POINTS AND AUTHORITIES

Alfred brings this motion to reconsider because there seems to be a misunderstanding of the facts and law. In the order the Court cites *Carson Ready Mix v. First Nat'l Bk*, 97 Nev. 474, 476 (1981) to hold “[t]he affidavits and declarations were not considered by the district court prior to entry of the judgment of conviction and are thus not part of the trial record or the record on appeal.” Order:2.

NRAP 10 defines the trial record in pertinent part:

(a) The Trial Court Record. The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.

...

Accordingly, NRAP 10(a) *does not limit* the trial record to affidavits and declarations considered by the judge prior to entry of the judgment of conviction. The only limitation within NRAP 10(a) is that documents must be filed in the district court. Here, the affidavits and declarations were filed in the district court. Therefore, they are part of the district court record and may be cited to under the rules - except for the fact the district court told Alfred he could not.

Likewise, *Carson Ready Mix, Inc.*, does not support the Court’s ruling. In *Carson Ready Mix, Inc.*, copies of the defendant’s proposed jury

instructions were not within his appendix on appeal and not filed in the district court record. The reason for the omission was that the trial court discussed jury instructions and objections in its chambers. Later, not all the objections and discussions were put on the record in violation of NRCP 51. On appeal, the appellant attempted to reconstruct the record by sending affidavits *directly* to the Supreme Court rather than following the procedure for reconstruction outlined in NRAP 10(c). The Court admonished the appellant that it was his responsibility to make sure the objections were properly placed on the record in district court and to follow NRAP 10(c) if anything was amiss.

Initially, it is important to point out that criminal cases do not follow NRCP 51. Therefore, *Carson Ready Mix, Inc.* is not dispositive because the case at bar is a criminal case not a civil case.

Additionally, in contrast to *Carson Ready Mix, Inc.*, here, it was the trial court – not the appellant as in *Carson* – who created the error. It was the trial court who did not make a record of what the trial court did during jury deliberations. Here, the jury gave the marshal a note seeking the answer to a question. It appears the note was given – we are not sure – to the judge. The judge did not notify the parties and the note was not discovered until after the judgement was filed. Thus, Alfred could not make

a record in district court *prior* to the filing of the judgment because the *trial court withheld this information from him*.

Furthermore, unlike *Carson Ready Mix, Inc.*, here, it was and is the *duty of the trial court* – not Alfred – to correct the error in the record because it was the *district court* not Alfred who made the error in not contacting the parties to inform them of the note from the jury. As a matter of public policy, the public can have no confidence in a judiciary that withholds information from a defendant during a trial and then later claims on appeal the record cannot be reconstructed and blames the defendant for not making an adequate record for review.

Finally, when Alfred discovered the *trial court erred*, he filed a NRAP 10(c) motion as required:

(c) Correction or Modification of the Record. If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Clerk.

He asked for the trial court's error to be reconstructed in the record because he intended to raise this issue on appeal. He asked for the trial judge to make a decision as he is entitled to by NRS 175.101. He asked that the district court record truly reflect what the district court and the court staff did

during the trial. Thus, Alfred followed the rules as delineated in *Carson Ready Mix, Inc.*, and NRAP 10 (c).

However, this Court's decision seems contrary to *Carson Ready Mix, Inc.*, and NRAP 10 (c) and NRS 175.101. Even though the error was created by the trial court and not him, this Court has denied him any remedy, just as he was denied any remedy by the district court.

This Court has the authority to order the district court to follow the rules and that is what Alfred asked when seeking a remand. Requiring the district court to follow the rules is different from this Court making a decision for the district court. When the Court creates rules such as those in NRAP 10(c), defendants are entitled under due process to expect the rules to be followed and to allow for reconstruction of the record with the trial judge after the judgment has been filed.

Lastly, it is important to note that by its very nature, a NRAP 10(c) motion can only be filed *after the judgement* is filed because it is a rule used by the parties when a case is on appeal. An NRAP 10(c) motion allows for correction or reconstruction of the district court record to ensure a defendant is given due process on appeal. But Court's order mistakenly concludes the information contained within the declarations of jurors was not considered by the trial court. In reality, the juror's declarations contain information the

trial court would have known at the time the marshall spoke to the jury. It contains information the court should have known prior to the filing of the judgment and contains some of the information withheld from the trial attorneys. A remand is necessary for the trial court to make a record of its error so that Alfred may obtain due process on direct appeal.

III. CONCLUSION

In view of the above, Alfred Harvey asks this Court to reconsider its decision and remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler. Alternatively, he asks this court to issue an order allowing Alfred to use, in his appeal, the declarations and affidavits he obtained from jurors, the investigator, and his trial attorneys which were included in his motions filed in district court.

DATED this 25th day of July, 2018.

**PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER**

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25 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