Supp

MICHAEL LASHER, ESQ.
Michael Lasher LLC
Nevada Bar No. 13805
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Michaellasher2@gmail.com
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON MURIC DORADO, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No.: 79556 Dist. Ct. Case No.: C-17-323098-1

SUPPLEMENTAL PLEADING

STEVEN WOLFSON, ESQ.
Clark County District Attorney
Nevada Bar No. 1565
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, NV 89155
(702) 671-2500
Attorney for Respondent

MICHAEL LASHER, ESQ
Michael Lasher LLC
Nevada Bar No. 13805
827 Kenny Way
Las Vegas, NV 89107
(510) 507-2869
Michaellasher2@gmail.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEVADA CASES

FEDERAL STATUTES

THE DISTRICT COURT ERRED IN DENYING DORADO'S MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

Procedural and Factual Background

After an evidentiary hearing on November 10, 2020; December 8, 2020; December 15, 2020; December 17, 2020, the District Court denied Dorado's motion to dismiss for pre-indictment delay. The court erred.

In a written order filed December 29, 2020, the Court found that *Wyman v. State*, 125 Nev. 592 (2009) is consistent with the principl es set forth in *United States v. Lovasco*, 431 U.S. 783 (1977) and *United States v. DeGeorge*, 380 F.3d 1204 (9th Cir. 2004). The District Court next found that Dorado could satisfy neither element of *Wyman*. Regarding prejudice, Dorado "was unable to present evidence that would have changed the outcome of the case based on the testimony of the victim. Moreover, there was not any loss of material evidence the Defendant can point to that would have led to his acquittal." As to the second prong, "there was no valid proof of a violation of any printed policy or procedures at the time of the investigation. Defendant fails to show that the State or investigating agency acted in bad faith or to gain a tactical advantage." Amended Supplemental Appellant's Appendix

page 2 (hereafter in the format "ASAA 2"). Both factually and legally, the District Court abused its discretion.

Legal Landscape

Wyman, supra, 125 Nev. at 600, adopted an abuse of discretion standard for appellate review of a denial of a motion to dismiss for pre-indictment delay. "Under this standard, we will reverse . . . when the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."

Analysis

As shown more fully below, the State retained only the inculpatory evidence against Dorado yet destroyed all exculpatory evidence soon after the events in April of 1999. Lost are two police reports, the tape of Ms. Lehr's voluntary statement, and her clothing, all of which would have impeached her trial testimony. ASAA 47; ASAA 18-20. Yet only the DNA and one supplemental police report were retained, despite Metro officially closing the case and ordering the disposal of the DNA. ASAA 87; ASAA 18-20. Most critically, because the SANE nurse was deceased by the time of trial, she could not testify that the complaining witness stated that there was no digital

penetration, a statement which contradicts the trial testimony which supported at least one count of sexual assault. ASAA 15. As well, the nurse could not be questioned about her conclusion that "the victim had little bruising . . . [which] was not definitive for sexual assault."

Even under the *Wyman* standard, the District Court abused its discretion because Metro repeatedly violated its own policy manual, indicating bad faith. First, its record retention schedule prohibited destruction of physical evidence a mere 8 months after the events in question. In fact, all evidence should have been retained until the Statute of Limitations had expired because no suspect was immediately arrested. See Evidentiary Hearing Subpoena Duces Tecum return. ASAA 21. See also Metro Manual Section 4/105.12, which requires following the record retention schedule. Given that Metro closed the case and ordered destruction of the DNA (which was nonetheless magically retained), while all of the other exculpatory evidence was destroyed so soon after the events and in violation of policy, bad faith is shown.

In denying relief, the District Court made much of the fact that "there was no valid proof of a violation of any printed policy or

procedures at the time of the investigation." ASAA 2. Presumably, the court meant that the subpoena return did not produce the retention schedule from 1999. Yet such holding is an abuse of discretion. First, pure common sense indicates that no 1999 policy would have allowed destruction of evidence a mere eight months after a crime that could carry a life sentence. The manual produced upon undersigned counsel's subpoena (which requested the 1999 manual) is sufficient to prove Dorado's point that it was a violation of policy to destroy critical evidence so quickly. ASAA 21. If this Court disagrees that a subsequent manual is insufficient, then this proves Dorado's point that he was prejudiced by the delay because he was deprived of the very thing necessary for a finding of bad faith.

Bad faith is further indicated because Metro violated other of its own policies, none of which were addressed by the District Court despite being raised at the hearing and at trial, and so indicating an abuse of discretion. On June 20, 2019, defense expert Robert Bub testified to the jury that he reviewed the Las Vegas Metropolitan Police Department manual and that Metro did not follow its own policies in this case. 9 AA 896-97. For instance, forensic lab requests are to be

"submitted in a timely manner concurrent with the investigation" under section 5/209.03. Here, the lab request was not submitted until 2015, 16 years after the events and well after the case was closed. This indicates bad faith, because all of the exculpatory evidence was destroyed by this point. Undersigned counsel reminded the District Court of this testimony. ASAA 70.

As well, Bub's report, submitted during an in limine hearing on June 18, 2019 (6 AA 591), stated that additional sections of the Metro manual were also violated: (1) 4/102.03, Performance of Duty "When the police purpose might be jeopardized by delay, immediate action shall be taken . . ." (2) 5/206.34 duty "to use all means necessary to ensure all investigations are thorough and complete." (3) 4/102.05, Protection of Crime Scenes "Members assigned to, or assuming control at, a crime scene shall immediately take steps to apprehend the violator, care for any injured person, detain witnesses, and keep the area or premises secure from intrusion by unauthorized persons. They shall take all necessary steps . . . to prevent the destruction, mutilation, concealment, or contamination of any physical evidence." ASAA 34.

Yet Metro did not interview any percipient witnesses other than Ms. Lehr. According to the foregoing protocol, the following should have been interviewed: Ms. Lehr's friend who was at the Silver Saddle and at the SANE exam; the young man at the apartment where the events took place; the two women in the parking lot; and people present at the Silver Saddle. All of these violations of Metro's own policy manual indicate bad faith. This too was raised at the hearing. ASAA 71.

Similarly, the Case Monitoring Form has many investigative boxes that were not checked off as completed: Area of Crime/Neighborhood Canvassed, Crime Scene Searched/visited, Fingerprint Search Conducted, and FI Files/Crime Analysis Checked. ASAA 17. Again, there is no credible evidence that law enforcement went to the apartment at 2101 Sunrise to canvass the neighborhood or process the crime scene, including for fingerprints. ASAA 105 and 115.

Finally, at Dorado's bail hearing on June 15, 2017 at 5 when asked by Judge Scotti about the delay, the State admitted that old sexual assault cases were not investigated well. ASAA 71. Nonetheless, the State went ahead and filed charges anyway. This decision to go forward, even after the case was closed by Metro and the

exculpatory evidence was ordered destroyed, clearly shows bad faith. In the end, everything that Dorado could have used to defend himself was destroyed, while only incriminating evidence was retained. It is also suspicious that none of the original officers testified at Dorado's trial. The totality of these circumstances indicates bad faith.

The District Court also abused its discretion in finding that "there was not any loss of material evidence the Defendant can point to that would have led to his acquittal." This ruling is belied by the District Court's own comments at the hearing. Specifically, the court stated that the death of the SANE nurse, and so the loss of her testimony, could conceivably be prejudicial to Dorado because the nurse would have testified that Ms. Lehr indicated that she was not digitally penetrated, contradicting her trial testimony. ASAA 77. When undersigned counsel argued this point at the conclusion of the hearing, the District Court stated that the nurse's report could have been introduced as a business record. Yet undersigned counsel pointed out that the court sustained the State's repeated lack of foundation and speculation objections when counsel attempted to introduce the report at the hearing. ASAA 70, 76, 88-89, 106. That is, the report would not

have been admissible at trial without the nurse to validate it. Again, the District Court's ruling was an abuse of discretion, because it seemed to acknowledge the exculpatory nature of the SANE report. ASAA 77.

Dorado was prejudiced in other ways as well because all of the evidence necessary for Dorado to impeach the complaining witness was destroyed eight months after the events, including: (1) reports by Officer Williams, Det. Reddon, and Officer Wiley of their interviews with Ms. Lehr, which would have impeached her trial testimony that she took officers to the apartment at 2101 Sunrise (ASAA 96, 106); (2) Ms. Lehr's clothing, which could have impeached her testimony that Dorado ripped her garments and that she stabbed him, causing him to bleed (ASAA 110); and (3) the audiotape of Ms. Lehr's voluntary statement, which would not have had the many gaps as the transcript. Ms. Lehr herself at trial decried the incomplete transcription. 1 AA 48. As one example, the transcript read: "I mean that's when he started unbuckling his pants, just threw my legs up and that's when I blanked out. And I remember _____.' An audio would have filled in this critical gap which addressed what Ms. Lehr remembered soon after the events and would have impeached Lehr's testimony.

Waiting 17 years to bring charges against Dorado when all of the exculpatory physical evidence and most police reports had been destroyed offends fundamental notions of justice. This is especially so when only the inculpatory evidence was retained, despite being ordered destroyed, and when Metro violated numerous of its own protocols. Because Ms. Lehr was the only percipient witness to testify, Dorado's ability to impeach her was critical. Any impeachment matters in these circumstances. Dorado's rights under the Fifth, Sixth, and Fourteenth Amendments were violated when he was forced to trial over 17 years after the alleged criminal conduct on April 24, 1999 in these circumstances.

Dorado continues to maintain that United States Supreme Court jurisprudence (see, e.g., *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977)) and persuasive holdings in the Ninth Circuit (see, e.g., *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997)) prohibit the use of *Wyman's* bad faith standard to prove a due process violation for pre-indictment delay. Dorado's Bench Memo filed on September 8, 2020 elucidates his view of the appropriate standard and that under the proper balancing test, the charges against him should be dismissed

because 17 years elapsed between the events in this case on April 24, 1999 and the filing of charges, over which time critical impeachment evidence was destroyed. Under a balancing test, Dorado was prejudiced by the destruction of evidence, while the delay was due to mere recklessness, at the least. Law enforcement had all they needed to apprehend a suspect. Because the State did virtually nothing to investigate, they simply did not find Dorado. They knew his first name, that he was a musician in a well-known band that regularly played gigs, and that Dorado likely lived at 2101 Sunrise. Yet they took no steps to find him. In fact, Blanca Muric testified at the hearing, Dorado lived at that address and so could easily have been found. Plus, he played frequently with Banda Zacatecas. ASAA 56. At the very least, his fingerprints would have been there. Yet the police did not go. Even Ms. Lehr's friend, Maria Perez, went back to the Silver Saddle to find a suspect. 9 AA 819. Not the police. Had the police bothered to look, they would have found Dorado. In these circumstances, due process is offended and the charges must be dismissed.

DATED this 26th day of February, 2021.

MICHAEL LASHER, ESQ.

CERTIFICATE OF SERVICE

The undersigned hereby declares that on February 26, 2021 a copy of the foregoing SUPPLEMENTAL PLEADING was delivered to the following:

STEVEN WOLFSON, ESQ.
Clark County District Attorney
Nevada Bar No. 1565
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, NV 89155
(702) 671-2500
Attorney for Respondent

RAMON MURIL DORADO
Inmate ID No.: 77774
High Desert State Prison
P. O. Box 650
Indian Springs, NV 89070

MICHAEL LASHER, ESQ.
Nevada Bar No. 13805