IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 21 2021 07:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JASON JEROME BOLDEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 79715

Appeal from a Judgment of Conviction
Following a Jury Trial and Verdict
Eighth Judicial District Court, Clark County
The Honorable Richard F. Scotti, District Judge
Case No. C-18-334635-1

APPELLANT'S PETITION FOR REHEARING

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Jurisdiction and Standard for Rehearing

Nevada Rule of Appellate Procedure 40(c)(2) permits this Court to rehear and reconsider a panel decision:

(A) When the court has overlooked or misapprehended a material fact in the record of a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Mr. Bolden submits that the Court has overlooked, misapplied, or failed to consider controlling statutes and case law in its decision, as outlined below.

A petition for rehearing is timely filed within eighteen days of the filing of the Court's decision. NRAP 40(a)(1). In this case, Mr. Bolden's petition for rehearing has been timely filed within eighteen days after this Court's decision in *Bolden v. State*, 137 Nev. Adv. Op. 28 (July 8, 2021).

II. Introduction

For over fifty years, this Court has recognized the inherent authority of Nevada's justice courts to consider the credibility of the witnesses who testify at preliminary hearings and to weigh the evidence when determining whether the State has satisfied its burden of establishing probable cause to

believe that a crime has occurred and that the defendant committed that crime. *See, e.g.*, *Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983); *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971); *Marcum v. Sheriff*, 85 Nev. 175, 179, 451 P.2d 845, 847 (1969). Part of the justice courts' responsibility at the preliminary hearing stage is to determine whether the evidence presented by the State leads to a "reasonable inference" that the defendant committed the charged crime. *State v. von Brincken*, 86 Nev. 769, 773, 476 P.2d 733, 735 (1970).

Yet, in this case, a panel of this Court ruled that a justice court commits "egregious error" when, after considering witness credibility and weighing the evidence, the justice court concludes that the evidence does not support a reasonable inference of criminal agency. *Bolden* at 11–12. Although the panel properly recognized that "egregious error" means "plain error that affects the outcome of the proceedings," *id.* at 11, the panel did not identify *any* error by the justice court, let alone an error under existing law that was "so unmistakable that it reveals itself from a casual inspection of the record." *See Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 893 P.2d 839, 842 n.2 (1990)).

Rather, the panel announced a new rule that *requires* justice courts to find probable cause "if an inference of criminal agency can be drawn from the evidence," regardless of whether that inference is reasonable, and regardless of the justice court's actual conclusions about the credibility and weight of the evidence presented by the State. *Bolden* at 11–12. As a result of this decision, even if a justice court concludes that an inference of criminal agency is unreasonable based on its evaluation of the weight of the evidence and the credibility of the witnesses, if any evidence could conceivably permit a trier of fact to draw an "inference of criminal agency," the justice court must now bind the case over so that the jury can make the "ultimate credibility determination at trial." *Id*. Rehearing is required in this case because the new rule announced by the panel conflicts with directly controlling law that both empowers and requires justice courts to consider witness credibility and weigh the evidence in determining probable cause. NRAP 40(c)(2)(B); *cf. State v. von Brincken*, 86 Nev. 769, 773, 476 P.2d 733, 734 (1970).

Although the panel relies on language taken from *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971), *Miner v. Lamb*, 86 Nev. 54, 58, 474 P.2d 451, 453 (1970), and *Bryant v. Sheriff*, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970), to support its new rule, the panel takes that language out of context. Crucially, each of those cases involved a challenge by the defendant to

the sufficiency of the evidence, not a challenge by the State to a justice court's dismissal of a criminal complaint. The standard of review on a defendant's challenge to the sufficiency of the evidence is much different from the standard of review on a challenge by the State to the justice court's "egregious error" in dismissing charges. Thus, the panel misapplied the law by superimposing a sufficiency of the evidence standard of review upon an egregious error challenge. NRAP 40(c)(2)(B).

III. Legal Argument

A. The Panel Overlooked, Misapplied, or Failed to Consider Directly Controlling Law Authorizing Justice Courts to Consider Witness Credibility and Weigh Evidence to Evaluate Whether an Inference of Criminal Agency is Reasonable.

Rehearing is required because the new rule announced by the panel conflicts with directly controlling law that both empowers and requires justice courts to consider witness credibility and weigh the evidence in determining probable cause. Specifically, the rule announced by the panel precludes justice courts from considering witness credibility and weighing the evidence and requires justice courts to find probable cause if an inference of criminal agency *could* be made, regardless of whether that inference is reasonable.

Although justice courts are "courts of limited jurisdiction and only have the authority granted by statute," *Parsons v. State*, 116 Nev. 928, 933, 10

P.3d 836, 839 (2000), they also have "limited inherent authority to act in a particular manner to carry out [their] authority granted by statute," *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054–55 (2006). As this Court explained in *Grace v. Eighth Judicial District Court*, "justice courts are statutorily empowered to conduct preliminary hearings for gross misdemeanor and felony charges" and "must examine the evidence presented" to determine if probable cause exists "to believe to that an offense has been committed and that the defendant has committed it." 132 Nev. 511, 513, 375 P.3d 1017, 1018 (2016) (citing NRS 171.196, 171.206, and *Parsons*, 116 Nev. at 933, 10 P.3d at 839). To carry out justice courts' statutory authority to conduct preliminary hearings, this Court has ruled that justice courts have "express and limited inherent authority to suppress illegally-obtained evidence during preliminary hearings." *Grace*, 132 Nev. at 514–15, 375 P.3d at 1018. Additionally, as set forth *infra*, justice courts have express and limited inherent authority to evaluate witness credibility and weigh evidence when determining probable cause.

The purpose of a preliminary hearing is to "weed out groundless and unsupported charges of grave offenses and to relieve the accused of the degradation and the expense of a criminal trial." *State v. von Brincken*, 86 Nev. 769, 772, 476 P.2d 733, 735 (1970). "The preliminary hearing is not a trial

and the issue of the defendant's guilty or innocence is not a matter before the court." *Parsons*, 116 Nev. at 933, 10 P.3d at 839. The preliminary hearing, however, does, require an "evidentiary evaluation of whether there is 'probable cause to believe that an offense has been committed and that the defendant has committed it.'" *Id.* (quoting NRS 171.206).

Although the State's burden at preliminary hearing is lower than it is at trial, the State nevertheless "does have the responsibility of establishing facts that will lead to the *reasonable inference* that" the defendant committed the crime charged. v*on Brincken*, 86 Nev. at 773, 476 P.2d at 735 (emphasis added). As this Court explained:

> While the inference drawn need not be a necessary inference, *it still remains that the inference must be reasonable, not unreasonable or so remote as to be unwarranted*. Probable cause requires that there shall be more evidence for guilt than against. It must be supported by evidence which inclines the mind to believe, though there may be room for doubt. The state of facts must be such as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion.

Id. (emphasis added).

To carry out these responsibilities, justice courts must have the inherent power to evaluate witness credibility and weigh evidence; without such powers, justice courts would be unable to determine whether the evidence

"reasonable infers" the defendant's guilt. Indeed, several cases have recognized that it is the justice court's function to consider the credibility of the witnesses who testify at the preliminary hearing when evaluating the sufficiency of the State's evidence. *See, e.g.*, *Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983) ("[w]hen the evidence is in conflict at the preliminary hearing it is the function of the magistrate to determine the weight to be accorded to the testimony of the witnesses . . . ."); *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971) (same); *Marcum v. Sheriff*, 85 Nev. 175, 179, 451 P.2d 845, 847 (1969) ("At a preliminary examination the credibility of a witness is one of the matters to be weighed by the magistrate."). Weighing witness credibility is a core aspect of the justice court's limited inherent authority at the preliminary hearing stage. *See also, e.g.*, *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054–55 (2006); *Grace v. Eighth Judicial Dist. Ct.*, 132 Nev. 511, 513, 375 P.3d 1017, 1018 (2016).

The panel's decision in this case conflicts with over fifty years of legal precedent recognizing justice courts' inherent authority to evaluate witness credibility, weigh evidence, and determine whether inferences of criminal agency are reasonable. Ignoring the vast weight of this authority, the panel concluded that Bolden "overreads *Wrenn*" and that *Wrenn* did not permit the justice court to weigh witness credibility at a preliminary hearing. *Bolden*

v. State, 137 Nev. Adv. Op. 28 at 11 (July 8, 2021). The panel claims that "*Wrenn* implicitly recognizes the slight-or-marginal-evidence standard and does not license the justice court to dismiss charges based on conflicting evidence where the evidence permits the finder of fact to draw 'an inference of criminal agency.'" *Id.* In essence, the panel has held that if an inference of criminal agency is at all possible, then the case must be bound over and submitted to the jury to make "the ultimate credibility determination at trial." *Id.* at 12. This holding flies in the fact of *State v. von Brincken*, which requires justice courts to find that any such inference "must be reasonable, not unreasonable or so remote as to be unwarranted." 86 Nev. 769, 773, 476 P.2d 733, 735 (1970). It is not enough that the inference be "permissible" — it must be *reasonable* for the justice court to bind the case over.

Because the panel overlooked or failed to consider directly controlling law that both empowers and requires justice courts to consider witness credibility and to weigh the evidence in determining probable cause, and because the panel failed to appreciate that the justice court must find inferences of criminal agency to be "reasonable" to warrant a bindover, rehearing is warranted. NRAP 40(c)(2)(B).

B. The Panel Overlooked the Procedural Posture in Which *Wrenn*, *Miner*, and *Bryant* Arose and Misapplied the Standard of Review From Those Cases.

As the panel acknowledged, when a justice court dismisses criminal charges for lack of probable cause, the State may file an information by affidavit in district court only "if the district court finds that the justice court committed egregious error." *Bolden v. State*, 137 Nev. Adv. Op. 28 at 11 (July 8, 2021). "Egregious error occurs when the justice of the peace 'commits plain error that affects the outcome of the proceedings.'" *Id.* (quoting *Moultrie v. State*, 131 Nev. 924, 930, 364 P.3d 606, 611 (Ct. App. 2015)). The plain error standard of review is extremely deferential to the justice court and does not allow the district court to substitute its judgment for that of the justice court; rather, the district court must find an "error [that] is so unmistakable that it reveals itself from a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 893 P.2d 839, 842 n.2 (1990)).

Likewise, when a defendant seeks to challenge a bindover on the grounds that the justice court erred in finding probable cause, the standard of review on appeal is also exceptionally deferential to the justice court. The standard in such cases is a "sufficiency of the evidence" one, and that is the procedural posture in which *Wrenn*, *Miner*, and *Bryant* all arose. *See Wrenn*

v. Sheriff, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971) (affirming denial of petition for writ of habeas corpus alleging insufficient evidence at preliminary hearing); *Miner v. Lamb*, 86 Nev. 54, 57–59, 474 P.2d 451, 453–54 (affirming "the denial of a pre-trial application for habeas corpus testing probable cause at a preliminary hearing") (1970), *Bryant v. Sheriff*, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970) (affirming denial of a petition for writ of habeas corpus where "[t]he thrust of the appellant's pre-trial habeas petition, and principal contention on appeal, is that the evidence was insufficient to constitute probable cause to hold him for trial on the offense charged."). When the sufficiency of the evidence is challenged on appeal, "[t]he relevant inquiry for [the appellate] court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hutchins v. State*, 110 Nev. 103, 107–08, 867 P.2d 1136, 1139 (1994) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

Here, the panel superimposed the sufficiency of the evidence standard utilized in *Wrenn*, *Miner*, and *Bryant* over the "egregious error" standard that applied in this case. While *Wrenn* held that "if an inference of criminal agency can be drawn from the evidence it is proper for the [justice of the

peace] to draw it, thereby leaving to the jury at trial the ultimate determination of which of the witnesses are more reliable," *Bolden* at 11 (citing *Wrenn*, 87 Nev. at 87, 483 P.2d at 290), this statement was made in the context of a sufficiency of the evidence challenge, where this Court was required to view the evidence in the light most favorable to the prosecution. This Court's statement in *Wrenn* that it was "proper" for the justice court to draw an inference of criminal agency was mere dicta — simply a recognition that the justice court acted appropriately in that case when it bound the case over, viewing the facts in the light most favorable to the prosecution.

That is not the appropriate standard of review to apply to a justice court that has dismissed criminal charges. In cases such as this one, the burden is on the *State* to establish "egregious error," and the justice court does not commit egregious error by failing to draw every possible inference in favor of the State in the face of conflicting evidence. It does not follow that a probable cause finding by the justice court that is deemed "proper" under a sufficiency of the evidence standard is *required* to avoid a finding of egregious error. Rehearing is required because the panel overlooked the procedural posture in which *Wrenn*, *Miner*, and *Bryant* arose and misapplied the law by superimposing a sufficiency of the evidence standard of review upon an egregious error challenge. NRAP 40(c)(2)(B).

C. The Panel Overlooked, Misapplied, or Failed to Consider the "Egregious Error" Standard of Review.

"Egregious" or "plain error" is "error [that] is so unmistakable that it reveals itself from a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 893 P.2d 839, 842 n.2 (1990)). "The error must also be clear under current Nevada law." *LaChance v. State*, 130 Nev. 263, 271 n.1, 321 P.3d 919, 925 n.1 (2014). As set forth *supra*, the panel in this case effectively changed the state of the law in Nevada when it issued this decision. Prior to the panel's opinion, it was well-settled that justice courts could consider the credibility of the witnesses who testify at preliminary hearing and could weigh the evidence when determining probable cause. *See, e.g.*, *Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983); *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971); *Marcum v. Sheriff*, 85 Nev. 175, 179, 451 P.2d 845, 847 (1969). Moreover, pursuant to *State v. von Brincken*, justice courts are still required to determine whether the State has "establish[ed] facts that will lead to the reasonable inference" that a crime occurred and that the defendant committed that crime. 86 Nev. 769, 773, 476 P.2d 733, 735 (1970). Yet the new rule announced by this panel precludes justice courts from both weighing witness credibility and "dismiss[ing] charges based on conflicting evidence where the evidence permits the finder of fact

to draw 'an inference of criminal agency.'" *Bolden* at 11. Because the new rule announced by the panel did not exist at the time of the justice court's decision, the justice court could not have plainly or egregiously erred by failing to apply it.

Aside from the justice court's exercise of its inherent functions of weighing witness credibility and determining probable cause, the panel fails to identify any "egregious error" committed by the justice court. The preliminary hearing transcript reflects that the justice court did not find the evidence linking Mr. Bolden to the charged crimes to be credible:

> THE COURT: This is what we have. We have one person that ID'd this gentleman, according to him, at the time he was in the hospital after being shot, after being, according to his brother, drunk and high, who identified the defendant on that day, under those circumstances, under painkillers, under weed, under alcohol, who identified him, who today says, I don't remember doing that. I don't remember this gentleman right here shooting me, and I don't know who that person is.
>
> That's what I'm struggling with. I'll be honest. I mean submitting or not submitting. I understand slight or marginal evidence, but at some point there's got to be some credible evidence that this gentleman is the one that shot the gun. And I'm struggling with the credible evidence, because frankly it's not very credible on the day it went down and it's not very credible today because he's saying, I can't say that's the guy who shot me.

(1 AA 56.) The justice court went on:

> THE COURT: They're not credible. They're not credible, and no disrespect to them, they're not credible from the day of the incident and they're not credible today. The day of the incident they're not credible because — well, for various reasons. I can go on and on, but one of them didn't even give his real name to the officer.
>
> And then the other one said, I gave — one of them said I gave a fake description. The one that did ID him said, I don't even remember doing that. I was — I don't remember giving a statement. I don't remember looking at the picture.

(*Id.*) Although the justice court was in the best position to view the witnesses and evidence first-hand, and to evaluate credibility and weigh the evidence before it, the panel conducted its own analysis of the same evidence on the cold record and found probable cause by ignoring the justice court's concerns about witness credibility:

> In this case, despite the credibility issues that troubled the justice court, the State satisfied its burden of demonstrating probable cause at the preliminary hearing. A picture of Bolden given to police when they arrived on scene was entered into evidence, and an officer testified that Brenton confirmed that the person in the picture was the shooter. A police detective and Bryston also testified to the description of the shooter Bryston gave on the scene, with the detective confirming that the description matched Bolden. The justice court committed egregious error in sua sponte determining that this evidence did not adequately demonstrate probably cause to believe Bolden committed the crime

> charged, thereby preventing a jury from making the ultimate credibility determination at trial.

Bolden at 12. The fact that this panel "may have arrived at a different conclusion based upon [its] review of the cold record does not justify overruling [a lower court's] judgment." *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994). Rehearing is warranted because the panel overlooked, misapplied, or failed to consider the "egregious error" standard of review in this case.

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CONCLUSION

The panel's ruling strips justice courts of their inherent power to consider the credibility of witnesses and to determine the weight to be accorded to witness testimony at preliminary hearing. The panel reached this result by overlooking and misapplying several decisions that directly control the dispositive issue in this case: whether the justice court committed "egregious error" that would permit the district court to grant the State's motion for leave to proceed by information filed in district court. The panel improperly applied its new reading of the law retroactively to find that the justice court committed egregious error by dismissing the charges in this case. This Court should grant rehearing.

DATED this 21 of July, 2021.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I certify that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using 14-point Georgia font.

I further certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 4263 words.

DATED this 21 of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21 of July, 2021, I served this document on the following:

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AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Ben Nadig	7-21-21
Ben Nadig	Date