

In the Supreme Court of the State of Nevada

Case No. 80255

Evaristo Jonathan Garcia

Appellant,

v.

James Dzurenda, et al.,

Respondents.

Motion to Remand

(NRAP 12A)

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Elizabeth A. Brown
Clerk of Supreme Court

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Points and Authorities

On March 16, this Court entered an order granting Garcia “14 days from the date of this order to file his status report in regard to this appeal or a motion for remand pursuant to NRAP 12A.” Garcia now timely moves to remand to allow the district court to carry out its intent to vacate the judgment on appeal and set an evidentiary hearing.

I. Factual and Procedural history

Garcia outlined the relevant factual and procedural history in his motion to stay briefing, filed in this Court on December 20, 2019. To not belabor this information, for the limited purposes of this motion, Garcia now simply provides the necessary updates since December.

A. Updates to post-conviction proceedings since Garcia filed the motion to stay briefing.

On December 20, 2019, Garcia moved to stay the briefing in this appeal to provide the district court an opportunity to resolve the outstanding Rule 59(e) motion before this appeal proceeded, as the resolution of the Rule 59(e) motion could render this appeal moot. Respondents did not oppose the motion.

On January 16, 2020, this Court granted the motion to stay, giving Garcia 30 days to file a status report “informing this court of the decision of the district court to deny the motion or providing this court with the district court’s order indicating its inclination to grant the motion.” This Court ordered the district court, if appropriate, to transmit to this Court “a written order certifying that it is inclined to grant the motion. Upon receipt of such an order, this court will remand the matter to the district court so that jurisdiction to grant the motion will be properly vested in that court.”

B. The district court certified that it intends to grant, in part, the Rule 59(e) motion.

The district court held oral argument on the Rule 59(e) motion on February 6, 2020. It heard arguments regarding Garcia’s alternative requests for relief: either to vacate the final judgment and enter a new judgment granting Garcia’s habeas petition or to vacate the final judgment and set the matter for an evidentiary hearing. The district court questioned Garcia’s counsel regarding which witnesses may be called for the requested evidentiary hearing. Garcia indicated he would

consider calling trial counsel, an eyewitness from the crime scene, as well as several police officers. After further argument, the court indicated that it intends to set this matter for the evidentiary hearing. (See Ex. F (transcript of proceedings)).

On March 2, 2020, the district court entered an order on the motion to alter or amend the judgment. (See Doc. No. 2020-08764 (Mar. 5, 2020) (order transmitted from district court to this Court)). The district court certified that it intends to deny, in part, and grant, in part, Garcia's motion to alter or amend the judgment pursuant to Nev. R. Civ. P. 59(e), whereby, upon remand from this Court, it will vacate the final judgment and "set this matter for an evidentiary hearing on June 26, 2020 at 9:00 AM, to hear evidence on the merits of petitioner's post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)). Upon remand from the Nevada Supreme Court, this Court will enter a written order effectuating the above."

The district court transmitted the above order to this Court. Now, Garcia moves to remand this matter to the district court to allow the

court to grant the Rule 59(e) motion as indicated above and set the matter for an evidentiary hearing on his *Brady* claim.

II. Rule 12A

Nevada Rule of Appellate Procedure 12A permits a party to request a remand after an indicative ruling by the district court on a motion for relief that is barred by a pending appeal. That is precisely the situation here.

This rule tracks the procedure outlined in this Court's order entered on January 16, 2020, in which this Court relied upon *Layton v. State*, 89 Nev. 252, 254, 510 P.2d 864, 865 (1973), and *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978). The circumstances of this case meet the situation described in Rule 12A and this Court's January 16th order and, therefore, remand is appropriate.

III. Garcia respectfully requests this Court to remand the case.

As this Court noted in its January 16th order, Garcia filed a timely motion to alter or amend the judgment pursuant to Nevada Rule of Civil Procedure 59(e) in the district court before filing his notice of appeal. He needed to do this because, according to *Klein v. Warden*, 118

Nev. 305, 309–11, 43 P.3d 1029, 1032–33 (2002), the civil tolling provisions of Nevada Rule of Appellate Procedure 4(a)(2) are inapplicable to the statutory procedures governing the litigation of post-conviction habeas corpus petitions.

As this Court further noted in its January 16th order, Garcia's filing of the notice of appeal rendered the district court without jurisdiction to grant the Rule 59(e) motion. Therefore, the district court has transmitted an order to this Court certifying that it intends to grant the Rule 59(e) motion, to vacate the final judgment, and set the case for an evidentiary hearing.

The circumstances described in Rule 12A(a) apply here. Because the district court has indicated that it intends to grant the motion on remand, this Court may remand to the district court pursuant to Rule 12A(b) in order for the district court to enter a written order effectuating its intent.

Garcia respectfully requests this Court do so, remanding to the district court so it may grant the Rule 59(e) motion, vacate the final judgment, and set the case for an evidentiary hearing as the district

court indicated it intends to do. This relief is warranted for the reasons explained at length below, in Garcia's Rule 59(e) motion, in his reply, and for the reasons discussed in open Court on February 6, 2020. (See 12/20/2019 Index of Exhibits in Support of Motion to Stay the Briefing Schedule, Exs. A, B; *see also* Exs. C–F (contemporaneously filed with this motion); Doc. No. 2020-08764 (Mar. 5, 2020) (order transmitted from district court to this Court).)

Namely, the Rule 59(e) motion raised substantial issues with the final judgment and convinced the district court that an evidentiary hearing should be held on Garcia's underlying *Brady* claim. The *Brady* claim raises a serious issue of prosecutorial misconduct: in a case hinging on the identity of the shooter, the State failed to disclose evidence that law enforcement encountered an alternative suspect matching the description of the shooter and that law enforcement was aware that the State's star eyewitness had actually provided multiple, alternative descriptions of the shooter, which would have been powerful impeachment evidence at trial.

This is especially important given the fact that during and immediately after the shooting, witnesses identified another person—Garcia’s cousin—as the shooter, not Garcia. If true, then Garcia has been falsely convicted of a crime he did not commit. The jury did not hear of the important exculpatory evidence described above because the State did not disclose it to the defense. Had the State done so, there is a reasonable probability that Garcia would have been acquitted. Therefore, especially given the magnitude of the offense, the sentence, and that Garcia was only a 16-year-old child in a special education program at the time he was accused of this murder, the district court’s decision to hold an evidentiary hearing on this claim is well founded.

Accordingly, Garcia respectfully requests this Court remand this matter to the district court so the district court can hold this evidentiary hearing.

IV. Conclusion

Garcia respectfully requests this Court remand this matter to the district court pursuant to Nevada Rule of Appellate Procedure 12A in order to vest the district court with jurisdiction to grant the Rule 59(e) motion, vacate the final judgment, and set this matter for an evidentiary hearing.

Dated March 20, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

/s/ S. Alex Spelman
S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include:

Alexander G. Chen.

/s/ Jessica Pillsbury

An Employee of the

Federal Public Defender, District of Nevada