

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

JOHN JOSEPH SEKA,

Respondent.

CASE NO.: 80925

District Court Case

Electronically Filed
Oct 05 2020 09:07 a.m.
No. 996150915
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENT JOHN SEKA'S MOTION TO STRIKE DOCUMENTS
AND ARGUMENT OUTSIDE THE RECORD OF APPEAL INCLUDED IN
THE APPELLANT'S OPENING BRIEF AND APPENDIX**

Respondent, John Seka, by and through his counsel Paola M. Armeni, Esq., of the law firm of Clark Hill PLC and Jennifer Springer, Esq., of the Rocky Mountain Innocence Center, moves this Honorable Court for an Order Granting Respondent John Seka's Motion to Strike Documents and Argument Outside the Record of Appeal Included in the Appellant's Opening Brief and Appendix. This Motion is based on the following Memorandum and all papers and pleadings on file herein.

Dated this 5th day October, 2020.

CLARK HILL PLC

/s/ Paola M. Armeni

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*Attorneys for Petitioner John Joseph
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INTRODUCTION

The State of Nevada is appealing the district court's Order Granting Mr. Seka's Motion for New Trial. The State intentionally offers inappropriate records in its appendix and Opening Brief that fall outside of the record of this appeal and thus asks this Court to look beyond the record. This Court should remedy the error and strike the records from the State of Nevada's appendix and any arguments referencing and relying on the records outlined in the Opening Brief. Specifically, this Court should strike from the appendix, AA 002522 - AA 11 002598 and from the opening brief, accompanying argument located on pages 8, 41 and 45.

ARGUMENT

The State of Nevada inappropriately includes Mr. Seka's Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484, State's Response to Defendant's Motion for an Own Recognizance Release and/or

Release on Electronic Supervision Pending Appeal, Court Minutes from June 29, 2020, and Reporter's Transcript of Proceedings, June 29, 2020 in its appendix and Opening Brief and invites this Court to look beyond the record on appeal. These motions, court minutes, and the hearing transcript are associated with a court proceeding that occurred months after the district court granted Mr. Seka's Motion for a New Trial. For the following reasons, this Court should strike the offending motions, court minutes and hearing transcript and any reference to and arguments based on these records from the appellant's appendix and opening brief.

First, the district court filed its order granting Mr. Seka's motion for a new trial on March 24, 2020 because post-conviction DNA testing "established a basis for new trial as the evidence is newly discovered, material to his defense, that even with the exercise of reasonable diligence it could not have been discovered or produced for trial, is non-cumulative, renders a different result probable upon retrial and is not only an attempt to discredit a witness and this evidence is the best evidence this case admits." The State appealed the district court's order granting a new trial and filed its notice of appeal and case appeal statement on March 27, 2020.

Mr. Seka filed his Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484 on June 15, 2020. The State filed its Response to Defendant's Motion for an Own Recognizance Release and/or Release on Electronic

Supervision Pending Appeal on June 18, 2020. The district court heard the bail matter on June 29, 2020, more than three months after the district court ordered a new trial and the State filed its notice of appeal of that order.

Mr. Seka's Motion for Bail was not pending before the district court when the court considered and granted Mr. Seka's Motion for a New Trial and therefore, is not part of the record of this appeal. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 623 P.2d 981 (Nevada 1981); *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911 (1971). Because the trial court was not considering this matter at the same time it considered Mr. Seka's bail motion, any arguments the Appellant raised in their opening brief based on the bail matter are not preserved and are outside of the record of this appeal.

Second, the Nevada Rules of Appellate Procedure require "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found." NRAP 28(e)(1). However, "all matters not essential to the decision of issues presented by the appeal *shall* be omitted. Brevity is required; the court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix." NRAP 30(b). (emphasis added). Counsel also "have a duty to confer and attempt to reach an agreement concerning a possible joint appendix." However, Appellant

did not contact Mr. Seka's counsel and attempt to resolve this matter. Further, the State of Nevada included non-essential documents in its appendix in violation of Rule 28.

Third, the only post-judgment motions required to be included in an appellate appendix are enumerated in NRAP 4(a) and include:

- (A) a motion for judgment under Rule 50(b);
- (B) a motion under Rule 52(b) to amend or make additional findings of fact;
- (C) a motion under Rule 59 to alter or amend the judgment;
- (D) a motion for a new trial under Rule 59.

The district court's Order Granting Mr. Seka's Motion for a New Trial was the final judgment in this case and is the order being appealed. A defendant's motion for bail is not included in the enumerated list and should not be included in the Appellant's appendix or opening brief. After Mr. Seka was granted a new trial his case returned to a pre-trial posture and he sought release during the pendency of the appeal and potential retrial.

Finally, an order granting a motion for a new trial is independently appealable whether the party is the State or the defendant. NRS 177.015 (1)(b). However, "the right to appeal is statutory; where no statutory authority to appeal is granted, no right to appeal exists." *Castillo v. State*, 106 Nev. 349, 792 P.2d 1133 (1990); *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). At the present time, there is no written order denying Mr. Seka's request

for bail, but even if there were, the State does not have the right to appeal the court's decision regarding bail because Mr. Seka's motion was denied leaving the State as the prevailing party in the matter. *See* NRS 177.015.

CONCLUSION

This Court has repeatedly asserted that appellate courts "have no power to look outside the record of a case" *Carson Ready Mix, Inc. v. First National Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). The bail matter was not before the court nor considered by the court when the court made its decision to grant Mr. Seka's Motion for New Trial. The bail matter and all of the records associated with that matter were filed and heard months after the court's Order Granting Mr. Seka's Motion for New Trial. Additionally, the State does not have the right to appeal the bail matter. For all of the reasons outlined above, the bail matter is outside of the record on appeal and should be stricken from the State's appendix and opening brief.

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Mr. Seka respectfully requests Appellant's appendix AA 002522 - AA 11 002598 be stricken from the record as well as all references to and arguments (located on pages 8, 41, 48) based on the offending records stricken from the Appellant's opening brief.

Dated this 5th day October, 2020.

CLARK HILL PLC

/s/ Paola M. Armeni

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CERTIFICATE OF SERVICE

The undersigned, an employee of Clark Hill PLLC hereby certifies that on the 5th day of October, 2020, I electronically filed with the Nevada Supreme Court via the E-Flex system a copy of RESPONDENT JOHN SEKA'S MOTION TO STRIKE DOCUMENTS AND ARGUMENT OUTSIDE THE RECORD OF APPEAL INCLUDED IN THE APPELLANT'S OPENING BRIEF AND APPENDIX, which will cause this document to be served upon the following:

Aaron D. Ford
Nevada Attorney General

Alexander G. Chen
Chief Deputy District Attorney



An employee of CLARK HILL PLLC