IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 21 2021 02:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA,

Appellant,

v.

JOHN JOSEPH SEKA

Respondent.

CASE NO: 80925

APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and answers to Respondent's Petition for En Banc Reconsideration in obedience to this Court's Order filed September 9, 2021, in the above-captioned appeal. This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 21st day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

BRIEF STATEMENT OF THE CASE RELEVANT TO THIS PETITION

The following synopsis is not meant to be a comprehensive review of the facts, but it hopefully will be helpful in explaining why en banc reconsideration is not warranted in this case. The underlying facts and evidence presented in this case are generally not in dispute. What Appellant and Respondent do dispute is whether the newly discovered DNA evidence, as it relates to the facts that were presented at Respondent's trial, was sufficient as to the legal question of whether the district court should have granted him a new trial.

This case involves the homicide and robbery of two different victims: Eric Hamilton (hereinafter "Hamilton") and Peter Limanni (hereinafter "Lamanni"). Hamilton's body was discovered on November 16, 1998 near the side of the road on Las Vegas Boulevard South, south of what is now St. Rose Parkway. At the time, the area was vacant and devoid of buildings or businesses. Hamilton's body was covered with wood. This wood would later be tied to wood that was being used at Respondent John Seka's (hereinafter "Seka") place of business. Seka's fingerprints were found on the wood covering Hamilton's body.

On December 23, 1998, Lamanni's partially decomposed body was found near the Nipton Road, near the Nevada and California state border. Upon further investigation, it was determined that Lamanni's blood was found at the scene of 1929

Western Avenue, which is located next to Seka's place of business. The incident that was investigated at 1929 Western Avue was on November 17, 1998, just one day after Hamilton's body had been discovered.

In 2001, Respondent John Seka (hereinafter "Seka") was tried by a jury of his peers and convicted on the four separate counts to which he was charged. He was convicted of Counts 1 and 3, which related to the First Degree Murder with Use of a Deadly Weapon and Robbery charge of Hamilton. He was also convicted on Counts 2 and 4, which related to the same exact charges for Seka's other victim, Limanni. A Judgment of Conviction was filed on May 9, 2001.

Seka filed a timely direct appeal to the Nevada Supreme Court. On April 8, 2003, this Court affirmed Seka's convictions on the following grounds:

1.) Seka's evidence of flight from Nevada to Pennsylvania was admissible.

2.) Sufficient evidence was produced to charge Seka for Limanni's murder in Nevada.

3.) Joinder of the Hamilton and Limanni charges was not in error.

4.) Seka was not prejudiced because the State had exhausted blood samples that had belonged to Limanni and Hamilton.

5.) There was sufficient evidence to convict Seka of all the charges.

Following the denial of his appeal, Seka filed a timely petition for a writ of habeas corpus (post-conviction). Among the issues that he raised in arguing that his trial counsel was ineffective was that no DNA experts or experts in forensic

pathology. This Court again rejected all arguments because counsel had consulted with a forensic pathologist that aided them in cross-examination of the witnesses. Remittitur was issued on July 12, 2005.

Then on June 19, 2017, roughly twelve years following remittitur from the denial of his post-conviction petition for writ of habeas corpus, Seka filed a new post-conviction petition requesting genetic marker testing pursuant to NRS 176.0918. Among the items that Seka requested for DNA testing by motion were (i) hairs collected from under Hamilton's fingernails; (ii) fingernail clippings from Hamilton; (iii) a black baseball cap belonging to Hamilton; (iv) lumber found covering the body of Hamilton which contained Seka's fingerprints; (v) hair and debris found on Hamilton's jeans; (vi) white cotton type material collected from the body of Lamanni; (vii) Marlboro brand cigarette butts found at the Hamilton scene; (vii) a Skoal brand tobacco container found at the Hamilton scene; (viii) two empty Beck's brand beer bottles found at the Hamilton scene; and finally (ix) bullet fragments found at the crime scene at 1929 Western Ave. Of all the items that Seka requested genetic marker testing on, only the white cotton type material pertaining to evidence related to Lamanni. The rest of the evidence that testing was requested on related to Hamilton only.

As litigation commenced on the petition for genetic marker testing, Seka modified and eliminated some of his initial requests for testing, based in large part

upon the testimony of his own expert witness. Seka later removed the request for testing of the lumber with his fingerprints covering Hamilton's body as well as the request for testing of the bullet fragments. Genetic marker testing was not performed on the white cotton type material related to Lamanni.

The State objected to the items being tested because the items would not yield any different result and would not contradict the evidence that was introduced at trial. The State argued that most of these items were simply trash that was discovered in the vacant lot around Hamilton's body, but that none of this evidence was used to convict Seka at trial. Over the State's objection, the district court, in an order filed January 24, 2019, ordered testing for DNA for nearly all of the items that Seka wanted tested. In short this consisted of testing on the hair and nail samples found on Hamilton, cigarette butts, a Skoal container, and two beer bottles located at the scene where Hamilton's body was discovered.

The findings of the DNA testing produced the following results. Of the two Marlboro cigarette butts tested, one did not have a DNA profile and the other had the contribution of 1 male, but Hamilton and Seka were excluded. The fingernail clippings of Hamilton yielded DNA that was likely Hamilton's own DNA. There was possibly another foreign contributor but Seka was excluded. The hair sample under Hamilton's nails was 3.24 billion times more likely to belong to Hamilton than an unknown contributor. The Skoal container excluded Hamilton and Seka as

possible contributors. One of the empty Becks beer bottles yielded the DNA of a female, the other beer bottle did not have any DNA suitable for interpretation. From the beer bottle with the female's DNA, both Hamilton and Seka were excluded as possible contributors. Finally, the black hat had Hamilton's DNA as well as two unknown profiles, but the result was inclusive as to whether Seka's DNA was found on the hat.

On November 19, 2019, Seka then filed a Motion for New Trial based upon the results of the genetic marker testing, specifically citing NRS 176.515(3) and NRS 176.0918(a). Seka argued that his DNA was not found on any of the new items tested. The State countered that the items, which consisted largely of trash found near the road of where Hamilton's body was found, did not reasonably change the likelihood of a different outcome at trial. Yet, the district court granted Seka's Motion for New Trial. In its March 24, 2020 order, the district court held that five of the 6 items tested had DNA of unknown origins and also excluded Seka as a contributor. Based upon this holding, the district court held that the evidence was "non-cumulative, renders a different result probable upon retrial, and is not only an attempt to discredit a witness."

The State then appealed the district court's granting Seka a new trial. Oral argument was held by a panel of this Court on April 15, 2021. Following oral argument, a panel of this Court issued its written order on July 8, 2021. In its written

order, the panel found that the district court had abused its discretion in granting a new trial because the DNA evidence was not favorable to Seka and would not have rendered a different result probable upon retrial. Seka now seeks en banc reconsideration from the granting of the State's appeal.

LAW AND ARGUMENT

I. The Panel Correctly Applied an Abuse of Discretion Standard when it Overturned the District Court's Decision to Grant Respondent a New Trial

This Court should not grant en banc reconsideration on this matter because the panel that decided it did not deviate from prior decisions of this court, and the facts as applied to the law here do not involve a substantial precedential, constitutional, or public policy issue. NRAP 40A(a). The panel's decision ultimately held that the district court's granting of a new trial was an abuse of discretion because the genetic marker analysis, or DNA testing, that was performed did not yield favorable results. The panel went into detail with each item of newly tested evidence to describe why the district court incorrectly granted a new trial.

At first, Respondent correctly argues that the issue on appeal was whether the district court abused its discretion in granting him a new trial. The grant or denial of a new trial is within the trial court's discretion and will not be reversed on appeal absent its abuse. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). An abuse of discretion occurs if the district court's decision is arbitrary or capricious

or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' or 'contrary to the evidence or established rules of law.'" State v. Dist. Ct. (Armstrong), 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011). The panel correctly acknowledged that it reviews the district court's decision to grant a new trial under an abuse of discretion standard.

As a preliminary matter, Respondent argues that the district court did not act arbitrarily, capriciously or with prejudice or preference because the district court did not make the decision lightly. However, the time or effort a court takes to decide is not the legal standard for what is arbitrary or capricious. As stated above, the decision is one founded on prejudice or preference rather than reason, or that the decision is contrary to the evidence or established rules of law. Id. As the panel opinion pointed out, the district court's ruling in this case ran afoul of the long-standing standard that should be applied when granting a new trial (referring to Sanborn). The new evidence that Respondent used to support his petition, when applied to the facts that were adduced at trial, were inadequate to warrant a new trial.

The factors for a district court's decision on granting a new trial is found in Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991). In order for a district court to grant a new trial, the evidence must be: "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could have been

discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits." Sanborn v. State, 107 Nev. at 406, 812 P.2d at 1284-1285 (1991) *citing* McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978).

Even though Respondent filed his motion for a new trial pursuant to NRS 176.515 and NRS 176.09187, he now argues that the panel erred in interpreting the very language of the statute that he relied on. NRS 176.515 is the statute that enables a court to grant a new trial "as a matter of law or on the ground of newly discovered evidence." NRS 176.515(3) explains that a motion for a new trial based on newly discovered evidence must be made within two years after the verdict or finding of guilt.

NRS 176.09187, upon which Respondent cited and relied, works in conjunction with NRS 176.515. According to NRS 176.09187, when genetic marker analysis is favorable to the petitioner, then the petitioner may bring a motion for a new trial pursuant to NRS 176.515 and the two- year statute of limitation is also waived.

Thus, NRS 176.09187 only allows for a person outside of the two-year time limitation to bring a motion for a new trial pursuant to NRS 176.515 when the

genetic marker analysis is actually favorable. If the genetic marker analysis is not favorable, then the motion for a new trial outside of the two-year requirement should be denied.

In his prior briefing to this court, Respondent agreed that that term "favorable" was synonymous with the Sanborn standard. In a footnote, the panel's opinion cites to this relevant point as well. Opinion, p.14. Yet because the panel ruled against him, Respondent now argues that the term "favorable" should have an altogether different meaning.

Here, panel of this Court to determine was correct to explain what "favorable" means pursuant to NRS 176.09187 because it was part of the district court's decision to entertain and grant Respondent's motion seeking a new trial. The district court's order granting a new trial specifically held that "the multiple unknown DNA profiles are favorable evidence to Mr. Seka," and "since there is favorable evidence, the two-year statute of limitations of NRS 176.515 is inapplicable." The determination of the word "favorable" was clearly part of the district court's ruling. Therefore, the panel correctly applied the standard that statutory interpretation is subject to de novo review. If the district court was wrong to consider the motion, then it certainly was an abuse of discretion for the district court to even go further in granting the same motion that should have been barred.

However, this Court also need not interfere with the panel's opinion because

in addition to the panel's analysis of the word "favorable," the panel recognized that the district court abused its discretion when it granted a new trial. The panel properly considered the DNA evidence within the framework of the existing case law that permits the granting of a new trial. Ultimately, the panel correctly held that the new genetic marker testing was not favorable, was cumulative, and would not have rendered a different result probable upon retrial. Even Respondent agrees that this standard, as set forth by Sanborn, is the correct standard that should be used. Respondent's Petition, p.11. Thus, the panel applied the correct standard, it is only the application of the standard that Respondent finds problematic even though the panel explained exactly why the newly discovered evidence was insufficient to warrant granting a new trial.

Even Respondent's request for en banc reconsideration does not identify any mistake of fact upon which the panel relied. The panel provided specific analysis for each piece of DNA evidence and explained why that evidence was not favorable, and why the evidence would not have made a different result probable. The panel's application of the facts and law was entirely consistent with pre-existing case law of this Court.

II. Reversal of the District Court's Decision in this Particular Case does not Negate the Intent of the DNA Testing Statute

Respondent then argues that en banc reconsideration is necessary because the panel negated the intent of the genetic marker analysis statute. This assertion is

incorrect. The panel acknowledged that the consideration for a court when presented with new DNA evidence is a fact-intensive inquiry. The fact-intensive inquiry that the panel applied in this case was whether the DNA evidence would meet the test that this Court has continuously used in Sanborn. Even Respondent agrees that Sanborn contains the factors to be considered when granting a new trial. The DNA elements discussed by the panel simply affirm that DNA evidence must meet the same requirements as any other type of new evidence that is presented for review. Under this specific scenario, the panel went through great lengths to explain exactly why the DNA evidence as it relates to this case is insufficient.

This was not a case where the State presented DNA evidence to obtain a conviction. Items like the cigarette butts, Skoal container, and beer bottles were never presented as proof or evidence that Respondent had committed the murder of Hamilton. Hamilton was shot, and there was never an argument presented that a physical struggle had ensued prior to his death. Hamilton's hat, which ultimately had Hamilton's DNA, was never argued to be something that the killer wore or touched. Moreover, all of the newly discovered DNA related to Hamilton, and none of it pertained to the murder of Limanni.

Despite repeatedly arguing that the panel should have applied the Sanborn factors, Respondent ultimately wants this court to impose a different standard when the newly discovered evidence pertains to DNA. For instance, Respondent writes

that the panel "inexplicitly" held that he was required to "contradict or refute the totality of the evidence supporting the verdict." Respondent's Petition, p. 10-11. However, this Court has always required that new evidence, no matter whether DNA is involved or not, must have a likelihood of making a different result probable.

The panel was not persuaded by the new DNA evidence that Respondent presented because his conviction was not one based on forensic evidence. The items that Respondent ultimately tested do nothing to exculpate him of the murders. The panel did not err by holding that DNA must actually be favorable to grant a new trial. Otherwise, a defendant would simply attempt to get any random item tested and argue that the DNA somehow proves his or her innocence despite the evidence of guilt that was presented.

The Nevada Attorneys for Criminal Justice (NACJ) also submitted a brief in support of en banc consideration. Their amicus brief does not take issue with the panel interpreting the word "favorable" as used in the statute, but it has an issue with the interpretation that the panel gives. In summary, NACJ argues that when a defendant has convinced a district court to grant genetic marker testing under the language that a reasonable probability exists that a different result would have occurred, then the results of that testing absent inculpating the defendant are in fact favorable.

This interpretation would set an incredibly low bar. Even though the standard

for granting a new trial has consistently used the Sanborn factors, DNA evidence would have a much lower standard than other types of evidence if this Court adopted NACJ's proposal. An individual that convinces a district court to order DNA testing on random pieces of evidence that have no nexus to the case would then be able to satisfy the favorable requirement when the defendant's DNA unsurprisingly is not found on the items tested. NACJ's interpretation would make the prior trial irrelevant because there would be no needed comparison between the evidence that the jury considered when it rendered its verdict, and the defendant's new theory. For these reasons, the panel's opinion was appropriate and consistent with this court's long-standing history and precedent that favorable evidence must make a new outcome probable, not merely possible.

The panel recognized that this inquiry is a fact-intensive one, and when it considered the facts here, it was apparent that the district court had no legal basis to grant a new trial. However, despite ruling against Respondent, nothing about the ruling is contrary to the statutes regarding genetic marker analysis or the laws regarding the granting or denying of a new trial. The panel's decision leaves open the possibility that DNA evidence will come to light in a case that raises the likelihood of a different outcome; however, this is not that case.

WHEREFORE, the State respectfully requests that Appellant's Petition for En Banc Reconsideration be DENIED.

Dated this 21st day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer 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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points contains 3,257 words and 269 lines of text.

Dated this 21st day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 21, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

PAOLA M. ARMENI, ESQ.
JENNIFER SPRINGER, ESQ.
Counsels for Respondent

ALEXANDER CHEN
Chief Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

AC//ed