

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE GRANT SNIPES

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jul 01 2021 01:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82384

**REPLY TO OPPOSITION TO MOTION TO STRIKE PORTIONS OF
APPELLANT'S OPENING BRIEF**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHON VANBOSKERCK, and files this Reply to Opposition to Motion to Strike Portions of Appellant's Opening Brief. This motion is brought pursuant to NRAP 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 1st day of July 2021.

Respectfully submitted,

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

BY */s/ Jonathan VanBoskerck*

JONATHAN VANBOSKERCK
Chief Deputy District Attorney
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ARGUMENT

Nevada Rules of Appellate Procedure (NRAP) 36(c)(3) is a rule or it is not. If it is, this Court needs to enforce it. If it is not, this Court should remove it from the appellate rules. What this Court should not do is perpetuate the ambiguity Appellant alleges.

The State does not dispute that counsel “did not purposely violate” NRAP 36(c)(3). Appellant’s Opposition to State Motion to Strike, filed July 1, 2021, p. 1. That is why the State did not and does not ask for sanctions or some other disproportionate remedy.

However, Appellant’s contention that an alleged common practice somehow justifies violation of NRAP 36(c)(3) is problematic in the extreme. Id. at 1-3. Appellant cites only two cases in support of this alleged common practice. Id. at 2. In the first, this Court discussed an unpublished dispositional order. Id. Notably, NRAP 36(c)(3) does not address itself to this Court. Nor does conduct by this Court suggest anything about an alleged common attorney practice of ignoring NRAP 36(c)(3). As to the second case noted by Appellant, this Court cautioned counsel about violating NRAP 36(c)(3). Id. A warning does not substantiate a common practice nor does it amount to an endorsement of such conduct.

Ultimately, if Appellant’s theorized common practice is a fair description of reality, this Court has a responsibility to clear up any ambiguity. Either NRAP

36(c)(3) is a rule or it is not. This Court has stated that it will not legitimize conduct that “rewards and thus incentivizes less than forthright advocacy[.]” Righetti v. Eighth Judicial District Court, 133 Nev. __, __, 388 P.3d 643, 648 (2017). While the State does not doubt that counsel made an honest mistake, ambiguity about the rules encourages conduct that rewards and incentivizes pushing the boundaries of ambiguity. Indeed, if Appellant is right to believe that attorneys regularly violate NRCP 36(c)(3) and as such that they are allowed to violate the rule, can counsel be found ineffective for *not* violating NRCP 36(c)(3) if there is an otherwise perfectly on point pre-2016 dispositional order. While the answer to that question is clearly within the control of this Court, will this Court’s ability to enforce its own rules be undermined if the ambiguity Appellant relies upon continues. See, Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015), cert. denied, __ U.S. __, 136 S. Ct. 1450 (2016) (“Normally, procedural default will preclude consideration of the claim on federal habeas review. However, the procedural ground at issue here, Nev. Rev. Stat. § 34.810, has been held to be inadequate to bar federal review because the rule was not regularly and consistently applied.”).

Respondent seeks only that this Court enforce its own rules. Appellant counsel made a mistake. This question becomes, what will this Court do with that mistake. The fair play and above-board spirit animating Righetti counsels striking Appellant’s reliance on an unpublished disposition order from 2014. If this Court

does not believe NRAP 36(c)(3) should be enforced, it should clearly say so. The one thing this Court should not do is perpetuate the ambiguity relied upon by Appellant. At the very least, this Court should explicitly inform Respondent whether the Answering Brief may cite pre-2016 unpublished dispositional orders in hopes of addressing the inappropriate authority cited and discussed by Appellant.

CONCLUSION

This Court has warned that rules exist for a reason and violating them comes with a price:

In the words of Justice Cardozo,

Every system of laws has within it artificial devices which are deemed to promote ... forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928).

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

WHEREFORE, the State respectfully requests that this Court strike the portions of Appellant's Opening Brief noted in the Respondent's Motion to Strike.

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Dated this 1st day of July, 2021.

Respectfully submitted,

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

BY */s/ Jonathan VanBoskerck*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 1, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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