

In the Supreme Court of the State of Nevada

* * *

BRAXTON CHEYANNE GARCIA,

Appellant,

vs.

No. 82968

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Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA,

Respondent.

_____ /

Second Judicial District Court

The Honorable Lynne K. Simons, District Judge

CR18-0273

Appellant's Opening Brief

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that judges of this court may evaluate possible disqualification or recusal:

David K. Neidert

Scott Edwards

Sean Neahusan

Peg Samples, Deputy District Attorney

N. Erica Flavin, Deputy Public Defender

Lynn Branzell, Deputy Public Defender

Jennifer Noble, Chief Deputy District Attorney

RULE 28(a)(5) ROUTING STATEMENT

The Defendant pleaded guilty to one count of Child Abuse Causing Substantial Bodily Harm, a Category B felony violation of NRS 200.508(1)(a)(2), a Category B Felony. As a result, the presumption, in Rule 17(b)(1) applies. This is a case which presumptively should be assigned to the Court of Appeals.

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JURISDICTIONAL STATEMENT

A. STATUTE ALLOWING JURISDICTION

NRS 177.015(3)

B. TIMELINESS OF THIS APPEAL

The District Court entered a *Judgment of Conviction* on April 23, 2020. R. 197-98. Pursuant to the Appellant's request, the Notice of Appeal was filed on May 21, 2021. R. 199-200.

C. TYPE OF APPEAL

This is an appeal following an entry of a guilty plea and sentencing.

ISSUES PRESENTED FOR REVIEW

1. Did the Defendant have a right to a Preliminary Hearing within 15 days of his arraignment in the Justice Court?

STATEMENT OF THE CASE

Following a Preliminary Hearing, the Appellant, BRAXTON CHEYENNE GARCIA ("Mr. Garcia") was charged by Information with Child Abuse with Substantial Bodily Harm, a violation of NRS 200.508(1)(a)(2). R. 1-3.

However, prior to the Preliminary Hearing, Mr. Garcia tried to assert his statutory right to a Preliminary Hearing within 15 days of his arraignment. R. 11-14. The Justice of the Peace refused to hear his motion because it was not filed through counsel. R. 40.

Mr. Garcia filed a *Petition for Writ of Mandamus* in the district court raising the same claim. R. 108-15. Mr. Garcia initially entered a plea of “not” guilty and the case was scheduled for trial.

The parties entered into negotiations and Mr. Garcia entered a plea of guilty. R. 138. *See* R. 142-47 (*Guilty Plea Memorandum*). At counsel’s request, the district court stated it was inclined to follow the negotiations in the case. R. 116-118, 125.

On the sentencing date, Mr. Garcia expressed dissatisfaction with current counsel and a desire to withdraw his plea. R. 156-57. The district court appointed another attorney to represent Mr. Garcia regarding whether or not he should try to withdraw his plea. R. 160.

Ultimately, Mr. Garcia decided he did not wish to withdraw his plea or have new counsel but did request that an appeal be filed on his behalf. R. 176. Mr. Garcia was sentenced consistent with the plea negotiations. R. 197-98.

STATEMENT OF THE FACTS

The State filed a criminal complaint against Mr. Garcia in the Reno Justice Court on January 22, 2018. R. 35-36. On March 8, 2018, Mr. Garcia was arraigned in the Justice Court and the Public Defender was appointed the same day. R. 8. The Preliminary Hearing was initially set for March 15, 2018, but on

that date counsel for the State and defense stipulated to continue it to April 26, 2018. R. 16.

On March 29, 2018, Mr. Garcia mailed to the Justice Court a document he styled *Petition for Writ of Habeas Corpus* alleging his rights were violated when he did not receive a preliminary hearing within 15 days of his arraignment pursuant to NRS 171.196(2). R. 11-14.

At the beginning of the Preliminary Hearing, Justice of the Peace Scott Pearson addressed Mr. Garcia's filing in this colloquy with him:

THE COURT: Mr. Garcia. You wrote a letter to the Court. It went to Judge Lynch. It doesn't look like she did anything with it. She made sure it was sent, I guess, to the DA and the public defender but did not rule on it. I will now.

This is what we would term a "fugitive document." If you have a legal claim with regard to the speedy trial or speedy prelim, that needs to come from your attorney, not from you. It will not be considered if it comes from you. So it is not considered.

THE DEFENDANT: Yeah. But she's not going file because she knows that my 14th Amendment was violated because, a, Nevada law states that the defendant must have a 15 day prelim hearing after his MSC.

THE COURT: So –

THE DEFENDANT: Now she's trying –

THE COURT: So you're wrong on the law. And you didn't even write this. It appears to be some sort of jailhouse or prison house lawyer and then filed in the blanks for you.

THE DEFENDANT: No. It was actually a law librarian.

THE COURT: So either way, it's wrong. We'll give you your preliminary examination today. Any claim that you have with regards to your counsel being ineffective will be addressed after this case is done. You can file a writ of habeas corpus challenging that representation. But it is a fugitive document.

I've looked at the procedural history of your case. It is a statutory right that, quite frankly, your attorney can waive on your behalf if she feels that there's a strategic advantage of waiting until she gets the actual police reports and other evidence before she does a preliminary hearing. It's not a constitutional right that requires your waiving of that right.

So that's all we're going to say about that. We're going to move on to the first question or to the first witnesses.

R. 40-41.

Mr. Garcia's motion was not renewed by any of his subsequent attorneys, though he did file a *Writ of Mandamus* in the district court and separately in this court, which was docketed and subsequently denied as #76067-COA. Both those documents also complained about the denial of Mr. Garcia's right to a preliminary hearing within 15 days of his Justice Court Arraignment. R. 108-15.

SUMMARY OF ARGUMENT

Because Mr. Garcia was denied his right to a preliminary hearing within 15 day of his arraignment, his conviction should be overturned.

ARGUMENT

1. Mr. Garcia was denied his right to a timely preliminary hearing when his attorney continued it without his consent.

Nevada law governs preliminary hearings. NRS 171.192(2) provides “If the defendant does not waive examination, the magistrate shall hear the evidence within 15 days, unless for good cause shown the magistrate extends such time. Unless the defendant waives counsel, reasonable time must be allowed for counsel to appear.”

Mr. Garcia, upset that the Preliminary Hearing was continued without his knowledge, attempted to remedy the issue by filing his own pleading asserting his right to a speedy preliminary hearing. The Justice of the Peace ruled that the document was fugitive and then made a substantive ruling on it as well.

The Nevada Supreme Court has held that the right to a preliminary hearing is statutory but because the proceedings are adversarial, the right to counsel applies. *Sheriff v. Witzenberg*, 122 Nev. 1056, 1059, 145 P.3d 1002, 1004 (2006). However, *Witzenberg* went on to hold that other rights, such as the right to confront accusers, does not apply. 122 Nev. at 1060-61, 145 P.3d at 1005.

As the Court held in another case, “[T]here is no requirement that the defendant be present and no reason why the preliminary hearing cannot be

conducted outside the presence of the defendant.” *State v. Sargent*, 122 Nev. 210, 216, 128 P.3d 1052, 1056 (2006).

Additionally, the Court has held that district courts do not have the authority to review discretionary rulings from the justice courts but do have the authority to review decisions where a justice court exceeds its authority. *Sheriff v. Blackmore*, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983).

The statutory language in the preliminary hearing statute uses the word “shall”, which in a variety of different contexts, the Nevada Supreme Court has held, “In construing statutes, ‘shall’ is presumptively mandatory and ‘may’ is construed as permissive unless legislative intent demands another construction.” *State v. American Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990).

In this case Mr. Garcia’s attorney, without either his knowledge or his consent, continued the preliminary hearing for a month and the justice court made no findings of “good cause” to extend the time. Mr. Garcia alerted the Court at the earliest opportunity, where he was informed that his filing was a fugitive document.

While the right to a preliminary hearing is statutory, and a criminal defendant can even waive the right to appear for it, the mandatory requirement for

a preliminary hearing within 15 days of arraignment should require a defendant's consent and not be done behind his or her back, as was done in this case.

CONCLUSION

This case should be remanded with instructions to dismiss the information for violating Mr. Garcia's preliminary hearing rights.

RULE 28.1 CERTIFICATION

I hereby certify that this opening brief 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: This Opening Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this opening complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is Proportionoan:

[X] Proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages

3. Finally, I hereby certify that I have read this opening brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate

Procedure including NRAP 28(e)(1), which every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

In accordance with Rule 5 of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 27th day of October, 2021 a true and correct copy of the foregoing was served via the Nevada Supreme Court's electronic mailing system on:

Christopher J. Hicks
Washoe County District Attorney
Jennifer P. Noble
Chief Appellate Deputy District Attorney

s/ David K. Neidert
DAVID K. NEIDERT
Attorney at Law

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirmed that the foregoing document does not contain the Social Security number of any person.

Dated this 27th day of October, 2021.

s/ David K. Neidert
DAVID K. NEIDERT
Attorney at Law