IN THE SUPREME COURT OF THE STATE OF NEVADA

KIM BLANDINO,

Appellant,

vs.

THE STATE OF NEVADA,

Appellee.

Electronically Filed
Mar 26 2023 05:37 PM
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 84433

APPELLANT'S OPENING BRIEF

JOSEPH Z. GERSTEN, ESQ
The Gersten Law Firm PLLC
Nevada Bar No. 13876
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
702-857-8777

Counsel for Appellant

STEVEN B. WOLFSON, ESQ.
District Attorney Clark County
200 Lewis Street, 3rd Floor
Las Vegas, NV 89101

AARON FORD, ESQ.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
775-684-1265

Counsel for Appellee

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, on behalf of Appellant KIM BLANDINO, certifies there are no corporations, entities, or additional law firms described in NRAP 26.1(a) which must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27th day of March 2023.

Joseph Z. Gersten

JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Other References

II. JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction under Nev. Const. art. 6, § 4(1), and NRS 1.030. Appellant was found guilty by jury on March 9, 2022. AA0693. On March 21, 2022, Appellant filed his Notice of Appeal. AA0893.

III. ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is presumptively assigned to the Court of Appeals because it entails a postconviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are not category A felonies.

IV. STATEMENT OF ISSUES

///

///

///

V. STATEMENT OF THE CASE

On July 12, 2019, Defendant was indicted on felony and gross misdemeanor charges. AA0295. Initial arraignment in Department XII was held on July 23, 2019. After various hearings, on August 29, 2019, Appellant was granted leave to represent himself, with appointed stand-by counsel. Subsequently, on September 17, 2019, Appellant was appointed Attorney Batemen as his stand-by counsel. The case was assigned to Judge Michelle Leavitt. Judge Leavitt referred Defendant for competency evaluation on September 17, 2019. Id.

On December 13, 2019, Defendant filed a Motion to Disqualify Judge Leavitt, Judge Linda Bell, and all judges of the Eighth Judicial District Court. Id. Judges Leavitt and Bell filed affidavits denying any bias or prejudice towards any party in this case. Id. The Motion was denied on January 23, 2020. Id. Defendant was found competent to proceed with adjudication on April 9, 2020. Id.

On May 7, 2020, Defendant filed another Motion to Disqualify Judges Leavitt, Bell, Silva, Marquis, Hardy, Villani, and all judges of the Eighth Judicial District Court. Id. No certificate of service was included

with the May 7, 2020, Motion. Id. On July 1, 2020, parties appeared before Senior Judge Barker for a Trial Readiness conference. Id. Following the Trial Readiness Conference, Defendant filed a Motion to Disqualify Senior Judge Barker on July 10, 2020. Id. Both the May 7, 2020, and July 10, 2020, Motions to Disqualify were denied by Chief Judge Linda Bell. Id.

On August 11, 2020, Defendant filed an Emergency Motion to Disqualify Chief Judge Bell, and simultaneously filed a Motion for Reconsideration regarding Judge Bell's August 3, 2020, Decision and Order. Id. Both the Emergency Motion and the Motion for Reconsideration were denied by Judge Bell. Id.

On March 8, 2021, Defendant filed another Motion to Disqualify Judge Leavitt. Id. On March 15, 2021, Defendant filed another Motion to Disqualify Chief Judge Bell. Id. On April 14, 2021, Defendant filed another Motion to Disqualify Judges Leavitt and Judge Bell. On April 22, 2021, Defendant filed a Motion to Disqualify Judge Tierra D. Jones. Id. On May 6, 2021, Defendant filed a Motion to Disqualify Judge Nancy Allf. Id.

On August 8, 2021, an Order Denying Defendant's Motion to Disqualify Judge Leavitt was filed. Id.

On August 18 and 23, 2021, Defendant filed another Motion to Disqualify Judge Leavitt. Id. On August 20 and September 23, 2021, the Motions were denied by Judge Jones. Id. On September 29, 2021, Defendant filed Motions to Disqualify Judge Leavitt and Judge Jones. Id. Judge Jones filed an affidavit in response thereto on October 6, 2021. Id.

Appellant proceeded to trial on March 1, 2022. AA01006. During the course of the trial, Appellant was disallowed from representing himself; Attorney Bateman was appointed as counsel. AA0644 – 0647.

On March 9, 2022, Appellant was found guilty on all counts. AA0693.

Appellant was sentenced on July 7, 2022, and a judgment of conviction was filed on July 12, 2022. AA02053; AA0994. Appellant's Notice of Appeal was filed March 21, 2022. AA0893. This appeal follows.

///

///

///

VI. STATEMENT OF FACTS[1]

On April 9, 2019, LVMPD officers were contacted by a male, later identified as victim #1, who reported he was being extorted by a male, later identified as the defendant Kim Dennis Blandino.

Victim #1 reported that on August 28, 2018, he was a Pro Tem Judge at the City of Las Vegas Municipal Court, and Mr. Blandino appeared in court for traffic related offenses. Victim #1 presided over the hearing and Mr. Blandino was found guilty at trial for the traffic offenses. Officers reviewed the court's video footage which allegedly showed that during the trial, there were continual disruptions outburst, and disorderly courtroom behavior from Mr: B1andino. Victim #1 admonished Mr. Blandino several times for his behavior but allowed Mr. Blandino to proceed *pro se*. In the months following the trial, Mr. Blandino filed multiple appeals with the City of Las Vegas, but all the appeals were denied.

---

[1] The statement of facts relies heavily on the Presentence Investigation prepared by the Division of Parole and Probation in this matter. Should this Court desire a copy of said report, Counsel will be happy to file same under seal.

On April 8, 2019, Mr. Blandino allegedly appeared unannounced at the personal/private law office of victim #1, and dropped off a two-page, handwritten letter. In the letter, Mr. Blandino advised he was ready to begin filing complaints against victim #1 for his activities on the bench during the trial on August 28, 2018.

On April 25, 2019, Mr. Blandino again appeared in court, in the court room where victim #1 was on the bench. After Mr. Blandino entered the court room, victim #1 ordered Mr. Blandino out of court based on his previous behavior at victim #1's private law office. Mr. Blandino then appeared again at victim #1's personal/private law office and dropped off a letter to victim #1, in his capacity as a judge *pro tempore*. Mr. Blandino noted in the letter that he filed a customer feedback form on victim #1 and claimed that victim #1 committed judicial misconduct. Mr. Blandino noted victim #1 had one strike and asked victim #1 to repent.

On April 29, 2019, an officer claiming to be with the Federal Bureau of Investigation, later identified as victim #2, made contact with victim #1, and it was discussed that victim #1 should contact Mr. Blandino to ascertain what Mt. Blandino meant by his letter. Victim #1 contacted Mr. Blandino via telephone and placed the call on speakerphone for Victim

#2 to listen. During the call, Mr. Blandino stated that at a minimum, Victim #1 should issue an apology in an open forum for kicking him out of the courtroom on April 25, 2019. Mr. Blandino stated he would need time to think about a further settlement but would send an email at a later time with a settlement offer.

On May 2, 2019, Victim #1 received an email from Mr. Blandino with attachments of a settlement agreement and release. In the documents Mr. Blandino requested Victim #1 pay $25.00 for the cost of the court recording, apologize in writing before May 30, 2019, and complete an Ethics, Fairness and Security in Your Courtroom and Community class at Victim #l's own expense. Mr. Blandino stated that if the parties agreed to settle, he would not file any other actions, claim suits, or proceedings again Victim #1.

On May 9, 2019, Victim #1 contacted Mr. Blandino and Mr. Blandino responded that he wanted his settlement letter answered by May 23, 2019. Mr. Blandino threatened to file a complaint with the Judicial Commission if the settlement was not accepted. Mr. Blandino also advised he would go the FBI with a criminal complaint against Victim #1 for civil rights violations as well. Lastly, Mr. Blandino stated

he would write letters to the partners of Victim #1's law firm, advising them of Victim #1's conduct.

On May 15, 2019, Mr. Blandino left Victim #1 an urgent voicemail at his law office, but the call was not returned.

On May 16, 2019, Mr. Blandino sent a letter to the managing partners at Victim #1's law firm and asked the firm to look into the settlement and push Victim #1 to have a sit down with Mr. Blandino and settle the matter.

After completing their investigation, LVMPD officers obtained a Warrant of Arrest for Mr. Blandino. On May 21, 2019, Mr. Blandino was arrested and booked at the Clark County Detention Center.

VII. ARGUMENT

STANDARD OF REVIEW

The appellate courts review questions of law under a de novo standard. SIIS v. United Exposition Servs. Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Under de novo review, the appellate court uses the district court's record but reviews the evidence and law without deference

to the district court's legal conclusions. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

a. THE DISTRICT COURT ERRED WHEN IT DENIED APPLELLANT THE ABILITY TO REPRESENT HIMSELF.

The District Court erred when it denied Appellant the ability to represent himself. The right to represent oneself is firmly embedded in our law as a fundamental aspect of the right to control one's own defense. Miles v. State, 500 P.3d 1263 (Nev. 2021). A criminal defendant may waive one's right to counsel and represent oneself. See generally Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The right to represent oneself, and to refuse appointed counsel of the State's choosing, stems from "that respect for the individual which is the lifeblood of the law." Miles v. State, 500 P.3d 1263 (Nev. 2021); McCoy v. Louisiana, 584 U.S. , , 138 S. Ct. 1500, 1507, 200 L. Ed. 2d 821 (2018) (internal quotation marks omitted); see McKaskle v. Wiggins, 465 U.S. 168, 178, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (*recognizing* that the right to represent oneself "exists to affirm the accused's individual dignity and autonomy").

Furthermore, the trial judge has a duty to "maintain, especially in

a jury trial, that restraint which is essential to the dignity of the court and to the assurance of an atmosphere of impartiality." United States v. Allen, 431 F.2d 712, 713 (9th Cir. 1970); see also Holderer v. Aetna Cas. & Sur. Co., 114 Nev. 845, 850, 963 P.2d 459, 463 (1998) (*finding* judicial misconduct where trial judge trivialized the proceedings with facetious comments); Parodi v. Washoe Med. Ctr., Inc., 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). The Nevada Code of Judicial Conduct specifically requires a judge to "be patient, dignified, and courteous to litigants," and the canvass should adhere to this obligation. NCJC 2.8(B); *cf*. In re Disciplinary Proceeding Against Eiler, 169 Wn.2d 340, 236 P.3d 873, 878-79 (Wash. 2010) (*upholding* judicial suspension in part based on deriding pro se litigants' intelligence).

In this case, Appellant was allowed to represent himself, albeit with stand-by counsel. However, on December 2, 2021, during a disagreement with Leavitt, J., she revoked Appellant's ability to represent himself. See AA0644 – 0647. The revocation of Appellant's ability to represent himself was in direct violation of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Miles v. State, 500 P.3d 1263 (Nev. 2021); McCoy v. Louisiana, 584 U.S. , , 138 S. Ct. 1500, 1507, 200 L. Ed. 2d

821 (2018); and McKaskle v. Wiggins, 465 U.S. 168, 178, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

As a noted above, because Appellant's right to represent oneself is firmly embedded in our law as a fundamental aspect of the right to control one's own defense, Miles v. State, 500 P.3d 1263 (Nev. 2021), Appellant's right to self-representation was destroyed and he suffered irreparable harm in the defense of his case.

Wherefore, Appellant prays that this Court grant his Appeal.

b. THE DISTRICT COURT ERRED WHEN IT DENIED APPLELLANT'S JURY INSTRUCTION ON MISTAKE OF FACT.

The District Court erred when it denied Appellant's jury instruction on mistake of fact. This Court has held that the defense has the right to have the jury instructed on its theory of the case [,] ... no matter how weak or incredible that evidence may be. Crawford v. State, 121 Nev. 746, 751, 121 P.3d 582, 586 (2005). And when a defendant requests "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking," the district court must give those instructions. Id. at 753, 121 P.3d at 588.

In this case, Appellant's counsel specifically requested a mistake of fact instruction be included in the instructions read to the jury. See AA1933, ln 24 – AA1934, ln 25.

That is the following request was made by Appellant's Counsel during the jury instruction conference:

> MR. BATEMAN: Yes, Judge, I would ask that -- there was one, there's a sample one from the State. Judge, it, I believe it does also go to our theory of defense that Mr. Blandino was mistaken as to the fact that he was in a legitimate negotiation. That this was, in his mind, wrongfully so, the fact that this was not a negotiation that he could engage in. And I think that fact goes to the specific intent which would be required to -- that would be required to commit an act of extortion, when in his mind the fact of the matter is that he is engaged in a legitimate legal negotiation.

See Id. (emphasis added)

Clearly Appellant's request contemplated his theory of defense. However, the District Court denied said request. See Id.

Thus, because the defense has the right to have the jury instructed on its theory of the case [,] ... no matter how weak or incredible that evidence may be. Crawford v. State, 121 Nev. 746, 751, 121 P.3d 582, 586 (2005), the District Court's denial of the requested jury instruction, was

in violation of Appellant's rights and the law of this State.

Wherefore, Appellant prays that this Court grant his Appeal.

c. THE DISTRICT COURT ERRED WHEN IT DENIED APPELLANT'S MOTIONS TO DISQUALIFY LEAVITT, J. FROM HEARING HIS MATTER.

The District Court erred when it denied Appellant's motions to disqualify Leavitt, J. from hearing his matter. The Appellant has repeatedly attempted to disqualify Leavitt, J. from hearing Appellant's matter. See Decision and Order AA0295 .

It is axiomatic that a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification. Canarelli v. Eighth Judicial Dist. Court of Nev., 506 P.3d 334 (Nev. 2022); Millen v. Eighth Judicial Dist. Court, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006); see also NCJC Rule 2.7 ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."). Id. Judges are presumed to be unbiased, Millen, 122 Nev. at 1254, 148 P.3d at 701, and a judge's decision not to recuse herself will not be overturned absent a clear abuse of discretion. Rivero v. Rivero, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (*overruled*

in part on other grounds by Romano v. Romano, 138 Nev. Adv. Rep. 1, 501 P.3d 980 (2022); PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 437, 894 P.2d 337, 341 (1995) (*overruled* on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court, 121. Nev. 251, 260-61, 112 P.3d 1063, 1069-70 (2005)). However, Appellant notes that, NCJC Rule 2.11(A)(1) requires a judge to recuse herself "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or has personal knowledge of facts that are in dispute in the proceeding. The remaining circumstances described in NCJC Rule 2.11(A)(2)-(6) concern bias arising from an extrajudicial source. See NCJC Rule 2.11(A)(2) (when someone closely related to the judge is involved in the proceeding); NCJC Rule 2.11(A)(3) (when the judge or the judge's fiduciary or close family member "has an economic interest in" the case); NCJC Rule 2.11(A)(5) (when the judge made an extrajudicial public statement "that commits or appears to commit the judge to reach a particular result"); NCJC Rule 2.11(A)(6) (when the judge was substantively involved in the matter before becoming the presiding judge on that case).

Furthermore, recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Rippo v. Baker, 580 U.S. 285, 137 S. Ct. 905 (2017); Withrow v. Larkin, 421 U. S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); see Williams v. Pennsylvania, 579 U. S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132, 141 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

In this case, Appellant has filed numerous motions to disqualify Leavitt, J. See AA0295. Appellant has cited *inter alia* issues of failure to allow Appellant to proceed *pro se*, failure to terminate forced counsel, and outright prejudice. See AA00362; AA0694; AA0783.

All of these reasons give rise to questions of impartiality on the part of the District Court. NCJC Rule 2.11(A)(1) requires a judge to recuse herself in any proceeding in which the judge's impartiality might reasonably be questioned. Yet, time and time again, Appellant's motions to disqualify Leavitt, J. have been denied. As a result, Appellant's due

process rights have been violated by Leavitt, J.'s failure to remove herself from this litigation as is required by Nevada law and Judicial Canon and Rule.

Wherefore, Appellant prays that this Court grant his Appeal.

VIII. CONCLUSION

WHEREFORE, this Petitioner prays that this Court grant his Appeal.

Dated this 27th day of March 2023.

Joseph Z. Gersten

JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

IX. ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Word 365, Century Schoolbook.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains **3940** words.

Finally, I hereby certify that I have read this appellate 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 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires 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.

DATED this 27th day of March 2023.

Joseph Z. Gersten

JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

X. CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPLELANT'S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system on the 27th day of March 2023.

The following participants in this case are registered electronic filing system users and will be served electronically:

STEVEN B. WOLFSON, ESQ.
District Attorney Clark County
200 Lewis Street, 3rd Floor
Las Vegas, NV 89101

AARON FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
775-684-1265

By: Joseph Z. Gersten
An Employee of The Gersten Law Firm PLLC