IN THE SUPREME COURT OF THE STATE OF NEVADA

KIM BLANDINO,

Appellant,

vs.

THE STATE OF NEVADA,

Appellee.

Electronically Filed
Aug 09 2023 02:58 PM
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 84433

APPELLANT'S REPLY 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

Docket 84433 Document 2023-25777

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Other References

II. STATEMENT OF ISSUES

III. 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 IN RESCINDING APPELLANT'S ABILITY TO REPRESENT HIMSELF.

The District Court erred in rescinding Appellant's ability to represent himself. The Appellant understands that the right to self-representation is not absolute; the constitutional guarantee to a fair trial

permits "the trial judge [to] terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." United States v. Johnson, 610 F.3d 1138 (9th Cir. 2010). However, it is an open question what standard of review this court should apply to a district court's decision to permit an obstreperous defendant to represent himself under Faretta when there is a risk the trial will violate due process. Id. It is clear that Blandino did not engage in such serious obstructionist conduct that the fairness of their trial was jeopardized, requiring the district court to terminate their self-representation. Id. Termination of self-representation is required when defendants engage in serious misconduct, are unwilling to abide by courtroom protocol, or are extremely disruptive and defiant. Id. But the behavior of the defendant during the trial in this case, while occasionally unexpected, was not disruptive or defiant. Id. The defendant filed numerous pleadings, was uncooperative at times, and chose to wear questionable garb during trial, but he did not exhibit a blatant disregard for courtroom rules or protocol and did not make it impossible for the court to administer fair proceedings. Id. Given an opportunity, Appellant would have made opening statements, closing arguments, cross-examined

witnesses, argued jury instructions, and testified on their own behalf. Id. He did not disrupt the proceedings or have to be gagged, shackled, or removed from the courtroom. Id.; see also United States v. Mack, 362 F.3d 597, 600-03 (9th Cir. 2004) (*holding* self-representation should have been terminated where defendant's behavior led to the trial court's exclusion of the defendant from the courtroom and the denial of the defendant's right to call witnesses and conduct closing argument). The Appellant's courtroom behavior, although eccentric at times, would not have justified, let alone require, the involuntary deprivation of their constitutional right to represent themselves. Id.

The Nevada Code of Judicial Conduct specifically requires a judge to "be patient, dignified, and courteous to litigants." 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).

As noted previously 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).

While the Respondent set out several instances where they and the District Court believe the Defendant courted his eventual revocation, (see Respondent's Opposition Brief at 15-17), none of the enumerated instances rose to the level of engaging in serious misconduct, or being unwilling to abide by courtroom protocol, or being extremely disruptive and defiant. United States v. Johnson, 610 F.3d 1138 (9th Cir. 2010). And he certainly was not gagged, shackled, or removed from the courtroom. Id.; see also United States v. Mack, 362 F.3d 597, 600-03 (9th Cir. 2004).

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 IN DENYING APPELLANT'S PROPSED JURY INSTRUCTION ON A MISTAKE OF FACT.

The District Court erred in denying Appellant's proposed jury instruction on a mistake of fact. As previously noted, and held by this Court, 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. In the State's Opposition Brief they repeatedly discuss a mistake of law defense. See Respondent's Opposition Brief at 17 – 20. Again, 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; mistake of fact, not mistake of law. However, the District Court still 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, the District Court's denial of the requested jury instruction was in violation of Appellant's rights and the law of this State. Crawford v. State, 121 Nev. 746, 751, 121 P.3d 582, 586 (2005).

Wherefore, Appellant prays that this Court grant his Appeal.

///

///

c. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE DISTRICT COURT FROM PRESIDING OVER HIS CASE.

The District Court erred in denying Appellant's motion to disqualify the District Court from presiding over his case. In its response, the State repeatedly contends that Leavitt, J. had no bias towards the Appellant, and as a result his attempts to disqualify her were disingenuous. This could not be further from the truth.

How do we know this? From the Request for Evaluation for Competency dated September 17, 2019. See AA3001. Notice the signatory, Michelle Leavitt, "on behalf" of Kim Blandino. Id. Essentially, the District Court acted as an unsolicited "advocate" for the Appellant. Mr. Blandino never requested this from the Court, and it would appear to be wholly improper for the Court itself to act as Appellant's "advocate," when he clearly wished to represent himself. As a result, it is completely within reason and credulity that Mr. Blandino would properly seek to disqualify a judge that overstepped her bounds with regard to his representation.

As noted previously, 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. And again, 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, as is the case here where Leavitt, J. stepped into the ring to "represent/advocate" for the Appellant.

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)). Furthermore, not a single judge has asked the question [SCOTUS] precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. Rippo v. Baker, 580 U.S. 285, 287, 137 S. Ct. 905, 907 (2017).

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. And now, the judge's injection of herself into the Appellant's advocacy. See AA0301.

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.

IV. CONCLUSION

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

Dated this 9th day of August 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

V. 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 **2624** 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 9th day of August 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

VI. CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPLELANT'S REPLY BRIEF** with the Clerk of the Court by using the electronic filing system on the 9th day of August 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