

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

v.

DUSTIN LEWIS,
Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 85158

**APPELLANT'S POINTS AND AUTHORITIES IN SUPPORT OF
PROPRIETY OF APPEAL**

PRELIMINARY STATEMENT

This is a State's appeal from an order of the district court granting Dustin Lewis' pretrial motion to suppress evidence. By Order of this Court filed on August 22, 2022, the State submits the following points and authorities as a preliminary showing of the propriety of the appeal and to argue there will be a miscarriage of justice if the appeal is not entertained. See NRS 177.015(2).

STATEMENT OF THE ISSUE

Whether good cause exists to allow an appeal from the district court's suppression order.

STATEMENT OF THE CASE

On May 3, 2019, the State filed an Indictment charging Dustin Lewis ("Lewis") and Margaux Ornelas ("Ornelas") with the following: Count 1 –

Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 2 – Burglary (Category B Felony – NRS 205.060); Count 3 – Burglary (Category B Felony – NRS 205.060); Count 4 – Burglary (Category B Felony – NRS 205.060); Count 5 – Grand Larceny (Category B Felony – NRS 205.220.1, 205.222.3); Count 6 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 7 – Burglary (Category B Felony – NRS 205.060).¹ Vol. I Appellant’s Appendix (“AA”) 01-05.

On February 26, 2021, Lewis filed a Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine. I AA 06. On March 3, 2021, Ornelas filed a Joinder to Co-Defendant Dustin Lewis’ Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine. I AA 80. On March 4, 2021, the State filed its Opposition. I AA 82. On March 12, 2021, Lewis filed a Reply. I AA 88.

On March 29, 2021, the district court issued a Minute Order stating that no evidentiary hearing was necessary and that the parties would have the opportunity to argue their respective positions. I AA 104. On that same date, the State filed a Response to the Reply. I AA 96. On April 5, 2021, the district court heard argument. I AA 105-11. After hearing argument, the district court orally granted the motion in

¹Two additional defendants, Tyree Faulkner and Thomas Herod, were also charged in Counts 6 and 7. I AA 01, 03-04. These defendants are not respondents in the instant appeal.

its entirety. I AA 111. On April 8, 2021, the district court filed its Order Granting Defendant Dustin Lewis Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine. I AA 112-14.

The State filed Notices of Appeal with the district court and this Court on April 9, 2021. I AA 115. On March 18, 2022, this Court vacated the district court's Order, and remanded the matter back to the district court for an evidentiary hearing. I AA 121-24.

On June 10, 2022, the district court held an evidentiary hearing. I AA 126. At the conclusion of the evidentiary hearing, the district court granted the motion to suppress. I AA 126. On August 11, 2022, the district court filed its Findings of Fact, Conclusions of Law, and Order Granting Defendant Dustin Lewis's and Margaux Ornelas's Motions to Suppress Evidence. I AA 127-39.

On August 12, 2022, the State filed a Notice of Appeal. I AA 143. On August 22, 2022, this Court ordered the State to file the instant points and authorities to make a showing as to why this Court should entertain the appeal.

STATEMENT OF THE FACTS

In December of 2018, Nedy Macedo was the on-site manager of Storage One at 9960 West Flamingo Road, Las Vegas, Nevada. II AA 175. On the morning of December 8, 2018, Macedo observed several units in building B that were open with no lock. II AA 178. Macedo also observed damage to the door of unit B145. II AA

179. Macedo noticed that the doors to units B151 and B147 were open. II AA 155. Macedo then notified her manager, as well as the customers for units B151, B147, and B145. II AA 180. Macedo provided the police with Storage One surveillance video from the previous night. II AA 180-81. The surveillance video showed two individuals walking out of Storage One. II AA 181-82. One individual appeared to be pushing a wheelchair while another appeared to be carrying a couple of duffle bags. II AA 182.

In December of 2018, Michael Rodrigue was renting storage unit B147 from Storage One. II AA 158. On December 8, 2018, the police and Storage One informed Rodrigue that it appeared his unit had been burglarized. II AA 160. Upon arriving at Storage One, Rodrigue observed a hole in the side of his storage unit which had not been present the last time he saw the unit. II AA 160. Rodrigue also observed that multiple items were missing from his unit, specifically a wooden chess set, an Army style jacket, and Army dog tags. II AA 160-61.

In December of 2018, Marc Falcone was renting five units from Storage One. II AA 165. One of those units was unit B151. II AA 167. On December 8, 2018, Falcone was notified by the manager of Storage One that it appeared one of his units, B151, had been burglarized. II AA 165-66. Falcone is a watch collector and was storing numerous watches in B151. II AA 167. Upon arriving at Storage One, Falcone observed that the lock to his unit was damaged. II AA 166-67. Falcone also

observed that some of the watches he had been storing in the unit were missing. II AA 168. The total value of the missing watches was approximately \$2.2 million. II AA 168. Five of the missing watches were Panerai brand watches. II AA 172.

On December 8, 2018, Las Vegas Metropolitan Police Department (“LVMPD”) crime scene analyst Whitney Scharpf responded to Storage One to process the scene. II AA 218-19. Scharpf processed unit B151. II AA 219-20. Scharpf dusted various areas to obtain fingerprints. II AA 220. Scharpf dusted the walls of the unit as well as a safe inside of the unit. II AA 220. Scharpf was able to obtain multiple fingerprints, which were impounded and forwarded to LVMPD’s latent print section for forensic analysis. II AA 221-22.

On December 10, 2018, LVMPD Detective Ethan Grimes was assigned to investigate the burglaries at Storage One. II AA 226-27. After being assigned to the case, Detective Grimes reviewed still photos from the video surveillance of the incident on December 8, 2018. II AA 228. Grimes observed one male and one female suspect; the female suspect was pushing a wheelchair with a chess board. II AA 28-29. Grimes observed the male suspect was carrying multiple bags and wearing an Army jacket. II AA 229.

On the night of December 11, 2018, in the course of his investigation, Detective Grimes responded to a desert area next to Storage One. II AA 230. Detective Grimes responded to the area because another squad was on the scene

attempting to locate homeless people. II AA 230.

Other officers reported to Detective Grimes that they had observed in the area a tent with a wheelchair approximately 25 yards away from it. II AA 231. The officers challenged the tent to determine if there was anyone inside. II AA 231-32. When the officers received no answer, they unzipped the tent and observed that there was a large chess board and numerous watch boxes, one with the Panerai brand name, inside the tent. II AA 232. Based on this information, Detective Grimes assisted Detective Andrew Shark with obtaining a search warrant. II AA 232-33. Detective Grimes also went to the area and observed the tent and the nearby wheelchair. II AA 231.

After the search warrant was obtained, Detective Grimes and other officers entered the tent and observed a Panerai bag, as well as other items that matched the victims' descriptions of the missing items. II AA 232. Items recovered from the tent included a chess board, business cards bearing Marc Falcone's name and a Panerai watch box. II AA 232. Crime scene analysts responded to the scene to obtain fingerprints from various items located inside the tent and near the tent. II AA 233-34. Crime scene analysts also processed unit B151 because it had been burglarized again. II AA 247. The Panerai watch box was dusted for fingerprints. II AA 234. The serial number on the Panerai watch box matched the Panerai serial number that Mr. Falcone had reported missing. II AA 235.

After impounding the items from the scene, detectives returned to the scene near the tent in an attempt to locate a detective's missing cellular phone. II AA 236. While the detectives were there, at approximately 11:00pm, they heard an alarm sound at Storage One. II AA 237. Detective Grimes and other detectives and officers then responded to the scene to assist in setting up a perimeter, because the alarm indicated individuals were on the property. II AA 237. Officers began searching Storage One for the intruders, and subsequently located a black SUV parked outside of the facility, with what appeared to be a watch in a plastic case on the passenger seat. II AA 238-39.

Detective Grimes contacted the emergency contact for Storage One, who responded to Storage One and obtained surveillance video for Detective Grimes to review. II AA 241. Upon reviewing the surveillance video, Detective Grimes observed three male individuals and recognized one of them from the December 8th surveillance video. II AA 241-42.

Pursuant to the second incident at Storage One on December 12, 2018, LVMPD crime scene analyst Tasha Olson processed the black SUV. II AA 211-13. Olson photographed the SUV and dusted items inside for fingerprints. II AA 213. One of the items dusted for fingerprints was a watch case. II AA 215. The fingerprints obtained were then submitted to LVMPD's latent print section for forensic analysis. II AA 215.

Lori Haines, a latent print examiner working in the LVMPD forensic laboratory was assigned to examine multiple fingerprints that were obtained in this case. II AA 191, 193. She compared a fingerprint obtained from the handle of a wheelchair with prints obtained from five known individuals. II AA 201. Haines determined that the fingerprint from the wheelchair matched the right thumb of Lewis. II AA 201. Haines also examined a fingerprint obtained from a wooden Panerai watch box, and determined that it matched the right middle finger of Ornelas. II AA 215-16. Haines also examined a fingerprint obtained from a green watch box and determined that it matched the right middle finger of Ornelas. II AA 216. Haines also examined a fingerprint obtained from a white watch box and determined it matched the left thumb of Ornelas. II AA 216.

Haines also examined a fingerprint obtained from a plastic case found in the tent. II AA 216. Haines entered the fingerprint into an AFIS database and received a positive hit. II AA 216. Haines then compared the AFIS hit with the fingerprint and rendered a conclusion of identification to the left thumb of Lewis. II AA 216.

Haines also examined a palm print obtained from the exterior wall of Storage One unit B145. II AA 208. Haines determined that the palm print matched the right palm of Lewis. II AA 208.

SUMMARY OF THE ARGUMENT

There is good cause to permit the appeal to go forward because without the

evidence suppressed by the district court the State is entirely unable to prosecute this case.

ARGUMENT

THERE IS GOOD CAUSE TO PERMIT THIS APPEAL TO PROCEED TO THE MERITS

The district court, in granting the motion to suppress, ordered suppressed “[a]ll tangible property and physical evidence recovered from the tent of Mr. Lewis and Ms. Ornelas and the surrounding area” as well as “the hand print of Mr. Lewis; the interviews of Mr. Lewis and Ms. Ornelas; any statements attributed to Mr. Lewis and Ms. Ornelas; all documents, statements, and any other tangible or physical evidence relating to the identity of Mr. Lewis and Ms. Ornelas; any evidence derived from the Lincoln Navigator that the State intends to use against Mr. Lewis and Ms. Ornelas; and any evidence derived from the Fun City Motel.” I AA 137. In essence, the district court suppressed all incriminating evidence against Lewis and Ornelas. The State’s case obviously requires the presentation of incriminating evidence against the defendants. Therefore, there is good cause to allow the State to appeal the suppression ruling.

The Legislature has authorized appeals from the grant of suppression motions upon a showing of good cause:

The State may, upon good cause shown, appeal to the appellate court of competent jurisdiction ... from a pretrial order of the district court granting or denying a motion to suppress evidence ... [.] The appellate

court of competent jurisdiction may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained.

NRS 177.015(2).

“NRS 177.015(2) thus requires the State to first show ‘good cause’ before this court will consider the merits of an appeal.” State v. Brown, 134 Nev. 837, 838, 432 P.3d 195, 197 (2018). Good cause mandates that “the State must make a preliminary showing of the ‘propriety of the appeal’ and that a ‘miscarriage of justice’ would result if the appeal is not entertained.” Id. This Court has defined the “propriety of the appeal” to mean “that the appeal is not taken for the purpose of delay.” Id. at 839, 432 P.3d at 198. “Miscarriage of justice” under NRS 177.015(2) means “that the suppressed evidence is of substantial importance such that its suppression would significantly impair or terminate the State’s ability to prosecute the case.” Id.²

The State is not pursuing this appeal for the purpose of delay. The State’s case is dependent upon presentation of the evidence the district court suppressed, including Lewis’s palm print found on the wall of one of the burglarized storage units, Lewis’s fingerprint that was found on a watch case inside the tent, Lewis’s

²The State has not addressed the underlying erroneous nature of the suppression ruling because Brown does not endorse such an undertaking. Brown focuses the good cause analysis upon delay and the impact upon the State’s case of the loss of the evidence. Whether the evidence should have been suppressed is an entirely different question. Brown renders arguments related to the merits of the appeal irrelevant for good cause purposes under NRS 177.015(2).

fingerprint found on the wheelchair outside the tent, Ornelas' fingerprints found on the watch boxes recovered from the tent and the Lincoln Navigator, as well as the fact that items taken from the Storage One units were found both in the tent and in the Lincoln Navigator. The State may need to present statements from Ornelas and Lewis as permitted under NRS 51.035(3)(a).

Furthermore, a successful prosecution is not remotely possible if the State is prohibited from introducing any "documents, statements, and any other tangible or physical evidence relating to the identity" of the defendants. I AA 113. At trial the prosecution must prove the defendant's guilt as to every element of the crime beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). The State is explicitly tasked with proving both that the charged crimes were committed, and that the defendant is the perpetrator of those crimes. See, e.g., Sheriff, Washoe Cty. v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).

Additional evidence that the State is not attempting to improperly delay this case can be found in the fact that the Notice of Appeal was filed before the short deadline of NRS 177.015(2). Indeed, the Notice was filed one day after the district

court filed its Order. Further, the State filed this pleading without requesting any extensions of time.

The factual reality of the evidence against Lewis and Ornelas establishes a miscarriage of justice. The loss of all incriminating evidence regarding these two defendants amounts to the death knell of the State's case. Suppressing all evidence related to the identities of these defendants makes prosecution virtually impossible. But for the suppression ruling, the State could introduce a wealth of incriminating information against Lewis and Ornelas. The purpose behind the State's request for appellate review is the need to preserve the evidence needed to support a finding of guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court find good cause to allow this appeal to proceed to the merits of the suppression order.

Dated this 31st day of August, 2022.

Respectfully submitted,

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BY */s/ Karen Mishler*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 31, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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KM//jh