

Case #33-4-95 LCR

SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LINCOLN

STATE OF NEVADA)	
)	
Respondent)	
)	
-vs-)	Reply Brief
)	of Appellant
GLENN CAMPBELL)	
)	
Appellant)	

Submitted by: Glenn Campbell
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Summary

In this Reply Brief, the Appellant, in proper person, replies to specific facts and arguments contained in Answering Brief of Respondent. According to the Stipulation for Scheduling of Appeal Proceedings, entered by the Court on May 30, 1995, this is the final brief before the appeal is set for hearing at the earliest date convenient to the Court. Accordingly, we ask the Court to act on this matter without delay.

Replies in this Brief are summarized as follows:

- 1) There are significant errors in the facts stated by the Respondent.
- 2) Respondent's argument that the obstruction statute, NRS 197.190, is analogous to a "strict liability" or "general intent" statute is fundamentally flawed.
- 3) Respondent's argument that testimony and potential evidence was properly excluded is improperly based on a "general intent" definition of the crime.
- 4) Respondent's Argument that Defendant was not entitled to a jury trial is based on irrelevant cases and disregards the clearly stated intent of the Legislature, as reflected in amendments to the jury trial law and Minutes of the Legislature's Judiciary Committee at the time of the amendments.

1. Misrepresentations of Fact

In its Answering Brief, Respondent makes three assertions of fact which are not supported by evidence on the record:

- 1) That the television reporter, Mr. HENRY, was the owner of the seized tapes.
- 2) That Mr. HENRY agreed to turn over the tapes.
- 3) That the video tape entered into evidence shows the Defendant locking the doors of the vehicle and refusing to unlock them.

The Appellant strongly asserts that all three claims are erroneous and could contribute to a false impression concerning

the Defendant's knowledge and intentions which was not conveyed at trial

In its Answering Brief (Page 3), Respondent states the following without citations to the transcript:

Even though the owner of the tapes (Mr. HENRY, the reporter) agreed to turn over the tapes, Appellant then locked the vehicle doors to stop the seizure.

Two assertions included in this sentence are erroneous and are not supported by any evidence on the record. No evidence was presented at trial to establish Mr. HENRY as the owner of the video tapes, and no evidence was presented at trial to establish that he agreed to turn over the tapes.

(a) Ownership of the Tapes

At no time during the trial did the State introduce any testimony or documentary evidence specifying the ownership of the tapes. However, the Defendant, testifying in his own defense, asserted that he had a bono fide personal stake in the tapes, (Tr. Page 106) because of the time he had invested in their production and in the benefit to his political cause of the resulting story. The State offered no evidence or testimony to counter this assertion.

(b) Consent to Seize Tapes Not Granted

The assertion that Mr. HENRY agreed to turn over the tapes prior to the Defendant's arrest is false and is not supported by any evidence on the record, including the video tape. To the contrary, Mr. HENRY repeatedly asserted his refusal to turn over the tapes without a warrant (See Video Tape). "I'll go to the wall on that," said Mr. HENRY in the tape. The record clearly shows that this was a non-consensual, warrantless seizure. Deputy LAMOREAUX asked the party to turn over their tapes. The acting spokesman for the party, Mr. HENRY, repeatedly refused, at which point LAMOREAUX announced his intention to seize the tapes without a warrant. As he was moving toward the vehicle to do so, the Defendant said, "Wait, there are unresolved issues here," and pushed down the door looks of the vehicle.

As soon as LAMOREAUX announced that he was seizing the tapes without a warrant, no further consent was requested and none was granted.

These two misrepresentations of the record by the Respondent can only be regarded as malicious, because they would tend to support Respondent's false contention, not demonstrated in evidence or testimony, that the Defendant had no valid stake in the tapes and that he acted against the wishes of those in his own party. In the Answering Brief, these assertions of fact were not contained in the "Statement of Facts" and were not supported by references in the trial transcript, even though those same assertions were questioned in the appellant's Opening Brief. These erroneous claims were "slipped in" to the Respondent's Argument, as though they were assumed to be true. At the least, the attempt would seem inconsistent with NRAP 28(e) and Respondent's own "Certificate of Compliance."

At the same time, the Respondent has failed to answer Appellant's contention in its Opening Brief that the trial Court improperly drew these same conclusions without evidence.

(c) Evidence of Video Tape Misrepresented

In its "Statement of Facts," Respondent notes that a video tape was entered into evidence at the trial, and further states:

The video showed Appellant locking the doors of the vehicle and his refusal to unlock them. (RT, 23:1-19)

This is grossly erroneous, as the video tape shows nothing of the sort (See Video.). The Respondent's transcript reference above refers not to the video tape but to Deputy LAMOREAUX's testimony (RT, 23:1-19), which is a different form of evidence than a video tape.

At the time of the Defendant's arrest, the camera was running, unattended, on the back seat of the vehicle in which the Defendant's party had been riding. The picture shows only the lower part of a passenger car door, while the audio

recorded only the wireless microphone worn by the reporter (Mr. HENRY), who was outside of the vehicle with the rest of the party. No door locks are seen in the frame, and no audio can be heard from the Defendant or from Deputy LAMOREAUX at the time of the arrest. The only movement recorded on the video are shadows seen through a corner of the passenger side window. A shadow is seen passing behind the window (outside the vehicle) and then a portion of a shirt is shown for a longer time, presumable as the Defendant stands against the vehicle for handcuffing during his arrest.

The video most definitely does NOT show, in video or audio, the Appellant locking the door locks, refusing to unlock them or indeed engaged in any act whatsoever. The only movement shown by the camera is an ambiguous shadow and shirt. The assertion that the Defendant locked the doors is made only in verbal testimony of the Deputies and the Defendant. The assertion that Campbell refused to unlock the doors when commanded was an issue of contention at the trial, supported only by the testimony of the Deputies.

The effect of Respondent's misrepresentation of the video tape evidence is to make the alleged acts seem clearly defined and beyond contention because they are "shown on the tape." This is not the case. Far from clearly portraying the act, as the Respondent implies, the video tape only contributes to ambiguities that lead to "reasonable doubt."

2. General Intent vs. Specific Intent

In its Answering Brief, the Respondent asserts:

Appellant argues that "evil intent" is required as an element of the offense. No Nevada law supports this argument. In fact, the plain language of the statute indicates that the offense is more analogous to a strict liability or general intent crime: when a person willfully does the act that hinders or delays the officer, the crime has been committed. Specific intent of the Defendant is not an element of the offense.

The contention that no Nevada law supports an argument is not valid itself if no Nevada law refutes the argument either. Nevada is a relatively young state, thinly populated until recently, that has not had an opportunity to build case law on many issues. In situations like this, the Courts have no choice but to look to the cases in other states and U.S. jurisdictions for analogous rulings. Fortunately, obstruction is a common law crime which is closely duplicated in the statutes of nearly every other state and federal jurisdiction. The enforcement of such statutes in all American jurisdictions must adhere to the requirements of the U.S. Constitution or be ultimately be annulled by the U.S. Supreme Court; thus the experience of other jurisdictions can clearly be instructional.

Respondent, in fact, has provided no case citations to support its suggestion that NRS 197.100 is "analogous" to a strict liability or general intent crime. Such an analogy cannot be held consistent with Constitutional case law. In practice, a citizen faced with an ambiguous situation in which fundamental rights might be lost must often make an immediate decision based on incomplete information, and this decision cannot be penalized if made in good faith. (See Citations in Opening Brief.) To rule otherwise would essentially be saying that a citizen must always do what a law enforcement officer says regardless of the circumstances and regardless of what constitutionally guaranteed rights might be permanently sacrificed.

What commonly distinguishes a general intent crime from a specific intent crime is the ruling of courts on specific offenses. At trial and in its Opening Brief, Appellant provided many case authorities supporting a specific-intent interpretation of obstruction statutes. One persuasive authority cited was a federal case, U.S. vs. McDonald, (1879) Fed Case #15,667 (cited in 48 ALR 746 and attached to the Opening Brief) which indicates in explicit language that obstruction is a specific intent crime, as embodied in the Court's rigorous definition of "willfully." As a supplemental authority, U.S. vs. McDonald is further affirmed by U.S. vs. Terry, (1889; D.C.) 32 Fed 317, which confirms, in a federal case, that where "willfully" appears in the obstruction statute, "bad intent"--that is, willful intention to commit a crime--is required for conviction and not simply an intentional act alone.

Thus, the Appellant has provided in its opening brief persuasive cases from other jurisdictions to support its definition of "willfully" and the specific-intent requirement thereby implied. The burden, then, is on the Respondent to provide other citations to indicate that these cases have been overturned or are otherwise invalid. The Respondent has provided

no citations whatsoever to support its own arbitrary definition of "willfully." Respondent only argues that the "plain language of the statute" supports its definition. That language, however, is far from plain and requires case law for interpretation. The Respondent's implication that the statute alone is all that need be consulted, not case law, is a philosophy running counter to the legal positivism upon which all American jurisprudence is based.

The record clearly shows that the subjective intent of the Defendant was to prevent an unreasonable search and seizure. The crime of obstruction requires intent specific to show that the accused indeed intended to obstruct or delay. That the Defendant did not intend, since there can be no obstruction of an unlawful search and seizure. (See Citations in Opening Brief)

The Respondent further argues:

Appellant next argues that a search issue was present in this case. His analysis, however, does not address the issue of probable cause, but rather is concerned with the Appellant's subjective belief or confusion about the existence of probable cause. The point is clear: since the officer had probable cause to seize the tapes from the vehicle, Appellant's belief about the "fate" of the tapes is irrelevant and does not raise a Fourth Amendment issue. The State submits that the testimony and the videotape admitted into evidence provide overwhelming evidence of guilt.

Indeed, the Appellant does contend that, in the absence of a warrant, his subjective belief or confusion was relevant to proof of the crime, especially given the use of a warrant in the nearly identical ABC News case.

Further, it is noted that the Respondent, just two paragraphs before, asserts that Mr. HENRY was the owner of the tapes and that he agreed to turn them over to the deputy. If consent was indeed given, as RESPONDENT falsely claims, how can RESPONDENT argue that probable cause has any relevance at all? Probable cause would not be needed if the owner, whomever that may be, had indeed properly consented to relinquishing the tapes. It seems inappropriate for the Respondent to pursue these two opposing theories simultaneously.

3. Exclusion of Evidence

Respondent argues in items B. and C. of its Argument that evidence of prior seizures and the Deputy's definition of probable cause were properly excluded because they have no bearing on the intentional act of pushing down the door locks.

This reasoning is not valid if a specific intent definition is supported by the Courts. If intent to commit a crime must be proven "beyond a reasonable doubt," then the Defense has a right to seek any evidence which might substantiate the knowledge and state of mind of the Defendant at the time of the alleged criminal act. The evidence of prior film and video seizures was known to the defendant at the time of the act, and thus was relevant to his subjective intent. In requesting this evidence in Discovery and seeking to have it admitted at trial, the Defendant sought to substantiate the fact that he had this knowledge and that it bore on his intent at the time.

For example, one of the most significant bodies of evidence in this regard was from the prior ABC News seizure, which created in the mind of the defendant the reasonable expectation that a warrant was required for involuntary search and seizure of news video. Also relevant were the many previous cases, known to the defendant at the time, in which film was taken from tourists by the same Deputy, with the false promise of return, where the film then vanished without accounting. Any such evidence, provided it was available to the Defendant at the time of the alleged act, would play a significant role in establishing his intent.

Evidence to indicate Deputy LAMOREAUX's definition of "probable cause" was relevant because the legality of the warrantless seizure hinged upon it. If the probable cause is found to be invalid, then the seizure was unreasonable, and no obstruction could have taken place.

4. Jury Trial

Respondent argues that Appellant was not entitled to a jury trial. After irrelevant cases are discounted, the argument in support of this position is reduced to a single ambiguous and unexplained case, *State vs District Court*, which cannot overcome the clear intent of the legislature in amending the jury trial statute NRS 175.011 subsequent to previous cases.

Extensive documentation on the jury trial issue can be found in Defendant's Response to Motion to Vacate Jury Trial and its Supplemental Points and Authorities. The following summary is provided in reply to Respondent's Answering Brief.

Irrelevant Cases

The following cases cited by the Respondent are irrelevant to jury trial issue in Justice's Court.

Nevada vs. Smith (1983), 99 Nev 808, is a ruling based on a prior version of the jury trial statute, NRS 175.011(b), which read in part:

In a justice's court a case shall be tried by jury only if the defendant so demands in writing not less than **5 days prior to trial**. [Emphasis added.]

The Court ruled that "shall" in this statute should be interpreted as "may" and stated that "If the legislature intended to grant a substantive right to a jury trial in every case, it would have said so in plain, explicit language."

The issue was addressed when the Legislature re-wrote the statute the same year, more effectively stating its intent both in the construction of the statute and the record of hearings in the Judicial Committee. (See below.) The current statute reads in part:

In a justice's court a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial.

Nevada vs. Smith is thus moot because it refers to a prior version of the statute for which no other record of Legislative intent was available. (See further discussion below.)

Blanton vs. North Las Vegas Municipal Court, (1987) 103 Nev 623, was decided after enactment of the new jury trial statute, but the statute itself was not tested because the charges were filed in Municipal Court, not Justice's Court. In Municipal Court, the right to a jury trial is specifically excluded in NRS 266.550:

The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice's courts... but the trial and proceedings in such cases shall be summary and without jury.

Thus, *Blanton* rules purely on a Constitutional issue is irrelevant to trials in Justices Court as defined by statute.

The only remaining case seeming to be in favor of the Respondent's position is *State vs. District Court*, 104 Nev 91. This is a private ruling published without facts or substantial opinion. For the convenience of the Court, the entire two-page ruling is attached. The ruling states only that, in a DWI case, a right to trial by jury is not Constitutionally mandated, even when charged in Justices Court. However, the ruling remains ambiguous and apparently ill-informed, because no mention is made of NRS 175.011 or NRS 175.021 (regarding jury size) and 1983 amendments to both, and no explanation is given for how the purely Constitutional issues in *Blanton* (where NRS 266.550 specifically disallows jury trials) are relevant to the statutory issues in Justices Court.

Because the circumstances of the case and the reasoning of the Court in *State vs. District Court* are unknown, it is difficult to extend this ruling to other cases. For example, it is not known....

- (a) Whether the case was tried under the new or old versions of the jury trial statute.
- (b) Whether the Defendant's request for jury trial was filed in a timely manner.
- (c) Whether some other special factor might eliminate jury trials in DWI cases.

The State vs. District Court ruling refers only to DWI cases. The court says nothing about obstruction or any other misdemeanor. If the Court had intended to disallow the right to a jury trial in every misdemeanor case or in every case judged as "petty," why did it not say so explicitly? Why did it limit the ruling only to DWI cases? Because no facts, reasoning or circumstances of this case were provided by the court it is impossible to extend this case to any other crime except DWI.

The Court further states, "Respondent has presented no authorities not consider by this Court in reaching its decision in Blanton." This suggests that the Court never considered the 1983 amendments to NRS 175.011 and NRS 175.021, which were not relevant to Blanton, or the Minutes of the Legislative committee at the time of the amendments (as discussed below), which also were not relevant to Blanton.

A similar conclusion holds here as it does in Smith: If the Court had intended to disallow jury trials in all misdemeanor cases, it would have said so in plain, explicit and unambiguous language. Otherwise, the intent of the Legislature must be the controlling authority.

In Northern Nevada Assn.of Injured Workers vs. SIIS, (1991) 107 Nev 108, cited by Respondent in its Answering Brief, the Nevada Supreme Court ruled that where the statutory language (of NRS 616.560) remained unchanged after the Court's previous ruling on it, the Legislature was presumed to approve of the Court's interpretation of that statute. Such a situation does not apply here, however, because neither Blanton nor State vs. District Court made any reference to the language of NRS 175.011; thus it was impossible for the Legislature to approve or disapprove of the ruling or modify the statute in such a way as to address it. The issues raised by the Court in Smith, however, were indeed addressed by the Legislature, which modified the statute to make it less ambiguous.

Thus, Northern Nevada Assn.of Injured Workers vs. SIIS has no bearing here.

Shall vs. Must

Respondent's argument hinges on the assertion that "shall" and "must" mean the same thing and that when the Legislature amended the statute, Smith applied equally to the new version as well. Respondent's citations to Black's are deceptive, as Black's itself is not a persuasive authority, and the subtle differences between "shall," "must" and "may" are more complex and variable than any dictionary can convey. Indeed, as Respondents subsequent citations suggest, both "shall" and "must" are "in general" mandatory with no opportunity for discretion, but each can occasionally have other meanings depending on context and legislative intent. "Shall" can be interpreted as "must" or "may" (Katkowski v. La Guardia, 22 NYS2d 244, cited along with hundreds of other must/shall/may distinctions in West's Words and Phrases under "Must" and "Shall"). Case law, construction and legislative intent must be consulted to determine which definition applies in a particular statute. The situation was stated succinctly in Harvey vs. Board of Chosen Freeholders of Essex County, 153 A2d 10, 30 NJ 381:

As used in statutes, the word "may" is ordinarily permissive or directory, and the words "must" and "shall" are generally mandatory; such terms, however, are interchangeable wherever necessary to execute clear intent of the Legislature, the problem being primarily of ascertaining intent of the Legislature.

Respondent neglects to note that the amendment of "shall" to "must" was not the only change to the jury trial statutes enacted in the same bill (Bill No. 211 in the 62nd Session). Specifically, in Justice's Court, standard 12-person juries were reduced to 6 person petite juries, while the time required for demand was substantially lengthened. Furthermore, while the prior version of the statute provided no source of legislative intent apart from the statute itself, the new statute is supported by hearing records from the Legislature's Judicial Committee.

Legislative Intent

Minutes of the Nevada legislature's Judiciary Committee (attached) leave no doubt that the legislature was aware of the affect of its changes to NRS 175.011(2) and NRS 175.021. Debate on Senate Bill No. 211, amending both statutes, occurred on Mar. 17, 22 and 24, 1983. While concerns were expressed that the amendments might overburden the Justices Courts by allowing a jury trial for even minor traffic offenses, contravening testimony focused on Nevada's

