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### Summary of Higgs v. State, 126 Nev. Adv. Op. No. 1

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**CRIMINAL LAW**

**Summary**

A multi-faceted appeal from a Second Judicial District Court conviction of first-degree murder.

**Disposition/Outcome**

District Court's conviction upheld.

**Factual and Procedural History**

On July 7, 2006, nurse Chaz Higgs ("Higgs") noted to a coworker, Kim Ramey ("Ramey"), that the appropriate way to "get rid of someone" was to use succinylcholine. Succinylcholine is an anti-paralytic drug used largely in emergency medical situations. Suspiciously, the next day Higgs called emergency personnel after finding his wife, Kathy Augustine ("Augustine") unresponsive in their home. After learning of Augustine's ailment, Ramey reported to police and treating physicians that she conversed the day before with Higgs and suspected that succinylcholine contributed to Augustine's condition. Augustine's treating physician took a urine sample to test for succinylcholine. Three days later, Augustine died after removal from life support. In determining Augustine's cause of death, investigators sent the urine sample to the FBI. Toxicologist Madeline Montgomery ("Montgomery") of the FBI issued a report showing the presence of succinylcholine in Augustine.

Police arrested Higgs in September 2006 and he was formally charged with first-degree murder of Augustine in December 2006. Both sides stipulated to a trial date of July 2007. During trial preparation, expert examination of the urine sample was important to both the State and the defendant. Both parties agreed that Montgomery worked cooperatively with defense expert Chip Walls ("Walls"). In May 2007, defense counsel moved for a continuance to allow Walls more time to evaluate the FBI's test results. The lower court denied the motion, reasoning that the defense waited too long to request more time and Walls possessed sufficient knowledge about the FBI toxicology report and methodology.

Higgs' trial began June 18, 2007. The State presented witnesses that described the troubled marital relationship between Higgs and Augustine and Higgs' unemotional response to Augustine's death. Similarly, Ramey testified about the conversation she had with the defendant, where he noted the appropriate way to "get rid of someone." The State also presented testimony of medical personnel who explained that a nurse, like Higgs, would be familiar with the use of succinylcholine and would be able to obtain it without difficulty. Police officers testified that Higgs possessed materials discussing the administration of succinylcholine.

Expert scientific evidence was critical throughout the trial. Augustine's attending physicians ruled out mundane causes of death, such as heart attack or stroke, and explained that succinylcholine poisoning could have been the cause of death. The physicians also emphasized

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<sup>1</sup> By Kathleen Wilde

that the hospital never administered the drug during the course of Augustine's treatment. A toxicologist explained that a tissue sample from Augustine contained a puncture wound, but it was unclear whether succinylcholine was injected into the tissue. A pathologist for the defense testified that the puncture wound in the tissue sample was too fresh to have occurred prior to Augustine's arrival at the hospital. Most importantly, Montgomery explained the volatile chemical nature and effects of succinylcholine and the ways experts test samples for the drug. Montgomery also testified that succinylcholine was present in Augustine's urine prior to her death. Although defense expert Walls did not testify during the trial, defense counsel used information obtained during his investigation during cross-examination of Montgomery.

Ultimately, a jury found the defendant guilty of first-degree murder. He appealed on numerous grounds. The Court initially decided the appeal in an unpublished opinion issued May 2009. After the Nevada Justice Association moved for publication, the Court published the decision in January 2010.

## **Discussion**

### *Motion to continue the trial*

Writing for a majority of four, Justice Hardesty began by noting that the Nevada Supreme Court reviews motions for continuance for an abuse of discretion.<sup>2</sup> Abuse of discretion usually occurs where a litigant has inadequate time to prepare for trial and is prejudiced by denial of a continuance.<sup>3</sup> The Court noted the defendant did not demonstrate prejudice and went on to observe that the State and its expert witness worked cooperatively in providing information to the defendant. Furthermore, the Court reasoned that the defendant had approximately six months to evaluate the FBI's toxicology report and had numerous opportunities to request additional time prior to May 2007. Finally, the Court concluded that the lower Court did not abuse its discretion by denying Defendant's motion to continue.

### *Sufficiency of the evidence*

When evaluating evidence sufficiency, the Nevada Supreme Court views evidence in the light most favorable to the prosecution and considers whether any rational trier of fact could have found the essential criminal elements beyond a reasonable doubt.<sup>4</sup> Because the State produced evidence that linked the defendant to succinylcholine, cleared the hospital of administering the drug, provided a motive, and demonstrated Augustine's cause of death, the Court held there was enough to support the major elements of first-degree murder.

### *Expert testimony*

In order to clarify prior confusion in Nevada law, Justice Hardesty discussed at length the judiciary's role as gatekeepers for expert testimony.

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<sup>2</sup> Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).

<sup>3</sup> Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978).

<sup>4</sup> Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)).

The Court began with an assessment of the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*.<sup>5</sup> In *Daubert*, the United States Supreme Court liberalized admission of expert witness testimony to be more compatible with Federal Rule of Evidence 702.<sup>6</sup> The Supreme Court noted the importance of relevance and reliability in expert testimony<sup>7</sup> and gave a sizeable, though non-exhaustive, list of factors a court may wish to evaluate.<sup>8</sup> Writing in dissent, Chief Justice Rehnquist noted that the majority's list of factors undermines discretion in assessing cases on their individual fact patterns and potentially causes confusion.

Although later United States Supreme Court opinions attempted to clarify that *Daubert* factors are not exhaustive and meant to be flexible, Chief Justice Hardesty noted a survey of Circuit Court opinions which demonstrated that the factors have been inconsistently used and often understood as a mandate.

Applying *Daubert* to Nevada law, the Court noted that state precedent mirrors Chief Justice Rehnquist's concerns about rigid application of the enumerated *Daubert* factors. Particularly in the case of *Hallmark v. Eldridge*, the Nevada Supreme Court noted that *Daubert* is only persuasive when understood to endorse a flexible approach to judicial gate keeping and has never been fully adopted.<sup>9</sup> Although the Court largely agreed with the importance of relevance and reliability, the majority noted that Nevada law, as codified in NRS 50.275 suggests three elements for admission of expert witness testimony. These factors are intended to create an inquiry based in law, rather than scientific principles. First, the expert must be qualified. Second, testimony must assist the jury. Third, the expert may not testify beyond the scope of their expertise. The Court then strongly emphasized that factors are not meant to be exhaustive and judicial discretion is supported.

Lastly, the Court considered whether the lower court abused its discretion by admitting Montgomery's testimony. Because Montgomery possessed scientific credentials and training, she was a qualified expert. Testimony about succinylcholine's chemical property and presence in Augustine's urine was useful to cause of death and assisted the jury. Lastly, Montgomery discussed only particular information on scientific testing. Thus, the Court concluded that the lower court properly allowed Montgomery to testify.

#### *Jury instructions regarding spoliation of evidence*

Next, the Court considered whether Higgs' should have received a spoliation jury instruction. Citing *Daniels v. State*, the Court noted that the State's failure to preserve material evidence may support a spoliation instruction or dismissal, if the defendant can show bad faith or

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<sup>5</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (replacing the "general acceptance in the particular field" approach previously required by *Frye v. United States*).

<sup>6</sup> *Id.* at 588.

<sup>7</sup> *Id.* at 589.

<sup>8</sup> Such factors include whether the evidence has been tested, subjected to peer review and publication, has known potential error rates, or if it is generally or widely accepted. *Id.* at 593-94.

<sup>9</sup> *Hallmark v. Eldridge*, 124 Nev. \_\_\_, \_\_\_, 189 P.3d 646, 650 (2008).

prejudice.<sup>10</sup> Because Higgs did not allege bad faith and the State did not benefit from the alleged poor preservation, the Court quickly rejected this point.

#### *Accumulation of plain error*

Finally, the Court considered eleven instances of plain error that Higgs alleged occurred throughout the trial. Because defense counsel did not object to any of the errors when they occurred, the Court noted that reversal is only available where a defendant's substantial rights are affected by actual prejudice or there is a miscarriage of justice.<sup>11</sup> After reviewing the case, the Court held that none of the alleged errors rose to the high standard.

#### **Concurring/Dissenting Opinion**

Justice Cherry concurred with the majority's rejection of *Daubert*, but would have reversed Higgs' conviction. Justice Cherry reasoned that there was no earth-shattering reason to proceed to trial without fully completing discovery. Although defense counsel did not specifically claim the expediency caused prejudice, the defense expert's failure to testify resulted in sufficient harm because toxicology was critical to the State's case. Furthermore, because discovery is an important component of confrontation<sup>12</sup> and relates to an individual's capability to effectively cross-examine, it was a violation of Higgs' due process rights to deny a motion to continue the trial.

#### **Concurring/Dissenting Opinion**

Justice Saitta also concurred with the majority's rejection of *Daubert* and would have reversed Higgs' conviction for due process reasons. Opining that defense expert Walls needed more time to evaluate the FBI toxicology report, Justice Saitta reasoned that the lower court abused its discretion by failing to accommodate the defendant's right to discovery.

#### **Conclusion**

The Court denied all of Higgs' arguments on appeal and upheld the lower court's conviction. In order to resolve confusion about expert witness testimony the Court reaffirmed that judges have much discretion in determining whether to admit an expert's testimony. Although the factors listed in *Daubert v. Merrell Dow Company* may be persuasive authority, state law encourages judges to use legal principles to assess cases on their own facts.

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<sup>10</sup> *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting *Howard v. State*, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)).

<sup>11</sup> *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

<sup>12</sup> *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).