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Summary of Thompson v. State, 124 Nev. Adv. Op. 59

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Thompson v. State, 124 Nev. Adv. Op. 59 (December 10, 2009)¹

CRIMINAL LAW – INDICTMENT DISMISSAL & EVIDENCE

Summary

Appeal from a judgment of conviction by jury of conspiracy to commit a crime, burglary, robbery, first-degree kidnapping, and attempted grand larceny auto.

Disposition/Outcome

Affirmed. The district court did not err in denying Thompson’s motion to dismiss an indictment because the State’s election to dismiss one of two pending proceedings did not violate NRS 178.562(1). The district court did not abuse its discretion in: (1) denying Thompson’s motion to suppress evidence of pretrial photographic identification (2) allowing testimony about the artistic techniques the victim used to identify her assailant, and (3) admitting photographs of the victim’s injuries. The State presented sufficient evidence to support appellant’s convictions.

Factual and Procedural History

Coppola was exiting her car at her apartment when Thompson and one other assailant approached her and forced her back into her car. She nearly escaped, but Thompson forced her back into the backseat and lay on top of her as the other man attempted to start the car. Coppola escaped and ran to a neighbor’s home to call 911. Coppola gave the police a voluntary statement. That night, Coppola used her skills as an art student to remember Thompson’s appearance.

The State arrested Thompson and charged him with conspiracy to commit a crime, burglary, robbery, first-degree kidnapping, and attempted grand larceny auto. After a preliminary hearing, the State filed an information. A grand jury later returned an indictment for the same charges. The district court granted the State’s motion to dismiss the information. Thompson moved to dismiss the indictment, which the district court denied after holding a hearing. The district court denied Thompson’s motion to prevent Coppola from identifying him at trial.

Coppola viewed three photographic lineups 19 days following the attack and identified Thompson from the third lineup. At that time, she was ninety percent sure that the man she identified was Thompson, but she testified she was one hundred percent certain at trial. Coppola testified about the art techniques she used to remember Thompson and about her injuries. The district court admitted photographs of her injuries.

The apartment complex guard on duty the night of the attack, Bailey, testified he saw two African-American men before the attack, and identified Thompson at trial. The jury found Thompson guilty on all counts, and he appealed.

Discussion

Motion to dismiss indictment

Appellant argued the State violated NRS 178.562(1) by prosecuting him under the grand jury indictment after it had dismissed the information. The Court reviewed this issue de novo.²

In Nevada, the State may begin prosecution by: (1) a grand jury indictment, or (2) a criminal complaint, resulting from the filing of an information if the defendant is bound after a

¹ By Stephanie S. Buntin

² See *Camacho v. State*, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

preliminary hearing.³ The State is allowed to use both of the proceedings for the same offense, and later dismiss one of the vehicles for prosecution⁴ without prejudice to the defendant.⁵

In Nevada's only case on point, *Turpin v. Sheriff*, the State filed an information and a grand jury later returned an indictment.⁶ The State chose to proceed solely on the indictment and moved to dismiss the information.⁷ However, one of the charges in the information was not in the indictment.⁸ The Court held that the State was not in violation of NRS 178.562(1) for choosing to proceed only on the indictment, but held that it could not prosecute the charge that had not been included in the information.⁹ The Court interpreted NRS 178.562(1) to bar subsequent, not pending, prosecutions for the same offense.¹⁰

NRS 178.562(1) was amended in 1997 to include, under NRS 174.085, an exception to the bar against prosecution of an offense that is not already pending in another vehicle for prosecution.¹¹ It requires that a prosecutor who drops an indictment or information and subsequently decides to prosecute the same offense that was not in a pending proceeding show "good cause" and that a court provide an order supporting such an action.¹²

Here, the State did not violate NRS 178.562(1) by proceeding on both an indictment and an information, and later electing to dismiss the information and proceed solely on the indictment. Furthermore, the State did not trigger the exception in NRS 178.562(1) because it was not a subsequent prosecution of an offense that had been previously dismissed. Thus, the district court did not err by denying Thompson's motion to dismiss the indictment.

Motion to suppress identification

Thompson argued that Coppola's in-court identification should have been suppressed because the photographic lineup was unnecessarily suggestive and the identification was unreliable. In determining whether a pretrial identification is admissible, the Court considers: "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure."¹³ Photographic identifications are only unnecessarily suggestive if there is a "very substantial likelihood" that it will lead to "irreparable misidentification."¹⁴

All of the men in Coppola's photographic lineup had physical characteristics that matched the description she had given to the police. Coppola's assailant was wearing a white T-shirt, and although Thompson was wearing a white T-shirt in the photograph, one other man in the lineup was also wearing a white T-shirt. The Court held that the photographic identification

³ NEV. REV. STAT. § 173.015 (2007).

⁴ *Sheriff v. Dhadda*, 115 Nev. 175, 183, 980 P.2d 1062, 1067 (1999).

⁵ *Turpin v. Sheriff*, 87 Nev. 236, 238, 484 P.2d 1083, 1085 (1971).

⁶ *Id.* at 237, 484 P.2d at 1084.

⁷ *Id.* at 237-238, 484 P.2d at 1084.

⁸ *Id.* at 238-239 n.4, 484 P.2d at 1085 n.4.

⁹ *Id.*

¹⁰ *See id.*

¹¹ NEV. REV. STAT. § 178.562(1) (2007) states: "Except as otherwise provided in NRS 174.085, an order for the dismissal of the action, as provided in NRS 178.554 and 178.556, is a bar to another prosecution for the same offense."

¹² *See Id.* § 174.085 (2007).

¹³ *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989).

¹⁴ *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (quoting *Simmons v. United States*, 390 U.S. 377, 383-384 (1968)).

was not unnecessarily suggestive,¹⁵ because it was not substantially likely that Coppola identified the wrong person.¹⁶ Thus, the Court did not need to consider whether the photographic identification was reliable.¹⁷

Evidentiary issues

Thompson argued that Coppola's testimony regarding her artistic skills was inadmissible expert testimony. The Court will only reverse in the event of a clear abuse of discretion, because the lower court is better able to evaluate the facts and decide on evidentiary issues.¹⁸ Coppola testified that her artistic skills helped her remember the proportions of her assailant's face. The Court held that the testimony did not fit the definition of expert testimony under NRS 50.275.¹⁹ Therefore, the district court did not abuse its discretion in admitting the testimony.

The Court also rejected Thompson's argument that it was an abuse of discretion to admit photographs of Coppola's injuries because they were not relevant. Accordingly, the Court held that the district court did not abuse its discretion in ruling that the photographs were relevant, because they were needed to show that Thompson forced Coppola into the car.²⁰ Furthermore, Thompson had not argued in his motion in limine to exclude the photographs that they were unfairly prejudicial, therefore he was not allowed to assert this argument on appeal.²¹

Sufficiency of the evidence

The Court rejected Thompson's argument that the State had failed to prove the elements of the crimes for which he was charged. The State must present a minimum threshold of evidence upon which any rational trier of fact could find the elements of the crime beyond a reasonable doubt.²² Coppola identified Thompson in a photographic line-up and in court, which was corroborated by Bailey. Thus, the Court held that the State had presented sufficient evidence for any rational juror to find that he was one of the assailants beyond a reasonable doubt.

Concurring Opinion (Cherry, J.)

Justice Cherry emphasized the distinction between cases where *Turpin* applies and cases where NRS 174.085 applies. NRS 174.085 applies only when a prosecutor dismisses an indictment or information with no other pending vehicle for prosecution, and then subsequently

¹⁵ See *Odoms v. State*, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986).

¹⁶ See *Cunningham*, 113 Nev. at 904, 944 P.2d at 265.

¹⁷ See *Bias*, 105 Nev. at 871, 784 P.2d at 964.

¹⁸ *Krause Inc. v. Little*, 117 Nev. 929, 934, 34 P.2d 566, 569 (2001) ("The district court is in a better position than this court to determine the helpfulness of proposed testimony in light of the material facts in issue").

¹⁹ NEV. REV. STAT. § 50.275 (2007) states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may testify to matters within the scope of such knowledge."

²⁰ See *Dutton v. State*, 94 Nev. 461, 464, 581 P.2d 856, 858 (1978) (noting that "[t]he state is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates the defendant or defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible" (internal quotation omitted)) *overruled on other grounds by Gray v. State*, 100 Nev. 556, 558 n.1, 688 P.2d 313, 314 n.1 (1984).

²¹ *Geer v. State*, 92 Nev. 221, 224, 548 P.2d 946, 947 (1976).

²² *Mejia v. State*, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

decides to prosecute the same charges. It does not apply when a prosecutor dismisses an indictment or information while there is still another pending indictment or information.

Conclusion

Thompson's arguments were without merit and, therefore, the Court affirmed the district court's judgment of conviction. Further, the Court reaffirmed its holding in *Turpin*, that NRS 178.562(1) does not preclude the State from electing to dismiss one course of prosecution and pursue another, when there are two pending proceedings for the same offense.