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Summary of Pineda v. State, 120 Nev. Adv. Rep 24

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Pineda v. State, 120 Nev. Adv. Rep 24, 88 P.3d 827 (2004).[1]

CRIMINAL LAW – APPEALS

Summary

Appellant appealed his jury conviction of second-degree murder in the Second Judicial District Court. Appellant raised three issues on appeal. They were:

(1) Whether the defendant waived his right to appeal the court's ruling in limine that his prior felony conviction could be used for impeachment purposes when *he introduced his convictions* during direct examination.

(2) Whether the proper "self-defense" jury instruction was provided to the jury, over the defendants proposed, but rejected, alternative jury instructions.

(3) Whether expert testimony is admissible during the penalty phase, when the prospective expert has only generalized knowledge regarding the specifics of the case.

Disposition/Outcome

The Nevada Supreme Court held that a defendant does not waive his right to appeal when he introduces potentially adverse evidence that was determined admissible during pre-trial motions.[2] The court also held that the district court failed to provide proper jury instructions with respect to the defendants "self-defense" claim.[3] Furthermore, the court held that expert testimony is admissible even if their expertise is generalized versus specific.[4] Reversed and remanded for a new trial.

Factual and Procedural History

On December 2, 1999 a physical altercation ensued between the defendant, Pineda, and the victim, Jimenez.[5] Several hours later the victim died in the hospital as a result of stab wounds. Pineda was charged with and convicted of second-degree murder with use of a deadly weapon, resulting in two consecutive life terms.[6]

Pineda's primary defense was that of self-defense.[7] Pineda and others testified during the trial that Pineda grew-up in "a gang and drug subculture" during his adolescent years in Southern California.[8] Pineda was both a victim and perpetrator of violence and a twice-convicted felon.[9]

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[1] By James Davis.
[2] Pineda v. State, 88 P.3d 827, 831 (Nev. 2004).
[3] *Id.* at 833.
[4] *Id*. at 834.
[5] *Id.* at 829.
[6] *Id.* at 828 – 29.
[7] *Id.* at 830.
[8] *Id.* at 829.
[9] *Id.* at 829 – 30.

Pineda moved to Nevada in 1999 where he maintained relatively stable employment but was the victim of attacks on two separate occasions before the altercation on the night in question.[10]

On the night of the altercation, Pineda was socializing with a number of acquaintances, including the victim. He introduced himself using his California "gang alias" in an attempt, according to Pineda, to diffuse any suspicion of rival gang membership. Tensions escalated within the group during the evening when Pineda refused to commit to "back-up" members of the group should problems arise. Pineda's lack of commitment caused a dispute between Pineda and the victim. The dispute escalated in a restaurant parking lot when the victim began advancing on Pineda. Although warnings were given, according to Pineda, the victim continued his advance resulting in his ultimate demise.

Issue I

When a court rules on a motion in limine to allow prior felony convictions to be used for impeachment purposes, does a defendant waive his right to appeal when he introduces his prior convictions during direct examination?

Commentary I

No, as long as the issue "has been fully briefed, the district court has thoroughly explored the objection during a hearing on the pretrial motion, and the district court has made a definitive ruling" then the issue has been properly preserved for appeal.[11]

Law in Other Jurisdictions

Jurisdictions are split on this issue. Some jurisdictions have adopted the rule established in *Ohler v. United States.*[12] [13] In *Ohler* the Court "concluded that a defendant waives his right to appellate standing concerning admission of prior convictions when he preemptively introduces the prior convictions after an unfavorable ruling in limine."[14] Courts that have followed the *Ohler* rule have done so because the ruling may be revisited during trial and is merely speculative during trial.[15]

Other states have rejected the *Ohler* rule because the "trial court is fully aware of the proposed evidence and law when ruling on such evidence in limine."[16] In addition, it would be a poor trial tactic for defense attorneys not to attempt to minimize the effects of prior bad acts testimony before introduction by the prosecution.[17]

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[10] *Id*. at 829.
[11] *Id*. at 831.
[12] 529 U.S. 753, 758 (2000).
[13] *See* Rivers v. State, 792 So.2d 564, 566-67 (Fla.Dist.Ct.App.2001); People v. Rodgers, 645 N.W.2d 294, 302 (Mich App. 2001); State v. Frank, 640 N.W.2d 198, 202-203 (Wis. Ct. App. 2001).
[14] *Pineda*, 88 P.3d at 831.
[15] *Id.* at 831.
[16] *Id.; See Ohler*, 529 U.S. at 762-63 (Souter, J. dissenting); State v. Keiser 807 A.2d 378, 387 (Vt. 2002); State v. Thang, 41 P.3d 1159, 1167-68 (Wash. 2002); State v. Daly, 623 N.W.2d 799, 801 (Iowa 2001).
[17] *Pineda*, 88 P.3d at 831.

Effect of *Pineda* on Current Law

In criminal proceedings, defendants no longer have to object to evidence when presented at trial if the court has already ruled on the issue during pre-trial motions after being fully briefed and argued.

Issue II

Was the jury given a proper instruction with respect to the defense's claim of self-defense?

Commentary II

No, the jury was given an incorrect jury instruction for Pineda's self-defense claim. The jury was given the following instruction:

> The defendant has offered evidence of having acted in self-defense when Julio Jimenez was killed. Self-defense exists when the killing is committed in the lawful defense of the slayer when there is reasonable ground to apprehend a design on the part of the person slain to do some great personal injury to the slayer, *and there is imminent danger of such design* being accomplished. A bare fear of such a threat shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.[18]

This instruction is in error because it may confuse the jury as to the requisites to sustain a claim of self-defense. This instruction is confusing because it appears to require that *imminent danger* must be proven. However, the Court rejected this reasoning in *Culverson v. State*[19] and reaffirms that a proper self-defense instruction is: "self-defense is a defense although the danger to life *or* personal security may not have been real, if a person in the circumstances and *from the viewpoint of the defendant* would reasonably have believed that he was in imminent danger of death or great bodily harm."[20]

Issue III

Can a defendant offer expert testimony during the penalty phase, when the prospective expert has only generalized knowledge regard the specifics of the case?

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[18] *Id*. at 832 (emphasis added).
[19] 797 P.2d 238, 239 – 40.
[20] *Pineda*, 88 P.3d at 833 (emphasis added).

Commentary III

Yes, interpreting Nevada Revised Statute 50.275[21] the court held that "the defense may elicit evidence … from a qualified 'gang' expert to testify generally to the violent nature of gang members."[22] The court went on to state that an expert's testimony should not be withheld because of their lack of familiarity with a witness.[23]

Law in Other Jurisdictions

This ruling is consistent with holdings by other courts in the Ninth Circuit. In *U.S. v. Johnson*, the Ninth Circuit held that "[g]overnment agents or similar persons may testify as to general practices of criminals to establish defendants' modus operandi."[24] Arizona, Utah, and Idaho courts have held similarly. [25]

Conclusion

When a motion in limine is brief and argued, a party does not lose their right to appeal the ruling by introducing the subject evidence during trial. Further, a proper self-defense jury instruction must include a provision that states in part that, "self-defense is a defense although the danger to life *or* personal security may not have been real, if a person in the circumstances and *from the viewpoint of the defendant* would reasonably have believed that he was in imminent danger of death or great bodily harm."[26] Finally, expert witness' testimony, during the penalty phase of a trial, is admissible even if the witness only has generalized knowledge of the subject matter.

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[21] The full text of Nevada Revised Statute 50.275 reads: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to 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."

[22] *Pineda*, 88 P.3d at 833.

[23] *Id.*

[24] U.S. v. Johnson, 735 F.2d 1200, 1203 (9th Cir. 1984).

[25] *See* State v. Salazar, 557 P.2d 552 (Ariz.App.Div.2 1976); State v. Hester, 760 P.2d 27 (Idaho 1988); State v. Rothlisberger, 503 Utah Adv. Rep. 19 (Utah.App. 2004).

[26] *Pineda*, 88 P.3d at 833 (emphasis added).