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Quisano v. State, 132 Nev. Adv. Op. 9 (February 18, 2016)

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CRIMINAL PROCEDURE: DUTY TO DISCLOSE

Summary

This court affirmed an appeal from a judgment of conviction, pursuant to an *Alford*² plea, of voluntary manslaughter and child abuse, neglect, or endangerment with substantial bodily harm holding:

- (1) *Brady* violations do not occur when the evidence in question is not favorable to the defendant;
- (2) Prosecutors have a strict duty to disclose under their own open-file policy until sentencing proceedings; and,
- (3) Media outlets require a written by the district court to electronically cover proceedings unless nonconstitutional or harmless error results in such coverage.

Background

On June 6, 2013, under appellant Jonathan Quisano's sole supervision, Khayden Quisano (Quisano and his longtime girlfriend Christina Rodrigues's three-year-old child) died as a result of injuries associated with blunt-force trauma to the head. Quisano maintained that Khayden fell off a couch and hit his head on tile floor; however, Quisano provided conflicting accounts of the circumstances, as did medical experts. Quisano had a documented history of child abuse and neglect—one his children already died and Khayden had suffered a broken leg and ribs from nonaccidental trauma his death.

On June 25, 2014, before his trial, Quisano pled guilty pursuant to *Alford*, to voluntary manslaughter and child abuse, neglect, or endangerment with substantial bodily harm. The State retained the right to argue and agreed not to argue a minimum sentence exceeding ten years. After entry of Quisano's guilty plea, but before sentencing, the State obtained an affidavit relevant to Quisano's case but did not disclose the affidavit to Quisano. The affidavit was from Clark County Department of Family Services (DFS), dated September 4, 2014, and swore that Christina Rodrigues said Khayden died as a result of physical abuse by Quisano, that he should be punished, and should go to prison.

On October 7, 2014 Quisano was sentenced. Christina Rodrigues provided a favorable oral statement to the court on Quisano's behalf, under the guise of a victim-impact statement—that Quisano was kind, loving, caring, responsible, and everyday showed love and affection, and sending him to prison will harm more than help. The State then used the affidavit to impeach Christina Rodrigues. The district court sustained Quisano's objections regarding the affidavit noting that the affidavit discussed testimony before another forum. Quisano then argued that the

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² See *North Carolina v. Alford*, 400 U.S. 25 (1970)

State failed to disclose the affidavit and requested the district court to designate the affidavit as an exhibit for the record. The district court did.

Nonetheless, although the district court had concerns about the conflicting medical evidence, Quisano's prior record of child abuse convinced the district court to sentence Quisano to serve a prison term of 4-10 years for voluntary manslaughter and a consecutive prison term of 6-19 years for child abuse, neglect, or endangerment with substantial bodily harm.

At sentencing, the district court permitted the *Las Vegas Review Journal* (LVRJ) to provide electronic coverage even though the media outlet did not timely file a request for permission. The district court reasoned that permitting the outlet to provide electronic coverage of the proceeding would facilitate public oversight over the judicial process. Generally, the district court grants all requests to provide electronic coverage and would have granted the request had the LVRJ filed one. The district court saw no prejudice in allowing the reporter record the proceeding.

Discussion

1. Quisano's *Brady*³ argument failed because the affidavit was not favorable to him.

Quisano argued the State withheld impeachment evidence in violation of *Brady* by failing to disclose the affidavit. On the other hand, the State argued that the affidavit was neither favorable nor useful to impeach at trial.

A defendant must prove the following three elements to establish a *Brady* violation: (1) the State withheld or failed to disclose evidence, (2) that was favorable to the defense, and (3) prejudice.⁴ Favorable evidence includes evidence that "provides grounds for the defense to attack the reliability, thoroughness, and good faith of police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks."⁵

In the affidavit, a DFS employee swore Rodrigues acknowledged that Quisano was responsible for death of their son and that Quisano should be imprisoned. There was no prejudice because the disclosure of the affidavit would not have provided Quisano with a basis to attack police investigation, impeach the State's witnesses, or bolster his case against prosecutorial attacks. Moreover, the affidavit was not exculpatory.⁶

Because the affidavit was not favorable, Quisano's *Brady* argument fails and this Court found no need to consider the remaining factors.

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴ *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 36 (2000).

⁵ *Id.*

⁶ *King v. State*, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000) (defining exculpatory evidence "as evidence that will explain away the charge").

2. The State's failure to disclose the affidavit, under an open-file policy, did not prejudice Quisano and therefore, did not warrant a new sentencing hearing.

Quisano argued that the State's open-file policy subjected the State to a duty to disclose all evidence in its possession; and that the State's failure to comply to the duty unfairly surprised and prejudiced him so he is entitled to a new sentencing hearing.

This court concluded the State's discovery policy on each Receipt of Copy constituted an open-file policy under ordinary contract principles.⁷ Under *McKee v. State*⁸, a prosecutor's open-file policy created a duty to disclose all inculpatory or exculpatory evidence when the defendant reasonably relied on the that policy. The State argued that *McKee* does not extend through sentencing.

Nonetheless, this court looked to a capital case, *Floyd v. State*,⁹ and how it applied discovery statutes¹⁰ to both guilt and penalty phase. The phrase "case in chief" as used in the discovery statutes included both guilt and penalty phase.¹¹ Therefore, duty to disclose evidence remains until proceedings fully conclude in trial court. Further, the State routinely discloses discovery that is inculpatory in nature in cases involving enhanced penalties like DUI, domestic violence, and habituality. Defendants must also have an opportunity to review materials prior sentencing because this opportunity enhances judicial efficiency by avoiding delays caused by surprise evidence.¹² The State's failure to disclose may impact a sentence so a defendant's reliance on an open-file policy following a plea or jury verdict continues until sentencing concludes.¹³ Thus, the duty to disclose under *McKee* applies to trial and sentencing in a noncapital case. When the State agrees to disclose all evidence in possession, the defendant may reasonably rely on that promise.¹⁴

A defendant may reasonably rely on an open-file policy beyond guilty plea when the policy explicitly provides that this invitation is ongoing and does not state the policy concludes upon entering guilty plea. Therefore, a defendant would reasonably expect disclosure continues until final judgment. Thus, for reasons stated, the duty to disclose in *McKee* extends through entry of judgment of conviction.

In Quisano's case, the State had an open-file policy subject to ongoing duty to disclose all evidence in its possession, repeated references to that policy, and regular discovery disclosures. So Quisano could reasonably rely, under the State's open-file policy, on the State's promise to

⁷ *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1, 079 (194) (explaining that plea agreements are subject to contract principles); *McKee v. State*, 112 Nev. 642, 647-48, 917 P.2d 940, 943-44 (1996) (open-file policy created expectation that prosecutor would disclose all available evidence—whether inculpatory or exculpatory; failure to disclose an inculpatory photograph was misconduct).

⁸ *Id.*

⁹ 118 Nev. 110, 178 P.3d 154 (2008).

¹⁰ NEV. REV. STAT. 174.234 and NEV. REV. STAT. 174.245. *Id.* at 167, 42 P.3d at 257.

¹¹ *Id.*

¹² *See* NEV. REV. STAT. 169.035 (statutes shall be "construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.")

¹³ *See* *Miller v. Hayes*, 95 Nev. 927, 929, 6504 P.2d 117, 118 (1979) (holding the district court's jurisdiction over the defendant continues until the judgment becomes final).

¹⁴ *McKee*, 112 Nev. At 648, 917 P.2d at 944.

provide discovery as it becomes available. Yet, the State failed to disclose the affidavit to Quisano prior to its use at Quisano's sentencing hearing and therefore engaged in misconduct.¹⁵

This court was mindful that high case volumes and differing case management systems may cause a prosecutor's failure to provide discovery and such failure may be unintentional rather than willful or intentional. Thus, district courts must make factual findings whether violations are inadvertent, willful, or intentional. Without finding willfulness or intent, courts should not classify unintentional violation as prosecutorial misconduct.

Nevertheless, the affidavit did not prejudice Quisano.

- (1) The district court sustained Quisano's objection after the State asserted to Rodrigues "you went to court one time and asked for one thing, and you're coming to court now and asking for the complete opposite";
- (2) The State relied on Quisano's prior record of child abuse and not the State's impeachment of Rodrigues;
- (3) The district court did not place value on the affidavit, only marked the affidavit as a court exhibit, and expressed Quisano's history of child abuse in Hawaii was particularly influential in its sentencing determination;
- (4) Most importantly, the district court sentenced Quisano according to the guilty plea agreement.

Thus, although the failure to disclose the affidavit violated the State's open-file policy, there was no prejudice or miscarriage of justice.¹⁶ Therefore, reversal of Quisano's sentence was not warranted on this issue.

3. The district court's err to permit the *Las Vegas Review Journal* to record Quisano's sentencing hearing did not contribute to the district court's sentencing determination and Quisano was not entitled to relief on this basis.

Quisano argued that this court remand because the district court erred in permitting the LVRJ to record the hearing without timely request for permission, written order, or make particularized findings. The State argued no err because courts grant untimely requests and do not need to make explicit findings regarding SCR 230(2) on the record.

A district court's failure to follow procedural requirements in allowing electronic coverage result in err when resulting in nonconstitutional and harmless error.¹⁷ The error must have substantially influence the sentencing determination or injure the defendant's sentence.¹⁸

¹⁵ See *McKee*, 112 Nev. At 648, 917 P.2d at 944 (concluding that the prosecutor engaged in misconduct by failing to comply with an open-file policy.)

¹⁶ *Valdez v State*, 124 Nev. 1172, 1190, 196 P.3d 465, 447 (reversal is not warranted under plain-error standard unless error affects defendant's substantial rights).

¹⁷ See NEV. REV. STAT. 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.")

¹⁸ See *Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (concluding that failure to apply the procedural safeguards for juror questioning constitutes nonconstitutional error and applying the federal test set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946)).

The United States Supreme Court has not created a per se constitutional rule against electronic coverage of court room proceedings.¹⁹ However, technological advancements have limited the disruption of cameras and states have safeguarded against the worries of earlier case law.²⁰

In Nevada, under SCR 230(2), public proceedings are presumptively subject to electronic coverage. Under SCR 240(1), participants in courtroom proceedings need not consent to electronic coverage. Under SCR 230(1), media outlets must file a written request at least 24 hours before electronic coverage of the proceeding, but the district court may grant requests to provide electronic coverage on shorter notice or waive the requirement for written request. “A judge shall make particularized findings on the record when determining whether electronic coverage will be allowed.”²¹ The written order must be made part of the record.²²

For Quisano, the district court permitted the LVRJ to provide electronic coverage of the sentencing hearing despite the LVRJ’s failure to timely file a request for permission—such determination was expressly authorized by SCR 230(1). However, the district court failed to make particularized findings on the record based on the factors in SCR 230(2), such as potential prejudice, public benefit, and physical adequacy of the courtroom, when it did not issue a written order granting the outlet’s request.

The district court erred in complying with the requirements, but such error was harmless. The record did not suggest the error contributed to sentencing determination and Quisano acknowledged that the presence of the camera did not prejudice him. This court also agreed with the district court that electronic coverage provides potential benefit to the public.²³ Therefore, this court found that Quisano’s argument failed.

¹⁹ Chandler v. Florida, 449 U.S. 560, 573, 582-83 (1981).

²⁰ *Id* at 576-77.

²¹ SCR 230(2): (a) the impact of coverage upon the right of any party; (b) the impact of coverage upon right of privacy on any party or witness; (c) impact of coverage upon safety and well-being of any party, witness, or juror; (d) the likelihood that coverage would distract or detract participants from dignity of proceedings; (e) the adequacy of physical facilities of the court for coverage; and (f) any other factor affecting fairness.

²² SCR 230(1).

²³ Such as (1) access to and knowledge of the justice system; (2) public oversight of the judicial process; (3) increased awareness to societal problems; and, (4) protection of defendant’s rights.

Conclusion

- (1) The prosecutor's failure to disclose the affidavit did not violate *Brady* because the affidavit was not favorable to Quisano;
- (2) Even though the prosecutor failed to disclose the affidavit regarding the State's open-file policy, the misconduct did not prejudice Quisano because the district court did not rely on the affidavit in sentencing Quisano according to the guilty plea;
- (3) Even though the district court failed to write an order on the particularized findings on the record regarding the factors in SCR 230(2) or to grant permission for the *Las Vegas Review-Journal* to provide electronic coverage of the sentencing hearing, any error was harmless because it did not contribute to the sentencing determination.

Affirmed.

Concurrence–Dissent

Agreed with most things except the open-file policy. The majority wrongly reasons that because several statutes²⁴ require the State to provide certain types of discovery in connection with certain types of sentencing proceedings, that the State's open-file policy should require the same disclosure in cases not covered by those statutes. Just because the legislature governs some discovery obligations does not mean the obligations govern prosecutors in cases the Legislature chose not to address. If anything, legislative intent did not create a general rule of discovery governing all criminal cases. The judiciary should not have the power to interpret the prosecutorial policy the way the majority had.

As an intermediate appellate court, this Court is bound by stare decisis and should not consider issues raised for first time on appeal²⁵ and should be limited to factual findings made by the district court. The courts should give deference to the executive branch for agency decisions and follow the legislature's statutes that are clear and unambiguous. The prosecutor's open-file policy is fundamentally an executive function and this Court should look at the district attorney who wrote it intended to give it that meaning. A court cannot force a prosecutor to adopt a policy he or she does not want.

Here, the prosecutorial policy overlaps with a criminal case. So the district court could sanction a prosecutor, exclude evidence from trial, or void a conviction if a prosecutor intentionally violated the policy.²⁶ But a court cannot write or amend laws, regulations, or policies for other branches of the government.²⁷

The dissent was also concerned whether the court possesses the power to interpret the meaning of an executive branch policy as a matter of law de novo. If interpretation of the policy

²⁴ NEV. REV. STAT. 174.234, NEV. REV. STAT. 174.245, NEV. REV. STAT. 484C.400(2), NEV. REV. STAT. 200.485(4), and NEV. REV. STAT. 207.016(2).

²⁵ *Stone v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

²⁶ *See McKee v. State*, 112 Nev. 642, 648, 917 P.2d 940, 944 (1996) (when prosecutor represented that he would comply with open-file policy but didn't, he committed "an act of deception" that misled the defendant and warranted reversal of criminal conviction.).

²⁷ *See Holiday Ret. Corp v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012).

or statute is ambiguous then the court must assess the intent of the drafter. There is no publically available history or debate to analyze the intent of the drafter for the open-file policy so it is unclear if this Court has the power to interpret the policy. The dissent does not assume this Court had the power to engage in judicial construction of the prosecutor's policy and even if the Court did, should give considerable deference to the district attorney rather than as a question de novo.

The open-file policy goes further than *Brady* or *Giglio* so if the district attorney decides its voluntary discovery policy should expire before sentencing, then the courts should do nothing if it does not violate existing law, the constitution, or intrude judicial functions. Here it did not. There was no *Brady* or *Giglio* violation. The majority gave no deference to the district attorney. Quisano's sentence was not affected by the open-file policy. And nobody asserts that the policy is illegal, unconstitutional, or ambiguous.

Thus, the content and meaning of the prosecutor's policy is none of the court's business.