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## State v. Carroll, 132 Nev. Adv. Op. 23 (Apr. 7, 2016)

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## CRIMINAL PROCEDURE: SUPPRESSION OF STATEMENTS

### **Summary**

Defendant Deangelo Carroll appealed from a conviction for conspiracy to commit murder and first-degree murder with use of a deadly weapon. The Supreme Court of Nevada found the district court erred in denying Carroll's motion to suppress his statements to police because the police subjected Carroll to a custodial interrogation, without advising him of his *Miranda*<sup>2</sup> rights. The Court affirmed however, finding the error harmless beyond a reasonable doubt.

### **Background**

Carroll was an employee at the Palomino Club. Palomino Club management recruited Carroll to "knock off" a prior employee, Timothy Hadland, who was spreading negative rumors about the club. Carroll recruited Kenneth Counts as the individual who would "knock off" the former employee. Carroll contacted Hadland on the night of the murder and arranged to meet Hadland that evening. When Hadland noticed Carroll in the Palomino Club Van he walked to the driver's side window where Carroll was sitting. As Hadland and Carroll talked, Counts exited the van through the side door, snuck around to the front, and fired two shots into Hadland's head.

The evening after Hadland's murder, homicide detectives contacted Carroll at the Palomino club. Carroll agreed to speak with detectives and he was driven to the homicide office for questioning. The detectives did not give Carroll *Miranda* warnings before questioning him. Carroll implicated himself, Palomino Club management, and Counts in Hadland's murder. Carroll also volunteered to wear a recording device to corroborate his story by speaking with the Palomino Club management. The information obtained from these recordings allowed the State to charge three members of Palomino Club management for their roles in Hadland's murder.

After detectives finished obtaining information and evidence from Carroll, they arrested him. As a result, the State charged Carroll with conspiracy to commit murder and murder with use of a deadly weapon. A jury returned a guilty verdict on all charges. Carroll appealed.

### **Discussion**

On appeal, Carroll argued: 1) the wire recordings should not have been admitted against him at trial because they were not relevant, were prejudicial, consisted of inadmissible hearsay, and violated his right against self-incrimination; 2) the district court erred when it admitted his statements to the detectives because the detectives violated *Miranda* and coerced his statement; 3) there was insufficient evidence to support the convictions for conspiracy to commit murder, first degree murder, and the deadly weapon enhancement; and 4) cumulative error warrants reversal.

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<sup>1</sup> By Jessie Folkestad.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

## *Wire recordings*

### *Whether the relevance of the recordings was substantially outweighed by unfair prejudice*

Carroll contended the district court abused its discretion by admitting wire tape recordings because they were not relevant to his guilt or innocence and were unfairly prejudicial. Carroll argued he played a role assigned to him by detectives, and jurors would not be able to discern which statements he fabricated, and which the detectives fabricated.

At the outset, the Court dismissed the State's contention that because Carroll referenced the recordings in his closing argument he cannot attack their relevance. The Court reviewed for plain error<sup>3</sup> because Carroll did not object. The Court found Carroll's relevancy argument meritless under NRS 48.015 because a review of the wire recordings demonstrated relevance as the facts supported both Carroll's position that there was never meant to be a killing, and the State's that a killing was intended.<sup>4</sup> The Court also found Carroll's prejudice argument meritless as the evidence was extremely probative based on the fact that the central issue of the case was Carroll's intent. The Court explained that any prejudice was explained away when the jury heard the proper context of Carroll's statements. The Court found Carroll could not demonstrate plain error.

### *Whether Carroll's statements were inadmissible hearsay*

Carroll argued his statements on the recordings were not his own, but those of a state actor. The Court reviewed for plain error because counsel Carroll did not object at trial based on hearsay.<sup>5</sup>

The Court found the statements were not inadmissible hearsay because they were offered to provide context to the statements of the Palomino Club managers. The Court noted that even if the statements were provided for their truth, they would still be admissible as statements of a party under NRS 51.035(3)(a). The Court held the statements admissible because there was no evidence indicating the police instructed Carroll what to say and they were not offered to prove their truth.

### *Whether the statements of the managers of the Palomino Club were made in furtherance of the conspiracy.*

Carroll contended the statements of the Palomino Club's managers on the wire recordings were not admissible because the statements were not made in furtherance of the conspiracy. Carroll also contended that because he withdrew from the conspiracy by acting as the State's agent, the statements were not made by coconspirators and were therefore inadmissible.

The Court found Carroll's argument that he was no longer part of the conspiracy unpersuasive because a defendant need not be a member of the conspiracy at the time the statement was made, so long as the declarant was part of the conspiracy when the statement was made and the defendant was a part of the same conspiracy at some point.<sup>6</sup> The Court noted Carroll did not make his withdrawal from the conspiracy known to the coconspirators nor did he make a "clean

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<sup>3</sup> See *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006).

<sup>4</sup> NEV. REV. STAT. § 48.015 ("any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.").

<sup>5</sup> See *Baltazar-Monterrosa*, 122 Nev. at 614, 137 P.3d at 1142.

<sup>6</sup> See *McDowell v. State*, 103 Nev. 527, 529—30, 746 P.2d 149, 150 (1987)

breast” to authorities when he told multiple stories to detectives in an attempt to minimize culpability.<sup>7</sup>

The Court also found Carroll’s argument that the statements were not made in furtherance of the conspiracy to be meritless as Carroll’s citation to *Davis*<sup>8</sup> was inapplicable. The Court concluded the statements were admissible because even if Carroll had withdrawn from the conspiracy, the other members had not, rendering the statements in furtherance of the conspiracy.

*Whether the club managers’ statements violated Carroll’s right against self-incrimination*

Carroll argued the admission of the managers’ statements violated his right against self-incrimination because he had to choose between forfeiting his right to explain the statements or his right to not testify. Carroll contended this violated his substantial rights because the State referenced his fabricated statements as proof that he intended to kill Hadland rather than to commit battery. The Court held Carroll’s constitutional rights were not violated because the statements did not force him to testify and both parties provided the proper context for the statements.

The Court noted that although Carroll did not object nor preserve the issue for appeal, because it is a constitutional issue, it may be addressed.<sup>9</sup> Carroll argued the admission of the wire recordings put him in a difficult place in deciding whether to testify. The Court noted, however, that the same may be said about essentially every incriminating piece of evidence offered by the State and facing a difficult decision to testify, does not violate a defendant’s constitutional rights.<sup>10</sup> Because Carroll did not testify and was still able to put the wire recordings into their proper context, the Court determined Carroll failed to demonstrate his right against self-incrimination was violated. The Court concluded the district court did not abuse its discretion when it admitted Carroll’s or his coconspirators’ statements from the wire recordings.

*Police interrogation*

*Whether police coerced Carroll’s statement*

Carroll argued the police coerced his statement by promising him leniency<sup>11</sup> if he implicated himself in Hadland’s murder. The primary consideration for determining voluntariness is the “totality of the circumstances”<sup>12</sup> and “whether the defendant’s will was overborne when he confessed.”<sup>13</sup> Factors to consider include: “the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the

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<sup>7</sup> *United States v. Patel*, 879 F.2d 292, 294 (9th Cir. 1989) (for withdrawal to limit a conspirator’s liability...the defendant must take affirmative steps by making a “clean breast” to the authorities).

<sup>8</sup> *State v. Davis*, 528 P.2d 117 (Or. Ct. App. 1974).

<sup>9</sup> *See McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 117, 1158 (1983).

<sup>10</sup> *See Dzul v. State*, 118 Nev. 681, 693, 56 P.3d 875, 883 (2002).

<sup>11</sup> The question decided by the Court was whether the police promised Carroll leniency when they promised to take him home.

<sup>12</sup> *Blackburn v. Alabama*, 361 U.S. 199, 206 (1990).

<sup>13</sup> *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

deprivation of food or sleep.”<sup>14</sup> In considering the *Passama* factors, the Court determined the police did not coerce Carroll’s statement.

Carroll further argued the police promised him leniency and that he would not go to jail. However, the Court found the record did not indicate any such promises. The Court acknowledged that Carroll may have misunderstood the detectives’ statements as a promise of leniency, the promise of taking Carroll home at the conclusion of the interrogation does not render the statements coerced or involuntary.

#### *Whether Carroll was in custody for Miranda purposes*

Carroll argued the police violated his *Miranda* rights. The question for the Court was whether Carroll was in custody for purposes of *Miranda* and, if so, whether he properly received *Miranda* warnings. A custody determination is reviewed *de novo*<sup>15</sup> and because the district court was remiss in their duty and failed to issue an order containing findings of fact and conclusions of law, this court cannot give deference to any factual findings.<sup>16</sup>

*Miranda* warnings are required “when a suspect is subjected to custodial interrogation”<sup>17</sup> and statements made during a custodial interrogation may be admitted at trial only if *Miranda* rights are administered and validly waived.<sup>18</sup> Custody is determined by the totality of the circumstances, “including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning.”<sup>19</sup>

#### *Site of the interrogation*

The Court determined the site of the interrogation indicated Carroll was in police custody when he gave his statement because the questioning was conducted after Carroll was transported in an official police vehicle to the homicide office as opposed to the Palomino Club where Carroll was located or his residence. This conclusion was furthered by the detective’s admission that the homicide office was a “more intimidating place to question a witness.” The interrogation room was small, had one door, and two detectives were placed between Carroll and the door. Importantly, because police drove Carroll to the office for questioning, Carroll could not terminate the interrogation or leave the office unless the detectives agreed and gave him a ride home.

The Court also distinguished the site of interrogation in *Silva*<sup>20</sup> from Carroll’s. In *Silva*, the Court held that questioning a suspect at a police station does not automatically mean that he was in custody.<sup>21</sup> However, the Court noted the circumstances in *Silva* and the circumstances in Carroll’s interrogation were different. Specifically, *Silva* was permitted to speak with his sister and the police did not make any promises.<sup>22</sup> Carroll on the other hand, was not allowed to use his phone, the police took away his phone, the police did not take him home when he indicated he

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<sup>14</sup> *Id.*

<sup>15</sup> *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006).

<sup>18</sup> *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

<sup>19</sup> *Taylor v. State*, 114 Nev. 1071, 1081—82, 968 P.2d 315, 323 (1998).

<sup>20</sup> *Silva v. State*, 113 Nev. 1365, 951 P.2d 591 (1997).

<sup>21</sup> *Silva*, 113 Nev. at 1370, 951 P.2d at 594.

<sup>22</sup> *Id.*

wanted to go home, and the detectives promised Carroll they would confirm his claim that he did not murder Hadland and was acting under direction of Palomino Club management. Thus, the Court determined *Silva* was distinguishable and the site of interrogation suggested custody.

*Objective indicia of arrest*

Objective indicia of arrest comprise the following:

1) whether the suspect was told that the questioning was voluntary or that he was free to leave; 2) whether the suspect was not formally under arrest; 3) whether the suspect could move about freely during questioning 4) whether the suspect voluntarily responded to questions; 5) whether the atmosphere of questioning was police-dominated; 6) whether the police used strong-arm tactics or deception during questioning; and 7) whether the police arrested the suspect at the termination of questioning.<sup>23</sup>

1) The Court found the first factor weighed in favor of Carroll based on the following: The objective indicia of arrest indicated Carroll was in police custody when he gave his statement; the interrogating detectives did not tell Carroll he was free to leave; at the beginning of Carroll's interview the detective informed him he was not under arrest "right now"; police did not provide *Miranda* warnings until the interrogation was two-thirds finished and Carroll had implicated himself in the murder; and Carroll repeatedly informed detectives that he wanted to go home prior to making the implicating statements, but these requests were refused.

2) The Court found the second factor weighed in the State's factor because police informed Carroll he was not under formal arrest when he was questioned.

3) The Court found the third factor weighed in Carroll's favor because the interrogation room was very small, prevented Carroll from moving freely, and he could not leave the room without asking the detectives to move.

4) The Court found the fourth factor weighed in Carroll's favor because the transcript of the statement demonstrates he voluntarily responded to the detective's questions. The Court specifically noted that Carroll repeatedly voiced his apprehension in speaking candidly to detectives, indicated he did not want to get in trouble because he had a child at home, and indicated he feared for his life and the idea of going to jail.

5) The Court found this factor clearly and overwhelmingly weighed in favor of Carroll based on the fact that two detectives questioned him throughout the interrogation, when Carroll requested to make a call to confirm his story the detectives refused and confiscated his phone, detectives transported Carroll to the homicide office, and detectives did not take him home when he expressed a desire to go home.

6) The Court determined this factor weighed in favor of Carroll because a detective deceived Carroll when he claimed police obtained Carroll's phone records indicating he

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<sup>23</sup> *Taylor*, 114 Nev. at 1082 n.1, 968 P.2d 323 n.1.

was near the scene of the crime when it occurred. The Court also noted that strong-arm tactics were evident throughout the interrogation in that they transported Carroll to the homicide office, questioned him in a small room, and confiscated his cell phone. Additionally, the detectives promised Carroll they would take him home after the interrogation and prove his story about how Hadland was killed if he told them the truth.

7) Lastly, this factor weighs in favor of the State because Carroll was not arrested at the end of the interrogation and the detectives took him home.

The Court concluded that only two of the seven factors weighed in the State's favor, with one factor neither weighing for or against the State. This left four of the factors weighing in Carroll's favor. The Court held the objective indicia of arrest suggested Carroll was in custody at the time of interrogation.

#### *Length and form of questioning*

Carroll was questioned for two and one half hours, excluding breaks. The detectives took him from his place of employment, across town, to the homicide office, where he was questioned until almost midnight. A third, more aggressive detective joined the original two detectives in the questioning. The Court explained the detective's testimony that one purpose of the breaks was to let Carroll "kind of go a little bit crazy" suggests he was questioned as a suspect, not a witness. This led the Court to conclude that the length and form of questioning suggested Carroll was in custody at the time of the interrogation.

The detectives chose not to provide Carroll *Miranda* warnings until the last of the three detectives began questioning him, after he had already made inculpatory statements. The Court held that although Carroll was not under formal arrest, he was in custody and should have received *Miranda* warnings. The Court concluded the district court erred in failing to suppress Carroll's statements.

#### *Post-Miranda statements*

The Court also concluded that Carroll's statement to police after he received the *Miranda* warnings should have been suppressed based upon the Supreme Court's holding in *Seibert*.<sup>24</sup> In *Seibert*, police delayed recitation of *Miranda* warnings until the defendant confessed to the crime. The Supreme Court in *Seibert* determined these type of warnings do not serve their intended purpose and ruled the post-warning statements inadmissible.<sup>25</sup> The Court determined the actions of the detectives with Carroll are indistinguishable from those in *Seibert* as Carroll's post-warning statements were simply a recitation of his pre-warning statements. The Court explained that despite the short break in questioning, Carroll was subjected to continuous questioning. Thus, the Court concluded the district court should have suppressed Carroll's post-*Miranda* statement to police.

However, although the Court determined the district court erred in failing to suppress the statements, the Court concluded the State demonstrated beyond a reasonable doubt that the error

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<sup>24</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004).

<sup>25</sup> *Id.* at 617.

was harmless<sup>26</sup> because the district court properly admitted other powerful evidence of Carroll's guilt.

### *Sufficiency of the evidence*

Carroll contended the State did not present sufficient evidence to convict him of conspiracy to commit murder because the State failed to show he intended for Counts to kill Hadland. The Nevada Supreme Court concluded this contention had no merit because the evidence at trial did in fact support a finding that Carroll knew the order was to kill Hadland and Carroll recruited Counts for this purpose.

### *Cumulative error*

Carroll contended cumulative error denied him a fair trial. The Nevada Supreme Court disagreed finding the sole error was the district court's denial of Carroll's motion to suppress his statement to police. The Nevada Supreme Court stated a sole error cannot be cumulative.

### **Conclusion**

Carroll was entitled to suppression of both his pre-*Miranda* and post-*Miranda* statements as he was in custody and not read his *Miranda* rights. The district court erred in failing to suppress the statements. However, the Court affirmed Carroll's convictions finding this error harmless beyond a reasonable doubt.

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<sup>26</sup> See *Boehm v. State*, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (applying harmless error analysis to a statement admitted at trial in violation of *Miranda*).