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Pimentel v. State, 133 Nev. Adv. Op. 31 (June 22, 2017)

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Pimentel v. State, 133 Nev. Adv. Op. 31 (June 22, 2017)[1]

CRIMINAL LAW: CHALLENGE-TO-FIGHT THEORY (NRS 200.450)
CONSTITUTIONAL LAW: FIRST AMENDMENT

Summary

The Court determined that (1) the challenge-to-fight theory under NRS 200.450 is not vague and overbroad, (2) all bench conferences must be recorded in criminal trials, (3) self-defense is not available as a defense in a violation of NRS 200.450, and (4) an expert witness cannot impeach defendant's testimony with statements defendant made during court-ordered psychiatric evaluation.

Background

Appellant-defendant Pimentel had an altercation with decedent Holland over their mutual female friend. Holland initiated a fistfight by punching Pimentel. During the fight, Pimentel shot Holland twice. Holland died from his wounds.

The district court ordered Pimentel to undergo a psychological evaluation with Dr. Piasecki. During her testimony, Dr. Piasecki's compared Pimentel's statements during evaluation and during his trial testimony. The district court instructed jury that self-defense is not available under a challenge-to-fight theory. Pimentel is convicted to first degree murder pursuant to NRS 200.450, killing as the result of a challenge to fight. Pimentel appealed.

Discussion

NRS 200.450 is neither vague nor overbroad

A criminal statute is unconstitutionally vague if it fails one of two tests: (1) if it does not give "a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement."[2] NRS 200.450 provides that

> "[i]f a person, upon previous concert and agreement, fights with any other person or gives, sends or authorizes any other person to give or send a challenge verbally or in writing to fight any other person, the person giving, sending or accepting the challenge to fight any other person . . . is guilty of first degree murder when death ensues to a person in such a fight, . . . the person causing or having any agency in causing the death . . ."[3]

The Court held that NRS 200.450 is not void for vagueness because it satisfies both parts of the vagueness test.

First, NRS 200.450 is not vague under the first test because Pimentel and Holland's

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[1] By Ping Chang.
[2] Scott v. First Jud. Dist. Ct., 131 Nev. Adv. Op. 101, 363 P.3d 1159, 1161 (2015).
[3] NEV. REV. STAT. § 200.450(1), (3) (1999).

shouted words can be reasonably interpreted as challenging or accepting to fight from each other. After the shouting, a fight ensued when Holland struck Pimentel. Pimentel and Holland used a deadly weapon and Holland died as a result of fight. Because a person of reasonable intelligence would construe Pimentel's action as either challenging or accepting a fight and participating in an ensuing fight, NRS 200.450 satisfies the first test.

Moreover, NRS 200.450 does not fail the second test. There is no evidence indicating that others participated in the fight. The evidence required to meet NRS 200.450 are (1) "the fighters agreed to fight beforehand, (2) a fight actually took place, (3) and in the case of murder charges, that one or more of the fighters died as a result." Accordingly, the Court held that NRS 200.450 does not lead to arbitrary or discriminatory enforcement and satisfies the second test. Therefore, NRS 200.450 is not void for vagueness as it satisfies either test.

The Court held that NRS 200.450 is not overbroad in violation of the First Amendment because it merely uses speech to demonstrate a person's intent to fight and the resulting death. A statute is overbroad when its application violates protected conduct, such as protected speech under First Amendment.[4] NRS 200.450 does not criminalize speech because it provides a criminal liability when there is an ensuing fight and first-degree murder liability if the fight results in death.[5] Therefore, the Court held that NRS 200.450 is not overbroad because it does not penalize speech but only utilizes speech to demonstrate the mens rea for murder—a person's intent to fight.

The Court further stated that while self-defense may be available under a challenge-to-fight theory of murder, it is not available here because Pimentel did not distinguish his case from *Wilmeth*, where the Court held that self-defense was not available as a defense when the defendant participated in a fight voluntarily, even if the decedent unilaterally escalated the situation by using a deadly weapon.[6]

In addition, Pimentel argued that there was a violation of exclusionary rule when Dr. Piasecki listened to his, Dr. Boyd's and Lowe's testimony before taking the stand. Because the record does not demonstrate that Pimentel objected or raised the exclusionary issue at trial, the Court cannot grant him relief.

Pimentel asserted that he was uncertain if the exclusionary rule was invoked because the district court erred by failing to record the bench conferences prior to trial. The Court agreed with Pimentel that the district court erred but held that the error is harmless and did not require a reversal because Pimentel had not shown the significance or prejudicial effect of the missing record. Moreover, the Court stated that while Dr. Piasecki's testimony was impermissible it is not prejudicial because Pimentel's own testimony was sufficient to show that "he either challenged Holland to fight or accepted Holland's challenge to fight before they actually fought and Holland died."

Conclusion

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[4] *Id.* at 1162.
[5] NEV. REV. STAT. § 200.450(1), (3).
[6] Wilmeth v. State, 96 Nev. 403, 405-06, 610 P.2d 735, 737 (1980).

The Court concluded that NRS 200.450 is not vague because a person with ordinary intelligence would understand the conduct prohibited under the statute and it provides clear enforcement standards. Furthermore, NRS 200.450 is not overbroad because it does not violate First Amendment speech protection and merely uses speech to demonstrate a person's intent to fight and the resulting death. Though Dr. Piasecki's testimony exceeded the allowable scope and the district court erred by failing to record the bench conferences prior to the trial, the Court held that these errors were harmless in light of Pimentel's own testimony. The Court affirmed the judgment of conviction.