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Summary of City of Reno v. Howard, 130 Nev. Adv. Op. 12

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CONSTITUTIONAL LAW: CONFRONTATION CLAUSE

Summary

The Court determined whether the “substantial-and-bona-fide-dispute” requirement under NRS 50.315(6) violated the Confrontation Clause, given the U.S. Supreme Court’s recent decision in *Melendez-Diaz v. Massachusetts*.

Disposition

In light of *Melendez-Diaz*, the requirement of NRS 50.315(6)—that a defendant must establish a substantial and bona fide dispute regarding the facts in a declaration made and offered as evidence pursuant to NRS 50.315(4)—impermissibly burdens the right to confrontation.

Factual and Procedural History

The City of Reno (City) charged Cheryl Lee with misdemeanor driving under the influence in Reno Municipal Court. The City sought to introduce into evidence the declaration of the phlebotomist who collected Lee’s blood for evidentiary testing. Lee objected to the admission of the declaration on Confrontation Clause grounds, and the municipal court sustained the objection. Subsequently, the City petitioned the district court for a writ of mandamus to compel the municipal court to admit the declaration into evidence. The district court denied the petition, stating that such an admission would have violated Lee’s rights under the Confrontation Clause. The City then appealed.

Discussion

This court has jurisdiction to hear this appeal.

This Court has jurisdiction to review orders granting or refusing to grant mandamus pursuant to NRS 2.090(2). Furthermore, the Court may hear an appeal from a final judgment entered in an action commenced in the court in which judgment is rendered pursuant to NRAP 3A(b)(1). In matters where the only issue is a petition for writ of mandamus, a district court’s order denying the petition constitutes a “final judgment within the meaning of NRAP 3A(b)(1).”² As the City’s petition was the only issue before the district court, this Court has jurisdiction to hear the appeal.

The declaration is testimonial.

The Confrontation Clause states that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”³ Under this clause, testimonial hearsay against a

¹ By Sean Daly.

² *Ashokan v. State, Dep’t of Ins.*, 109 Nev. 662, 665, 856 P.2d 244, 246 (1993).

³ U.S. CONST. amend. VI.

criminal defendant is prohibited unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.⁴ This Court has previously held that declarations made and offered pursuant to NRS 50.315(4) are testimonial hearsay.⁵

NRS 50.315(4) allows a declaration made under penalty of perjury by a person who collects blood from a subject for evidentiary testing to be admitted to prove (1) the declarant's occupation, (2) the identity of the subject, and (3) that the declarant kept the sample in his custody until delivering it to another identified person. The parties do not dispute that the declaration at issue was testimonial hearsay under NRS 50.315(4). As the record does not suggest that the phlebotomist was unavailable, or that Lee had a prior opportunity to cross-examine the phlebotomist, the declaration must be excluded unless Lee validly waived her confrontation rights.

NRS 50.315(6) impermissibly burdens confrontation rights.

The City argued that Lee validly waived her right to confront the phlebotomist by failing to show a substantial and bona fide dispute regarding the declaration under NRS 50.315(6). Lee argued that the statute impermissibly burdened her right to confront her accusers, and that the U.S. Supreme Court's decision in *Melendez-Diaz* compelled this Court to overrule its prior decision in *City of Las Vegas v. Walsh*.

A criminal defendant may waive his or her confrontation rights by failing to raise a proper objection. Under Nevada law, a defendant waives the right to confront an NRS 50.315(4) declarant if they fail "to argue that a substantial and bona fide dispute exists regarding the affidavit or declaration of the phlebotomist who drew the defendant's blood."⁶

In *Melendez-Diaz*, the U.S. Supreme Court considered a statute that allowed reports of forensic analysis to be admitted into evidence without requiring the prosecution to call the analysts as witnesses, but rather allowing defendants to subpoena the analysts. Because the statute "shift[ed] the consequences of adverse-witness no-shows from the State to the accused," it was struck down.⁷ Furthermore, the U.S. Supreme Court held that the Confrontation Clause puts the burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.

The City argued that NRS 50.315(6) was a procedural rule, analogous to accepted "notice-and-demand" statutes that require a timely objection to the admission of testimonial hearsay. Lee argued that the statute placed the burden on defendants to establish a substantial and bona fide dispute, contrary to U.S. Supreme Court's decision in *Melendez-Diaz*. Although the constitutionality of NRS 50.315(6) was settled in *Walsh*, *Walsh* was decided before *Melendez-Diaz*, so the Court revisited the issue.

The Court took notice of a similar issue that had arisen in Kansas. Under Kansas law, a defendant had 14 days to object to the admission of a certificate of a person who collected blood for analysis, and the defendant had to state the grounds for the objection (*i.e.*, the defendant had to show that the conclusions of the certificate would be contested at trial).⁸ The Kansas Supreme

⁴ Crawford v. Washington, 541 U.S. 36, 68 (2004).

⁵ City of Las Vegas v. Walsh, 121 Nev. 899, 906, 124 P.3d 203, 207–08 (2005).

⁶ Walsh, 121 Nev. at 906, 124 P.3d at 208.

⁷ Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).

⁸ KAN. STAT. ANN. § 22-3437(a)(3).

Court held that, in light of *Melendez-Diaz*, the statute was unconstitutional, because an objection based solely on the Confrontation Clause could not satisfy the requirements of the statute.⁹

The Court found the requirements of NRS 50.315(6) and the Kansas statute “substantially similar.” As both statutes imposed “additional requirements” beyond requiring a defendant’s timely objection to proffered evidence, the statutes were not analogous to the approved of “notice-and-demand” statutes in *Melendez-Diaz*. Therefore, since a defendant is forced to waive his confrontation rights if he cannot meet the additional burden of showing a substantial and bona fide dispute, the Court held that NRS 50.315(6) violates the Confrontation Clause. While the Court acknowledged that prior caselaw should not be overruled absent a “compelling reason,” the additional guidance provided by the U.S. Supreme Court in *Melendez-Diaz* gave rise to a compelling reason to overrule *Walsh*.

The nature of the declaration does not alter confrontation rights.

The City argued that *Melendez-Diaz* is inapplicable to this case because here (1) the phlebotomist’s task of collecting blood was relatively simple, and (2) the facts supported by the declaration were merely foundational.

The Court rejected these distinctions. With respect to the first argument, the Court stated that the Confrontation Clause is not concerned with reliability of evidence, but rather, with the manner in which reliability is tested (through the “crucible of cross-examination”). Thus, simplicity and reliability are not relevant to a Confrontation Clause analysis, and the fact that collecting blood was a simple task had no effect on the defendant’s confrontation rights. With respect to the second argument, the Court stated that because the declaration was testimonial hearsay, the Confrontation Clause applied, regardless of whether the evidence at issue was “foundational.” Therefore, even if the declaration was only being used to show that the phlebotomist was, in fact, a phlebotomist, it was still a declaration by a witness “against” Lee, because the City sought to use the declaration to prove its case.

However, the Court noted that not every person “with any connection to physical evidence” had to testify. Although the City argued that the phlebotomist was “merely a person with some connection to Lee’s blood sample,” and thus was not required to testify, the City relied on caselaw where no testimonial statement was at issue. Thus, the Court rejected the argument, stating that the fact the declaration was only offered to lay the foundation for other evidence “has no effect on its testimonial nature, and therefore has no effect on the rights provided by the Confrontation Clause.”

Conclusion

In light of *Melendez-Diaz*, the requirement of NRS 50.325(6)—that a defendant must establish a substantial and bona fide dispute regarding the facts in a declaration made and offered as evidence pursuant to NRS 50.315(4)—impermissibly burdens the right to confrontation, and thus *Walsh* is overruled. The simplicity of collecting blood and the foundational purpose for which the declaration was offered are irrelevant. Therefore, the district court did not err when it determined that the admission of the declaration would have violated Lee’s right to confrontation, and the district court did not abuse its discretion by denying the City’s petition for a writ of mandamus.

⁹ State v. Laturner, 218 P.3d 23, 30 (Kan. 2009).