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Summary of Howard v. State, 128 Nev. Adv. Op. 67

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Howard v. State, 128 Nev. Adv. Op. 67 (Dec. 27, 2012)¹
CRIMINAL LAW AND PROCEDURE – SEALED DOCUMENTS

Summary

The Court considered the State’s motion to reconsider and other various motions regarding the sealing of the ex parte motion to substitute counsel. It further deliberated whether documents and records could be filed under seal in a pending criminal case before the Court. In addition, the Court also addressed the requirements and procedures for sealing such documents and records.

Disposition/Outcome

Public access to judicial records and documents is an important aspect of the judicial system. However, the right to access is not absolute. The Court concluded that it had “inherent power to control its own records and supervise the functioning of the judicial system.”² The Court found that it would be appropriate to seal records or documents only when the public’s right to access is outweighed by the competing interests to protect the material.

The Court further set out specific procedures that a party must follow when seeking to have a record or document sealed in a pending criminal proceeding before the Court. The procedures imposed are as follows: (1) A party seeking to seal a document must file a written motion and serve the motion on all parties involved in the action; (2) The motion must identify the document or information the party seeks to seal; (3) The motion must identify the grounds upon which sealing the subject documents is justified and specify the duration of the sealing order; and (4) The motion must explain why less restrictive means will not adequately protect the material.

Factual and Procedural History

Appellant was convicted of murder in the first degree with the use of a deadly weapon and two counts of robbery with the use of a deadly weapon. Appellant received a sentence of death. The pending motions followed Appellant’s fourth post-conviction petition for a writ habeas corpus, wherein Appellant’s counsel filed an ex parte motion to substitute counsel (the “substitution motion”),³ which was marked as filed under seal.

The State filed an opposition, objecting to the substitution motion being filed under seal, and moved to have the document unsealed. Appellant then filed a motion to seal the State’s opposition. A Nevada Supreme Court Justice denied the State’s motion to unseal the substitution motion and granted Appellant’s motion to seal the opposition.⁴

Thereafter, the State filed a motion for reconsideration of the order denying the State’s motion to unseal and granting Appellant’s motion to seal the opposition. Appellant filed a motion to seal the State’s motion to reconsider and any documents relating to the substitution motion. Appellant further filed a motion to strike the State’s motion for reconsideration and to

¹ By Priscilla Baker

² Ex Parte Capital U-Drive-It, Inc., 630 S.E.2d 464, 469 (S.C. 2006).

³ The Court approved the substitution of counsel.

⁴ NRAP 27(c)(1) provides that “a justice of the Supreme Court may act alone on any motion.”

direct the State's conduct respecting the various pleadings filed regarding the substitution motion. The State filed an opposition to Appellant's motion. Appellant filed a reply to the State's opposition.

Discussion

Justice Hardesty wrote the opinion for the three justice panel.

I. Public access to judicial records and documents is an important aspect of the judicial system, stemming from common law, but is not an absolute right.

In order for our judicial system to be effective, by preventing perjury, misconduct, and secret bias or partiality, the system must be open to the public. The presumption of public access not only applies to trial, but to judicial records and documents because such item may be relied upon in the course of deciding the case. Public access, however, is not unconstrained. The Court's authority to limit public access to judicial records or documents stems from three sources: constitutional law, statutory law, and common law.

Nevada does not have a constitutional or statutory provision addressing public access to judicial records and documents in criminal proceedings pending before the Supreme Court of Nevada. Therefore, the Court looked to common law, barring any conflict with federal or Nevada Constitutional law.⁵ English common law provides a right of public access to judicial records and documents; however, a person cannot enforce the right unless the person has (1) a proprietary interest or (2) an evidentiary interest in the records or documents.⁶ American courts do not, generally, require such conditions to be met to enforce a right to public access.

"It is uncontested, however, that the right to inspect and copy judicial records is not absolute,"⁷ but must "yield to a trial judge's decision to impound records for 'good cause.'"⁸ A court has inherent authority over its own records and may deny access when the public's right to access is outweighed by competing interests to protect the material. Courts further recognize that the party seeking to seal judicial records or documents has the burden of proof to show that the interest to protect the material outweighs the presumption of public access.

II. The Supreme Court of Nevada struck the balance between public's right to access and competing privacy interests by setting out procedures to follow when requesting judicial records or documents be sealed.

Because the Supreme Court of Nevada did not have a rule outlining the procedures for sealing judicial records and documents in criminal proceedings, the Court looked to federal courts and Nevada Rules of Civil Procedure to create specific requirements for sealing such material in future pending criminal cases. Thereafter, the Court imposed the following procedures:

⁵ See NEV. REV. STAT. § 1.030 (2007).

⁶ Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 Notre Dame L. Rev. 117, 120-121 (1990).

⁷ Commonwealth v. Silva, 864 N.E.2d 1, 6 (Mass. 2007).

⁸ Conn. v. Upshur, 924 A.2d 642, 651 (Pa. 2007).

1. A party seeking to seal a document must file a written motion and serve the motion on all parties involved in the action;
2. The motion must identify the document or information the party seeks to seal;
3. The motion must identify the grounds upon which sealing the subject documents is justified and specify the duration of the sealing order; and
4. The motion must explain why less restrictive means will not adequately protect the material.

The Court provided examples of court records in criminal cases that may be sealed, which include⁹ “records containing privileged attorney-client communications where the privilege has not been waived, records containing information that is permitted or required under federal or Nevada law to be sealed, and records containing information the sealing of which is justified or required by an identified significant competing interest.”

The Court further provided that the records or documents subject of the motion to seal may be submitted separately and will remain confidential for a reasonable period of time pending the Court’s disposition of the motion to seal.

III. Appellant’s motion to seal the substitution motion and other related documents suffered from two significant deficiencies.

First, Appellant did not file a separate motion seeking to seal the substitution motion. Although there were no set procedures in place for requesting documents to be sealed in a criminal case when Appellant’s counsel filed the motion, the Court pointed out that the attorney had an obligation to file a separate written motion. The Court cited NRAP 27(a)(1), which provided that “[a]n application for an order . . . is made by motion unless these Rules prescribe another form.”

Second, the Court found that the documents or information were not appropriate for sealing. The substitution motion, however, did disclose information about a conflict of interest and defense strategy. Nevertheless, the Court found that the conflict of interest did not involve attorney-client privilege.¹⁰ It further found that the information about strategy were general statements and did not warrant protection from public inspection.

Conclusion

The Court determined that the documents relating to the substitution motion should not have been sealed because Appellant did not file a separate motion and because the documents were not appropriate for sealing. Accordingly, the Court denied Appellant’s motion to strike the State’s motion for reconsideration and denied Appellant’s motion to seal all pleadings related to the substitution motion. The Court granted the State’s motion for reconsideration of its order denying the State’s motion to unseal and granting Appellant’s motion to seal the opposition. The

⁹ The examples listed are not an exhaustive list.

¹⁰ Attorney-client privilege is limited to (1) confidential communications (2) between the attorney and client (or a representative of either) (3) made for the purpose of facilitating legal services to the client. Nev. Rev. Stat. § 49.095.

Court further directed the clerk of court to unseal the documents relating to the substitution motion.