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Summary of Ybarra v. State, 127 Nev. Adv. Op. No. 4

Jennifer DelCarmen
Nevada Law Journal

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Recommended Citation

DelCarmen, Jennifer, "Summary of Ybarra v. State, 127 Nev. Adv. Op. No. 4" (2011). *Nevada Supreme Court Summaries*. 283.

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Ybarra v. State, 127 Nev. Adv. Op. No. 4 (March 3, 2011)¹
CONSTITUTIONAL LAW AND CRIMINAL PROCEDURE AND LAW

Summary

An appeal based on claims of judicial bias. In addition, an appeal from an order denying a motion to strike the death penalty on a claim that Appellant is/was mentally retarded.

Disposition/Outcome

The district court's orders affirmed. Defendant's motion to disqualify lacked merit because no reasonable person would question the judge's impartiality. Additionally, there was substantial evidence to support the denial of Defendant's motion to strike the death penalty.

Factual and Procedural History

On September 28, 1979, Nancy Griffith ("Griffith") and a girlfriend met Robert Ybarra Jr. ("Ybarra") in Ely, Nevada. Ybarra drove the girls around town but eventually dropped the girlfriend off, leaving Griffith alone with Ybarra. Griffith was found the following day clinging to life in a desert outside of Ely. She had been beaten, raped, and set ablaze with gasoline. She died of the injuries shortly thereafter.

A jury found Ybarra guilty of first-degree murder, first-degree kidnapping, battery with intent to commit sexual assault, and sexual assault. The jury found four aggravating and zero mitigating circumstances, and sentenced Ybarra to death on the murder charge and consecutive life sentences without the possibility of parole for the remaining offenses. Ybarra filed three post-conviction petitions that the district court denied. The Nevada Supreme Court upheld the district court's denial of the petitions.

In 2002, the United States Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishment precludes execution of mentally retarded persons.² Nevada had since enacted a statute to address claims by mentally retarded persons sentenced prior to the landmark decision.³ Subsequently, on March 6, 2003, Ybarra filed a petition in which he claimed to be incompetent to execute. The district court dismissed the petition on procedural grounds. The Nevada Supreme Court disagreed and remanded the issue. Ybarra then filed a motion to strike the death penalty under N.R.S. 175.554(5).

District court Judge Dobrescu heard the motion. He disclosed that he had represented Griffith's parents and sister on unrelated matters prior to becoming a judge. This prompted Ybarra to file a motion to disqualify Judge Dobrescu for bias. The motion was denied by another district court judge. Judge Dobrescu then heard the motion to strike the death penalty. After a two day hearing at which the State and Ybarra presented expert witnesses, the district court

¹ By Jennifer DelCarmen

² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³ NEV. REV. STAT. 175.554(5) (2007).

found Ybarra failed to prove his retardation began during the developmental period. Ybarra appealed the denial of the motion to disqualify Judge Dobrescu, claiming it violated his due process guarantees. He also appealed the denial of the motion to strike the death penalty.

Motion to Disqualify

Ybarra's motion for disqualification lacked merit because no objective person would reasonably question Judge Dobrescu's impartiality. Thus, there was no violation of Ybarra's federal or state due process rights. The Court first addressed Ybarra's claim that the NCJC required disqualification. The Court found two sections relevant to his claim, namely NCJC, Canons 2A and 3E. The Court pointed out both Canons address the importance of impartiality. Both state, explicitly or implicitly, that a judge should disqualify himself if there is an appearance of impropriety. The Court pointed out the test for appearance of impropriety is contained in the commentary to NCJC, Canon 2A: "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." The Court noted a judge is presumed to be impartial. Thus, the burden of proving bias is on the party asserting the claim.⁴ The test is objective and takes into account all the facts to discover if a reasonable person would harbor doubts about impartiality.⁵ Moreover, the test is a question of law so the Court reviewed it de novo.⁶

Ybarra tried to argue the notoriety of his case entitled his disqualification motion to heightened scrutiny. However, the Court disagreed; the notoriety of Ybarra's case did not heighten the standard. Ybarra's argument would require local judges to recuse themselves in every high-profile case tried in the community in which it occurred. Since judges are presumed to be impartial, they will not be disqualified on mere speculation, but only on sufficient factual grounds.

The Court also observed that Ybarra's murder conviction occurred seventeen to nineteen years prior to Judge Dobrescu's representation of any Griffith family member. Further, the post-conviction proceedings commenced five to seven years after the end of the professional relationship. Nothing indicated Judge Dobrescu had any continuing obligations to the Griffith family. Consequently, the record contained no evidence Judge Dobrescu has a direct, personal interest in Ybarra's case.

Motion to Strike

Substantial evidence supported the district court's factual findings, and its legal conclusions were not erroneous. Ybarra failed to produce sufficient evidence of subaverage intellectual functioning and adaptive behavior deficits before he reached eighteen years of age, thus the motion to strike the death penalty was properly decided.

⁴ Goldman v Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988).

⁵ PETA v. Bobby Berolini Ltd., 111 Nev. 431, 436, 438, 894 P.2d 337, 340-41 (1995).

⁶ PETA, 111 Nev. at 437, 894 P.2d at 341.

Defining “Mental Retardation”

The Court first pointed out that the United States Supreme Court, while banning the execution of mentally retarded individuals, never defined mental retardation or set forth procedures for enforcement, instead leaving the task to the states.⁷ The Nevada Legislature responded by enacting statutes not only defining “mental retardation,” but also stating the procedures to be followed. Upon a motion by the defendant, the court must hold an evidentiary hearing to determine if the defendant is mentally retarded.⁸ The defendant must prove by a preponderance of the evidence that he is mentally retarded.⁹ The legislature defined “mentally retarded” as “significant subaverage general intelligence functioning which exists concurrently with deficits in adaptive behavior and manifested during the development period”.¹⁰

The Court had never previously interpreted the statute’s definition of “mentally retarded” and thus decided to do so before examining the district court’s decision. The Court first pointed out the definition of ‘mentally retarded’ in the current statute was taken from a prior Nevada statute.¹¹ The prior statutory definition conformed to the clinical definitions espoused by the American Association on Mental Retardation (“AAMR”) and the American Psychiatric Association (“APA”). The definition can be broken down into three conjunctive elements: (1) significant limitations in intellectual functioning; (2) significant limitation in adaptive function; and (3) age of onset. Both associations limited the onset age to eighteen years of age. Since the statutory definition of “mentally retarded” and the associations’ definitions were similar, the Court decided the associations could provide useful guidance in applying N.R.S. 174.098.

The Court then looked at how to measure significant limitations in intellectual functioning. An IQ score typically measures intellectual functioning. Clinical definitions indicate that persons with an IQ between seventy to seventy-five points are mentally retarded.¹² However, a person could also use evidence of school or other records to prove a significant limitation.

In addition to proving a subaverage intellectual functioning, a defendant must also demonstrate significant deficits in adaptive behavior. Without adaptive behavior problems, a person would not be considered mentally retarded,¹³ thus the interplay between intellectual functioning and adaptive behavior is critical. The Court then relied on other states’ case law and medical definitions to implicitly accept the definition of adaptive behavior to be a “collection of conceptual, social, and practical skills that have been learned by people in order to function in

⁷ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

⁸ NEV. REV. STAT. 174.098(1) & (2); N.R.S. 175.554(5) (2007).

⁹ NEV. REV. STAT. 174.098(5)(b) (2007).

¹⁰ NEV. REV. STAT. 174.098(7) (2007).

¹¹ NEV. REV. STAT. 433.174 (2007).

¹² *State v. Vela*, 777 N.W.2d 266, 294 (Neb. 2010); *State v. McManus*, 868 N.E.2d 778, 785 (Ind. 2007); *Ex Parte Briseno*, 135 S.W. 3d 1, 7, n.24 (Tex. Crim. App. 2004); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000).

¹³ *Meyers v. State*, 130 P.3d 262, 268 (Okla. Crim App. 2005); *Stripling v. State*, 401 S.E.2d 500, 504 (Ga. 1991) quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (3rd ed. 1980).

their everyday lives [and thus] limitations on adaptive behavior are ordinarily reflected by difficulties adjusting to ordinary demands made in daily life.”¹⁴

The final element the defendant must prove is the age of onset; that is, both of the first two elements occurred prior to a certain age. Since the statute refers to age of onset as the “developmental period,”¹⁵ the Court next considered what the exact age of onset is. The Court examined the two purposes behind the requirement: (1) to differentiate between retardation and brain injuries that occur later and (2) to prevent criminals from faking retardation once facing capital punishment. The Court then pointed out both that the AAMR and the APA, as well as approximately half of the states expressly focus on the age of eighteen as the onset age. Further, the Court observed that some states simply have “developmental period” in their statutes, while others that have defined the term use the age of eighteen as the required age of onset. The Court then concluded “developmental period” means prior to reaching eighteen years of age. Thus, a defendant must prove subaverage intellectual functioning and adaptive behavior deficits originated before age eighteen.

Standard of Review

Having fully explained the elements, the Court next addressed the proper standard of review when reviewing a district court decision regarding mental retardation on appeal. The Court noted states have used a variety of standards - abuse of discretion, clear error, or a combination of the two. The Court decided the determination of whether a defendant is mentally retarded is based on factual conclusions, but also requires legal analysis to determine whether the elements have been proven. Hence, the Court reviewed the district court’s decision as a mixed question of law and fact. The district court’s factual findings received deference as long as they were supported by substantial evidence and not clearly erroneous. The district court’s credibility determinations also receive deference. However, the Court proclaimed it would review the legal consequences of the district court’s factual findings de novo.

Evidence Adduced at the District Court Level

In a twenty-two day hearing, the district court reviewed mounds of evidence, three experts’ testimony, and 3,000 pages of records, which the Court then summarized. Ybarra was the oldest of five children. At the age of sixteen, he transferred to an alternative school where he received his adult diploma at eighteen. Ybarra was plagued with drug and alcohol problems beginning in his teens. He enlisted in the Marine Corps twice, but was discharged for homosexual conduct and fraudulent enlistment respectively. Ybarra then enlisted in the National Guard, which later discharged him due to asthma. Doctors diagnosed Ybarra with several mental conditions, including delusions and hallucinations, organic personality disorder, and bipolar disorder. At the age of twenty-five Ybarra married, but the marriage ended within a few months.

Ybarra’s first expert, Dr. Schmidt, interviewed and tested Ybarra in 2001 and 2002, and when considering his background, found Ybarra was/is mentally retarded. He defined the mentally retarded range as an IQ score ranging from seventy to seventy-five. He administered an

¹⁴ Commonwealth. v. Miller, 888 A.2d 624, 630 (Pa. 2005).

¹⁵ NEV. REV. STAT. 174.098(7) (2007).

IQ test on which Ybarra scored sixty, placing him in the mentally retarded range.¹⁶ Further, the expert explained Ybarra's health and school records also indicated low intellectual functioning.

Dr. Schmidt relied on a slew of evidentiary records, such as the psychiatric evaluation that Ybarra underwent prior to the age of eighteen, which diagnosed him as intellectually challenged. Dr. Schmidt also pointed to a head injury Ybarra received when he was nine years old which led to headaches and abnormal electroencephalogram tests. Dr Schmidt claimed the mental illness stemmed from the injury and changed the course of Ybarra's development, driving him into the range of mental retardation.

In support of Ybarra's claimed deficits in adaptive behavior, Dr. Schmidt pointed to Ybarra's school and employment records. Ybarra's inability to participate in sports, get along with his classmates, and his transfer to an alternative school all evidenced his deficits in adaptive behavior. In adulthood Ybarra could not maintain steady employment and relied on family and friends to obtain work, was in and out of the military, had never lived independently of other people, and became lost (in his own town) easily. Dr. Schmidt further claimed that Ybarra's consistent reliance on family and friends masked his deficits because it prompted them to assist him in adapting.

Ybarra's second expert, Dr. M. Young, also relied on interviews and tests to conclude Ybarra was/is mentally retarded. Dr. M. Young administered a Street Survival Skills Questionnaire to Ybarra and claimed he could translate the results into an IQ score.¹⁷ Ybarra scored a seventy-nine, which placed him in the borderline range of mental retardation. Dr. Young relied on observations of prior professionals who evaluated Ybarra. These professionals claimed Ybarra became overwhelmed, agitated, and avoidant when over stimulated and was unable to cope with complex problems. According to Dr. M. Young, such behavior indicated limited adaptive skills.

The State's expert, Dr. T Young, also interviewed and tested Ybarra, but concluded Ybarra manipulated the tests and thus could not interpret the results. On the first test, an IQ test, Ybarra scored a sixty-six, placing him in the mentally retarded range. However, Dr. T. Young also administered a memory test and concluded the result showed malingering. This caused Dr. T. Young to question the accuracy of the tests performed by the defense's experts. He ultimately concluded no valid IQ test results had ever been obtained from Ybarra. In addition, no defense expert tested Ybarra for malingering. Finally, Dr. T. Young concluded Ybarra's problems at school stemmed from drug alcohol and drug abuse.

Prior to his motion for post conviction relief, Ybarra had taken an IQ test in 1981 and scored an eighty-six (outside the range of mental retardation). However, Dr. Schmidt suggested the test might have been scored inaccurately. Dr. Schmidt further opined that even if the score was accurate, the Flynn effect could have inflated it by as much as fifteen points. The Flynn effect is a line of studies suggesting that IQ scores gradually increase over time until the test is

¹⁶ However, the test was accompanied by a disclaimer stating the IQ test score may have been artificially lower due to the stress caused by the test.

¹⁷ The test measures adaptive skills.

re-normed.¹⁸ If adjusted to account for the Flynn effect, Ybarra's score would fall into the mentally retarded range.

School, medical, military, and employment records also provided conflicting assessments of Ybarra's intellectual functioning. Ybarra's seventh grade teacher described him as an average student who could have performed better if he tried harder. Dr. Schmidt dismissed this statement because it was based on events that occurred over thirty-five years prior. Some mental health experts who examined Ybarra and found him to be of below average intellectual functioning with an IQ between seventy to eighty points. Other mental health professionals claimed Ybarra was faking his purported mental disorders. Ybarra's military records described him as "dull normal" and Dr. Schmidt conceded that is not within the range of mental retardation. In addition, Ybarra was employed for lengthy periods, earning salaries well above the minimum wage.

The district court also analyzed letters Ybarra wrote in prison and concluded they indicated Ybarra was not mentally retarded. Defense experts countered that the court could not use the letters as evidence of mental retardation because Ybarra might have received assistance in drafting them from other inmates.

Analysis of the District Court's Determinations:

Ybarra challenged the district court's determination that he did not demonstrate subaverage intellectual functioning during the developmental period. Ybarra claimed the district court erroneously focused on the 1981 IQ test to the exclusion of the IQ test administered by Dr. Schmidt. Further, Ybarra claimed the district court erroneously relied on the tests administered by Dr. T. Young.

Ybarra pointed out that using the Flynn effect would put his 1981 IQ test score in the range of mental retardation. However, the Court noted whether scores should be adjusted to account for the Flynn effect is greatly disputed in many jurisdictions. The Court then refused to take a position on the validity of the Flynn effect because it was unnecessary.

The Court pointed out that while not accepting the Flynn effect as scientifically valid, the district court did lower the score based on the Flynn effect, to seventy-eight, yet Ybarra still fell outside the mentally retarded range. The district court used an adjustment rate of .31 per year, which is consistent with other courts adjustments,¹⁹ instead of a reduction by fifteen points as Dr. Schmidt suggested was proper. The Court concluded the adjustment rate had a foundation and was a valid method. In addition, the Court declared 1981 IQ test to be of little value because Ybarra took it after he was eighteen years old.

Further, the district court did not merely rely on the 1981 IQ test to determine Ybarra failed to prove he suffers from significant subaverage intellectual functioning. Rather, the

¹⁸ Smith v. State, 245 P.3d 1233, 1237, n.6 (Okla. Crim. App. 2010); Pruitt v. State, 903 N.E.2d 887, 910, n.7 (Ind. 2009).

¹⁹ Witt v. State, 938, N.E.2d 1193, 1200 (Ind. Ct. App. 2010); Bowling v. Commissioner, 163 S.W.3d, 361, 374 (Ky. 2005).

district court looked at the evidence as a whole, including the various records, Ybarra's letters, and evidence of malingering.

The Court also found the district court's reliance on Dr. T. Young's testimony valid and supported by other evidence in the record. The district court found the IQ tests administered by Dr. T. Young to be invalid. It instead focused on the memory test Dr. T. Young administered which demonstrated that Ybarra was faking mental retardation. Ybarra pointed to evidence that the test was not meant to be used on mentally retarded persons, and occasionally yielded false-positives. However, the Court pointed out that other mental health experts concurred that Ybarra feigned other mental diseases. Further, the district court also relied on the letters written by Ybarra while in jail to add credence to the determination Ybarra was malingering. However, the Court again clarified that the memory test, administered after Ybarra reached eighteen years of age, is of little value anyway.

Ybarra also challenged the district court's determination that he did not have adaptive behavior deficits. He claimed the district court improperly disregarded evidence. Ybarra further claimed the district court relied on its own lay opinions, which were contrary to the evidence. The Court found the district court did not improperly disregard the evidence. Rather, the district court simply found the defense experts' testimony to lack credibility. While both Dr. M. Young and Dr. Schmidt opined Ybarra exhibited adaptive behavior deficits, contrary evidence existed in the record. The Court concluded the district court was in the best position to make such credibility determinations.

Ybarra also claimed the district court ignored evidence showing he had adaptive behavior deficits. Ybarra claimed the district court ignored evidence that he cannot navigate his hometown, had only held menial jobs, had problems in school, had a short, unsuccessful marriage, relied on his inmates, and the testimony of one psychiatrist who stated at age fifteen Ybarra reached his emotional and intellectual potential. In addition, Ybarra alleged the district court put too much weight on the evidence indicating malingering.

However, the Court found evidence conflicting Ybarra on all matters. It again gave great deference to the the district court's credibility determinations regarding Ybarra and his experts. The Court found that the district court relied on the evidence as a whole. The Court approved of the district court's inferences from the evidence of Ybarra's military service, his drug and alcohol abuse, his work record, his letters, and his ability to live independently and travel showed Ybarra did not have adaptive behavior deficits.

Further, the Court found the district court did not rely heavily on malingering in deciding Ybarra lacked adaptive behavior deficits. Instead, the district court used evidence of malingering to determine Ybarra did not demonstrate subaverage intellectual functioning. The district court expressly acknowledged that evidence of malingering alone would not be enough to prove Ybarra was not mentally retarded. The Court ultimately declared the district court based any reliance on evidence of malingering on substantial evidence.

Conclusion

A judge should recuse himself from a criminal case if there is an appearance of impropriety. To prevail on a motion to disqualify, defendants must prove a reasonable, objective person would harbor doubts about the judge's impartiality. A mere prior professional relationship between a judge and the victim's family, without more, is not enough to support such a motion.

To prevail on a motion to strike the death penalty on the basis of mental retardation, a defendant must prove: (1) significant limitations in intellectual functioning; (2) significant limitation in adaptive function; and that (3) both appeared in the developmental stages. The "developmental stage" refers to the period before a person reaches eighteen years of age. The Nevada Supreme Court reviews motions to strike the death penalty as a mixed question of law and fact, giving deference to the district court's credibility determinations.