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Charles Gianelloni
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Dieudonne v. State, 126 Nev. Adv. Op. No. 1 (January 27, 2011)¹
CRIMINAL LAW AND RPOCEDURE

Summary

Appeal from a criminal defendant claiming an absolute right to be sentenced by the same judge who accepted his plea deal. Defendant also objects to victim impact statements that were given at his sentencing trial, but were not properly sworn.

Disposition/Outcome

The Nevada Supreme Court held that absent an express agreement, there is no absolute right to be sentenced by the same judge who accepts the plea. Additionally, the Court reaffirmed that victim impact statements must be sworn, but failure to do so in this case did not rise to the level of plain error.

Factual and Procedural History

The State charged Abell Dieudonne with conspiracy to commit burglary, attempted robbery with a deadly weapon, conspiracy to commit murder, and murder with a deadly weapon, in connection with the robbery and murder of Giovanna Simmons. The State alleged that Dieudonne and McNair sought to burglarize the Simmons home. Additionally, the State alleged that McNair was the one who entered the Simmons home, robbed her, and killed her. Meanwhile, Dieudonne served as McNair's lookout and getaway driver.

Dieudonne entered his plea before Judge Elizabeth Gonzalez. Dieudonne agreed to plead guilty to conspiracy to commit robbery, robbery with a deadly weapon, and to second-degree murder. In return, the State would not object to the conspiracy charge running concurrently with the other charges. During the plea discussions between Dieudonne and Judge Gonzalez, the Judge used the pronoun "I" several times when explaining sentencing discretion; however, she never stated that she would be the one who sentenced the defendant.

Prior to sentencing, the case was transferred to Judge Douglas Smith. During the sentencing hearing, when Judge Smith asked defense counsel if there was a legal reason not to go forward with sentencing, counsel said no. Defense counsel also did not object to Judge Smith as presiding over the sentencing hearing. During the hearing, the victim's friends and family gave impact statements. The statements were racially biased, profane, and contained threats – all directed at Dieudonne.

Judge Smith sentenced Dieudonne to serve 12 to 72 months on the conspiracy charge, two consecutive terms of 60 to 180 months on the robbery with a deadly weapon charge, and 120 months to life on the murder charge. Judge Smith ordered the sentences to run consecutively. Expecting the sentences to run concurrently, defense counsel discussed this with Judge Smith. Judge Smith, acknowledging that Dieudonne likely thought Judge Gonzalez would sentence him, amended the judgment, allowing the conspiracy charge to run concurrently with the robbery and murder charges.

¹ By Charles Gianelloni

On Appeal, Dieudonne contends that he was entitled to be sentenced by the judge who took his plea. He also contends that he was entitled to a hearing where those making impact statements were properly sworn, and without racial insults and profanity.

Discussion

Failure to Object

Writing for the Court, Justice Cherry explained that because Dieudonne failed to object to his sentencing by Judge Smith or to the victim impact statements, the Court would review his arguments on appeal for plain error only. The Court explained that the error must be clear and must affect the defendant's substantial rights. Further, Dieudonne must show that the error was prejudicial to in order to prove it affected his substantial rights.

Sentencing Requirements

Dieudonne argued that due process entitled him to be sentenced by the same judge that took his plea. He also argued that he entered the plea with an expectation that Judge Gonzalez would sentence him. Dieudonne relied heavily on *People v. Arbuckle*,² a California case where the California Supreme Court dealt with the same issue. There, the judge who accepted a defendant's plea was transferred to another department.³ The defendant objected during sentencing, requesting the previous judge; the court denied the request.⁴ On appeal, the court agreed with the defendant and held that the sentence imposed by another judge could not stand.⁵

The Court then chronicled *Arbuckle* and its progeny, noting that California courts have interpreted *Arbuckle* in various ways. Some of the courts have interpreted it to mean there is an implied term in plea deals that the same judge will both take the plea and sentence the defendant.⁶ Other California courts have rejected the proposition that the judge who accepts the plea must always be the same judge who sentences the defendant.⁷

The Court also recounted federal circuit court decisions. The Eighth Circuit has held that there is no federal right to be sentenced by the same judge who took the plea.⁸ The same is true in the Eleventh Circuit⁹ as well as in the Third Circuit.¹⁰

The Nevada Supreme Court concluded that *Arbuckle* went too far by recognizing an absolute right to be sentenced by the judge who accepted the plea. The Court was worried about acknowledging such an absolute right many reasons. If it accepted that argument, then defendants could profoundly affect proceedings, simply based on an unmentioned expectation. It would also interfere with the district courts' authority to manage their caseloads. And allowing

² 587 P.2d 220, 224-25 (Cal. 1978).

³ *Id.* at 222.

⁴ *Id.*

⁵ *Id.* at 225.

⁶ *See, e.g.,* *People v. Letteer*, 127 Cal. Rptr. 2d 723, 732-34 (Ct. App. 2002).

⁷ *See, e.g.,* *People v. Hsu*, 85 Cal. Rptr. 3d 566, 574 (Ct. App. 2008).

⁸ *See, e.g.,* *Taylor v. Bowersox*, 329 F.3d 963, 969 (8th Cir. 2003).

⁹ *See, e.g.,* *United States v. Russell*, 776 F.2d 955, 959 (11th Cir. 1985).

¹⁰ *See, e.g.,* *United States v. Pizzo*, 453 F.2d 1063, 1065 (3d Cir. 1972).

defendants such an absolute right would permit them to obtain more favorable sentences by asking to be resentenced by the judge who originally accepted the plea.

The Court did acknowledge that a defendant might have a reasonable expectation that the judge would be the same for the plea and sentencing. However, that expectation is not an absolute right. The defendant must make an express agreement as part of the plea that the judge will be the same for the plea and sentencing in order to claim such an absolute right.

In this case, the Court noted, Dieudonne failed to show any expectation of being sentenced by the same judge that accepted the plea. There is no evidence of an express agreement. Additionally, Dieudonne's failure to object enforces the conclusion that he did not enter the plea in reliance of being sentenced by Judge Gonzalez.

Victim Impact Statements

Next, the Court turned to the issue of the victim impact statements. The Court immediately agreed with Dieudonne that the district court failed to swear in the victim impact witnesses. The Court used that opportunity to reaffirm *Buschauer v. State*.¹¹ There, the Court held that witnesses giving oral victim impact statements must be sworn before they can testify.

The Court also determined that the error was a plain error. However, the Court could not conclude that the error affected Dieudonne's substantial rights. The Court relied on Judge Smith's statement that the primary reason for his decision was the defendant's criminal history; he made no indication that the decision was based on victim impact statements.

The Court turned to NRS 176.015(3) to analyze Dieudonne's contention that the victim impact witnesses' profane remarks violated his due process rights.¹² The Court concluded that the statute allowed for the reasonable expression of views related to the crime. But looking to California for guidance, it determined that the statute did not allow for racially charged comments or profanity.¹³ Further, the Nevada Code of Judicial Conduct requires judges to manage such behavior in a courtroom.¹⁴

Additionally, the Court reiterated that because Dieudonne failed to object to the victim impact testimony, it would only review the issue for plain error. The Court agreed that the impact statements did contain profane language; however, the language in question did not render the proceeding unfair. Nothing in the record shows that Judge Smith's decisions were affected by the victim impact statements. Thus, the Court held that the impact statements did not affect the defendant's substantial rights.

Conclusion

Absent an express agreement, criminal defendants have no absolute right to be sentenced by the same judge who accepted the plea. Additionally, witnesses must be sworn before offering oral victim impact statements.

¹¹ 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990).

¹² NEV. REV. STAT. 176.015(3) (2007).

¹³ See, e.g., *People v. Polite*, 45 Cal. Rptr. 845, 850 (Ct. App. 1965).

¹⁴ NEV. CODE JUDICIAL CONDUCT CANON 2, R. 2.8 (West 2007).