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Summary of Mitchell v. State, 122 Nev. Adv. Op. No. 107

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***Mitchell v. State*, 124 Nev. Adv. Op. No. 70 (September 18, 2008)¹**

CRIMINAL LAW – SELF INCRIMINATION

Summary

Donald Mitchell appeals his second-degree murder conviction. Mitchell argues that the district court trial contained five procedural errors, the most significant being a violation of his Fifth Amendment right against self-incrimination.

Disposition/Outcome

Affirmed. The Nevada Supreme Court finds the district court did not abuse its discretion in any of the five instances in which Mitchell alleged wrongdoing. Concerning the Fifth Amendment issue, this opinion finds the district court properly ordered Mitchell to undergo a state-requested psychiatric evaluation because Mitchell had presented his own psychiatric evaluation evidencing post-traumatic stress disorder.

Factual and Procedural History

The Eighth Judicial District Court found that Donald Mitchell fatally shot Edward Charles at a swimming-pool party on July 24, 2005. The men, who had a history of violent confrontations, had another argument that ended with Mitchell repeatedly shooting Charles.

Before his trial, Mitchell sought out a psychiatric evaluation from Dr. Thomas Bittker and Dr. Louis Mortillaro. The doctors concluded that Mitchell suffered from post-traumatic stress disorder, hypervigilance, and paranoia.

Mitchell pleaded not guilty to the charge of murder with a deadly weapon, stating his mental condition made him unable to form the requisite mens rea and caused him to act in self-defense. He waived his right to a jury, and the case proceeded to a bench trial.

The district court, granting a motion by the State, then ordered Mitchell to undergo another psychiatric evaluation by an independent doctor. Dr. David Schmidt evaluated Mitchell for two days and concluded that Mitchell was trying to appear excessively pathological. The State failed to give Mitchell background information on the doctor's qualifications and planned testimony.

At the trial, the State asked Mitchell in cross-examination about an incident in which Mitchell prank called 911 about a terrorist attack. The State asked Dr. Bittker and Dr. Mortillaro in cross-examination about an incident in which Mitchell, as an elementary-school student, threatened another student with a knife.

¹ By Cristina Rodriguez

On appeal, Mitchell raises the five procedural errors. First, he argues the court violated his right against self-incrimination by forcing him to submit to Dr. Schmidt's psychiatric evaluation and then took Dr. Schmidt's testimony. Mitchell's also argues that the state did not present sufficient evidence to warrant the conviction, the court should not have allowed the State to inquire about Mitchell's prior bad acts, the court should have kept Dr. Schmidt from testifying because the State did not fully disclose witness information, and the court should not have let the State question Dr. Schmidt.

Discussion

A compelled psychiatric evaluation did not violate the right against self incrimination

The right against self-incrimination derives from the Fifth and Fourteenth amendments. The right bars a government from compelling a defendant to incriminate himself and from introducing those compelled statements at trial. However, an exception noted in *Estes v. State*² allows prosecutors to obtain their own psychiatric evaluation of a defendant when that defendant raises an insanity defense. The evaluation must speak to the defense, not the defendant's culpability for the charged offense.

Nevada had never before extended this exception beyond the insanity defense, so this opinion evaluated case law in state courts for battered-spouse cases³ and in federal circuit courts for insanity⁴ cases. Defendants in the battered-spouse cases, like Mitchell, presented their mental conditions as an explanation for why they acted in self-defense. This court relied on the following principles derived from battered-spouse cases: (1) courts have inherent authority to seek truth and promote orderliness,⁵ (2) a compelled psychiatric exam is proper when a defendant brings his own mental condition to issue,⁶ and (3) an unfair symmetry arises if the state cannot use its own psychiatric evaluation to rebut the defendant's.⁷ The insanity cases enumerated similar reasoning: (1) A defendant must submit to a psychiatric exam if he introduces his mental condition as an issue,⁸ (2) the court must be fair to the state⁹ and (3) a psychiatric exam is the best way for the state to examine the defendant's mental issues.¹⁰

The Court repeated that Mitchell himself raised the mental state as a defense. It concluded that the district court did not abuse its discretion by ordering Mitchell to undergo an independent psychiatric evaluation.

² 122 Nev. 1123, 1145-46, 146 P.3d 1114, 1129 (2006).

³ *State v. Briand*, 547 A.2d 235, 240 (N.H. 1988); *State v. Manning*, 598 N.E.2d 25, 28 (Ohio Ct. App. 1991); *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993).

⁴ *U.S. v. Phelps*, 955 F.2d 1258, 1263 (9th Cir. 1992); *United States v. Byers*, 740 F.2d 1104, 1115, 1123 (D.C. Cir. 1984); *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *United States v. Wade*, 489 F.2d 258, 258-59 (9th Cir. 1973); *United States v. Handy*, 454 F.2d 885, 888 (9th Cir. 1972); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971), overruled on other grounds by *United States v. Lawson*, 653 F.2d 299, 301-03 & n.12 (7th Cir. 1981); *United States v. Albright*, 388 F.2d 719, 725, 727 (4th Cir. 1968).

⁵ *See* *Briand*, 547 A.2d at 240.

⁶ *See* *Manning*, 598 N.E.2d at 28.

⁷ *See* *Hickson*, 630 So. 2d at 176-77.

⁸ *See, e.g.*, *Byers*, 740 F.2d at 1113; *Albright*, 388 F.2d at 727.

⁹ *See, e.g.*, *Byers*, 740 F.2d at 1113; *Pope v. United States*, 372 F.2d 710, 720 (1967); *Alexander v. United States*, 380 F.2d 33, 39 (8th Cir. 1967).

¹⁰ *See, e.g.*, *Albright*, 388 F.2d at 724.

The State presented sufficient evidence

Under Nevada law, there is a violation of due process when no rational fact finder – using evidence construed most favorably to the prosecution – can determine beyond a reasonable doubt that a defendant committed a crime.¹¹ For Mitchell’s second-degree murder charge, the State had to prove malice aforethought and use of a deadly weapon.¹²

The Court concluded that the State presented sufficient evidence for both propositions. The prosecution illustrated malice aforethought using Mitchell’s violent history with Charles, Mitchell’s announcement that he would get a gun and witness accounts about the shooting. Use of a deadly weapon was proved sufficiently by witness accounts, police evidence and Charles’ fatal gunshot wound.

The district court appropriately allowed questioning into prior bad acts

If a defendant does not object to questioning at trial, the Nevada Supreme Court reviews that questioning to determine if it affected the defendant’s substantial rights meaning the questioning prejudiced the defendant.¹³ Because Mitchell did not object at trial to questioning on his prior bad acts, this opinion searched for evidence of “plain error.”

Questioning on the 911 call was proper

Nevada sometimes allows prosecutors to raise evidence of a defendant’s actions separate from the charged crime. If a defendant submits evidence of his good character, the State may submit evidence of his bad character¹⁴ and then inquire about specific incidents.¹⁵

This opinion found that the district court committed no “plain error” in allowing the State to question Mitchell about a prank 911 call. Mitchell twice had described himself as truthful, so the prosecution merely responded to Mitchell’s own statements about his good character.

Questioning on the school-age threat was proper

If a defendant supports a defense by introducing a psychiatric evaluation of himself, the State may use that evaluation for rebuttal.¹⁶ The defendant’s un-Mirandized communication with a doctor would not be protected in that situation.

Therefore, the Court found no plain error occurred when the State asked Dr. Bittker and Dr. Mortillaro about a threat Mitchell made in elementary school. The court based its decision on three facts: Mitchell voluntarily requested the doctors’ report; the State cross-examined the

¹¹ Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

¹² NRS 193.165, 200.010, and 200.030.

¹³ See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

¹⁴ See NRS 48.045(1)(a); NRS 48.055(1).

¹⁵ See NRS 50.085(3).

¹⁶ See Estes, 122 Nev. at 1133-34, 146 P.3d at 1129.

doctors only about information in their files, not about separate conversations with Mitchell; and Mitchell introduced the evaluations as part of his self-defense argument.

Omissions from pretrial disclosures do not indicate abuse of discretion

When a defendant does not object at trial to an omission from pretrial disclosures, the Nevada Supreme Court reviews the situation for plain error so that a defendant must prove the omission violated his substantial rights.¹⁷ Mitchell did not object at trial to missing pretrial disclosures.

The Court concluded that the missing disclosures were not withheld in bad faith and therefore the omission did not violate Mitchell's substantial rights.

The district court appropriately allowed questioning of Dr. Schmidt

The Court restated that the State may rebut a defendant's use of a medical report by using, in a limited manner, un-Mirandized statements used in the report.¹⁸ The rebuttal must consist only of statements that refer to the defendant's mental state, not his culpability for a crime.¹⁹ The court stated that such testimony would be reviewed for plain error when it did not elicit an objection during the trial.

This court found no plain error in the district court allowing Dr. Schmidt's testimony. The doctor limited his testimony to Mitchell's mental condition, including that Mitchell malingered during his examination. Even though Dr. Schmidt briefly mentioned the shooting, that comment did not violate Mitchell's constitutional rights because (1) it was made in response to Mitchell's counsel and (2) no jury was present at Mitchell's trial.

Conclusion

The Nevada Supreme Court extends an exception to the constitutional right against self-incrimination. The court may order a defendant to undergo an independent psychiatric evaluation and allow the State to use that evaluation in trial when a defendant himself argues that post-traumatic stress disorder caused him to act in self defense.

¹⁷ See *Grey v. State*, 124 Nev. ____, ____, 178 P.3d 154, 161-62 (2008).

¹⁸ See *Estes*, 122 Nev. at 1133, 146 P.3d at 1121.

¹⁹ *Id.* at 1134, 146 P.3d at 1122.