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Summary of Diomampo v. State of Nevada, 124 Nev. Adv. Op. No. 41

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***Diomampo v. State of Nevada*, 124 Nev. Adv. Op. No. 41 (June 12, 2008)¹**

CRIMINAL LAW – CRIMINAL PROCEDURE

Summary

Appeal from a judgment of conviction, upon jury verdict, of one count of mid-level trafficking in a controlled substance.

Disposition/Outcome

Reversed and remanded holding that the State’s peremptory challenge of a prospective juror on the ground that he did not understand the English language was improper and the State introduced improper evidence at trial.

Factual and Procedural History

On May 19, 2004, Las Vegas Metropolitan Police Department officers Wojcik and Garbon effected a routine traffic stop of a car driven by Jose Noel Diomampo (“Diomampo”). Diomampo was driving on a suspended license and had outstanding warrants for his arrest. Officer Wojcik placed Diomampo under arrest. A routine search of the vehicle revealed an electronic scale that contained a “white, crystalline-type substance.” The same substance was also found in Diomampo’s sunglass case. This substance was later determined to be methamphetamine. Additional drug paraphernalia was also found in the vehicle. Officer Wojcik read Diomampo Miranda and Diomampo invoked his Fifth Amendment right to remain silent.

At trial, the State used all four of its peremptory challenges on minorities. Additionally, Officer Wojcik, the State’s witness, testified that Diomampo remained silent after being read his Miranda rights. The defense’s objection was overruled. Additionally, Officer Wojcik testified that “with methamphetamine[,] normally in order for somebody to support their habit[,] they’ll go out and commit robberies or burglaries.” The jury convicted Diomampo of mid-level trafficking in a controlled substance. Diomampo appealed and raised the following issues.

Discussion

The State’s Improper Peremptory Challenges

During jury selection, the State used all four of its peremptory challenges to dismiss four minorities. Diomampo claimed that the state violated *Boston v. Kentucky*.²

¹ By Tyler James Watson

² 476 U.S. 79 (1986).

In *Batson*, the United States Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution.³ The Court has outlined a three-pronged test for determining whether illegal discrimination has occurred: (1) the defendant must make a prima facie showing that discrimination based on race has occurred based upon the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge or challenges, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination.⁴

Here, the Court held that two of the four dismissed jurors were improperly dismissed. First, prospective juror Ramirez was improperly dismissed because the record did not support the State's race-neutral reason: that Ramirez had difficulties understanding English. Second, prospective juror Nelson was improperly dismissed because the record did not support the State's race-neutral reason: that Nelson was preoccupied with his divorce. However, the Court found that the other two dismissed jurors were properly dismissed under *Batson*. The Court concluded that the two *Batson* violations identified required reversal and remand for a new trial as a matter of law.

Post-Miranda Silence

Diomampo argues that Officer Wojcik commented on his post-Miranda silence in violation of the Fifth Amendment privilege against self-incrimination.⁵ The Court recently held in *Gaxiola v. State* that "the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights."⁶ However, a "mere passing reference" to post-Miranda silence "without more, does not mandate an automatic reversal."⁷

At trial, the prosecutor asked two questions of Officer Wojcik regarding Diomampo's silence. The Court concluded that, when considered in the context of the full record generated at trial, the State's questions and comments at trial regarding Diomampo's post-Miranda silence were more than "mere passing reference"⁸ and were not harmless beyond a reasonable doubt.

Here, the Court concluded that the jury could have drawn improper conclusions about Diomampo's silence based on the prosecutor's questions and the officer's answer and the failure of the district court to strike the testimony from the record or provide a limiting instruction to the jury. Therefore, the Court held that the judgment of conviction must be reversed and remanded for a new trial.

³ *Id.* at 86.

⁴ *Id.* at 96-98.

⁵ *Gaxiola v. State*, 121 Nev. 638, 655 (2005).

⁶ *Id.*

⁷ *Shepp v. State*, 87 Nev. 179, 181 (1971).

⁸ *Id.*

Evidence of Prior Bad Acts

The Court held that the State improperly introduced an instance of “prior bad acts” in violation of NRS 48.045(2) through Officer Wojcik’s comment about methamphetamine users criminal propensities. NRS 48.045(2) provides that “[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Under *Petrocelli v. State*,⁹ in order to admit evidence of prior bad acts, the district court must conduct a hearing outside the presence of the jury and determine “that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.”¹⁰

The Court held that admitting Officer Wojcik’s testimony that methamphetamine users normally support their habits by committing robberies affected Diomampo’s substantial rights because it permitted the jury to draw inferences about Diomampo’s character and his conforming propensity to commit other crimes. Accordingly, the Court held that the district court erred in admitting the portion of Officer Wojcik’s testimony that related to the practices of methamphetamine users.

Warrantless Vehicle Search and Sufficiency of the Evidence

The Court dismissed Diomampo’s remaining arguments. The Court held that the officer’s had sufficient justification under the Fourth Amendment to conduct a warrantless search of the vehicle, incident to arrest, for weapons or to inventory its contents. Additionally, the Court held that Diomampo’s argument that the prosecution failed to provide sufficient evidence to sustain his conviction was without merit.

Conclusion

The Court held that the violation of *Boston* compelled reversal of the judgment of conviction in this matter. Furthermore, the Court held that it could not conclude that the comments on Diomampo’s post-Miranda silence were harmless beyond a reasonable doubt. Finally, the improper admission of character evidence also mandated reversal. Accordingly, the Court reversed the judgment of conviction and remanded the matter for a new trial.

⁹ 101 Nev. 46 (1985).

¹⁰ *Tinch v. State*, 113 Nev. 1170, 1176 (1997).