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Hidalgo v. District Court
124 Nev. Adv. Op. 33
(May 29, 2008)¹

CRIMINAL LAW – AGGRAVATING CIRCUMSTANCES; CRIMINAL
PROCEDURE; DEATH PENALTY

Summary

Petitioner Luis Hidalgo III, awaiting a capital murder trial, successfully made a petition for a writ of mandamus or prohibition challenging the alleged aggravating circumstances (solicitation to commit murder) as not being “a felony involving the use or threat of violence to the person of another” as required by NRS 200.033(2)(b). Although the court found the other aggravating circumstance, murder to receive money, to be in violation of SCR 250(4)(c) requirements, the court decided to allow the State amend its notice of intent to seek the death penalty to cure the deficiency.²

Disposition/Outcome

The Nevada Supreme Court granted the petition in part, striking the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2), but also allowed the State to amend its notice of intent to seek the death penalty to clarify the pecuniary gain aggravator.

Factual and Procedural History

Luis Hidalgo III is awaiting trial on one count of conspiracy to murder Timothy Hadland, one count of first-degree murder for Hadland’s death, and two counts of solicitation to commit the murders of two alleged witnesses to Hadland’s death. The State had filed notice of intent to seek the death penalty alleging three aggravating circumstances: the two solicitation counts as prior felonies involving the use or threat of violence to another person and a third aggravator alleging the murder was committed to receive money.³

On December 12, 2005, petitioner moved the district court to strike the State’s notices of intent. The district court heard argument on the motion in March and September of 2006 and

¹ By Barbra E. Zess

² The original opinion, 123 Nev. Adv. Op. No. 59 (Dec. 27, 2007), which was withdrawn on February 21, 2008, fully granted the petitioner’s writ and struck the State’s notice of intent to seek the death penalty, rather than giving the State the opportunity to amend.

³ NEV. REV. STAT. § 200.033 lists the circumstances by which murder of the first degree may be aggravated. Here, the State’s notice of intent suggests that the first two aggravators (the two solicitation to commit murder counts) fall under 2(b): “A felony involving the use or threat of violence to the person of another...” and the third aggravator falls under (6): “The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.” *Id.*

denied the motion from the bench on September 8, 2006. The original petition challenged that district court ruling. On December 27, 2007, the court issued an opinion granting the petition for a writ of mandamus, which the court subsequently withdrew on February 21, 2008, pending resolution of a petition for rehearing. The court granted the rehearing petition and this opinion is issued in place of the court's prior opinion.

Discussion

Aggravators one and two: solicitation to commit murder as a prior felony involving the use or threat of violence under NRS 200.033(2)(b)

The question presented is whether solicitation to commit murder can serve as a prior-violent-felony aggravating circumstance under NRS 200.033(2)(b). The court narrowed the question to whether the solicitation of a violent crime can be considered an offense involving the *threat* of violence to the person of another.⁴ On the one hand, the court noted that solicitation is criminalized because it carries the risk of leading to the consummation of a crime. On the other hand, the court had already stated that a risk or potential of harm to others “does not constitute a ‘threat’ under NRSW 200.033(2)(b).”⁵

To answer the question, the court relied upon decisions from Florida and Arizona that concluded that solicitation to commit murder cannot support an aggravator based on a prior felony involving the use or threat of violence to another person. The Supreme Court of Florida, in *Elam v. State*, concluded that “violence is not an inherent element” of solicitation.⁶ In *Lopez v. State*, a Florida appellate court reasoned that the crime of solicitation does not itself involve a threat of violence.⁷ The Supreme Court of Arizona concluded in *State v. Ysea* that solicitation to commit aggravated assault could not support the aggravating factor of a prior felony involving “the use or threat of violence on another person” because the statutory definition of solicitation did not require an act or a threat of violence as an element of the crime.⁸

The underlying reasoning that the court adopts from these cases is that the violent nature of the crime being solicited “does not transform *soliciting* murder into *threatening* murder within the meaning of the statute.”⁹

⁴ The court noted that the crime of solicitation to commit murder is defined in NEV. REV. STAT. § 199.500(2) and that the elements of solicitation do not involve the *use* of violence to another, regardless of the crime solicited.

⁵ Redeker v. District Court, 108 Nev. 200, 202 (1992) (quoting People v. Miley, 204 Cal. Rptr. 347, 352 (Ct. App. 1984)).

⁶ See *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994).

⁷ See *Lopez v. State*, 864 So. 2d 1151 (Fla. Dist. Ct. App. 2003). “‘The gist of criminal solicitation is enticement’ of another to commit a crime. No agreement is needed, and criminal solicitation is committed even though the person solicited would never have acquiesced to the scheme set forth by the defendant. Thus the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime.” *Id.* at 1152-1153.

⁸ See *State v. Ysea*, 956 P.2d 499, 502 (Ariz. 1998).

⁹ *Hidalgo v. Dist. Ct.*, 124 Nev. Adv. Op. No. 33, 9 (May 29, 2007).

The court determined that the California and Oklahoma cases¹⁰ the State cited in support of allowing solicitation to commit murder to maintain a prior-violent-felony aggravator were not on point. Additionally, the court distinguished this case from *Weber v. State* in which two prior-violent-felony aggravators based on sexual assault of a minor were upheld, even though the elements of sexual assault do not include the use or threat of violence.¹¹ In *Weber*, the court had concluded that the evidence showed “at least implicit” threats of violence were perceived by the minor and enabled the sexual assaults to occur.¹² Here, the court noted that there were no allegations that the petitioners made threats of violence, implicit or explicit, that were perceived as such by the intended victims.¹³

Aggravator three: murder to receive money or any other thing of monetary value under NRS 200.033(6)

The petitioners also asserted that the State did not satisfy the requirements of SCR 250 that requires the State to specifically allege all aggravating circumstances it intends to prove and to specifically allege the facts on which the State will rely to prove each aggravating circumstance. The court concluded that while the notice in this case included a number of specific factual allegations, the repeated use of “and/or” “undercut” the required level of specificity and therefore the State failed to provide a clear statement of how the facts support the aggravator.

The court noted that when a notice connects a string of facts with “and/or,” it permits the finding of the aggravator based on any of the facts taken separately as well as together. Therefore, if the State pleads its notice in this fashion, each separate fact must support the aggravator, not just any of the facts taken together. The court concluded that the notice in this case failed in this regard because the State’s alleged factual allegations supporting this aggravator are in an “incomprehensible format” such that it fails the due process requirements of SCR 250(4)(c).

Rather than striking the notice of intent to seek the death penalty because it was not in compliance with SCR 250(4)(c),¹⁴ the court decided to allow the State to amend the notice to clarify the factual allegations. In doing so, the court distinguished this case from the only other published decisions in which it struck notices of intent to seek the death penalty that were also not compliant with SCR 250(4)(c).¹⁵ Notably, the court expressly limited its holding in *Redeker v. District Court*¹⁶ to the particular facts and circumstances in that case.

¹⁰ See *Woodruff v. State*, 846 P.2d 1124 (Okla. Crim. App. 1983); *People v. Edelbacher*, 766 P.2d 1 (Cal. 1989).

¹¹ See *Weber v. State*, 121 Nev. 554 (2005).

¹² *Id.* at 586.

¹³ Judge Maupin took exception to this finding in his dissent, stating: “I do not read NRS 200.033(2)(b) to require that such a “threat of violence” must be perceived by the intended victim. Rather, I understand the aggravating circumstance to encompass a threat of violence that is communicated to another regardless of whether the threatened victim is aware of it.”

¹⁴ Striking the State’s notice of intent to seek the death penalty because of non-compliance with SCR 250(4)(c) is exactly what the court pronounced in its original opinion of Dec. 27, 2007, withdrawn Feb. 21, 2008.

¹⁵ The court has published only two other cases in which it struck notices of intent to seek the death penalty that were not compliant with SCR 250(4)(c) – *Redeker v. Dist. Ct.*, 122 Nev. 164 (2006) and *State v. Dist. Ct. (Marshall)*, 116 Nev. 953 (2000).

¹⁶ *Redeker*, 122 Nev. At 127.

Conclusion

Solicitation to commit murder is *not* a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b). Further, when the allegations in a notice of intent to seek the death penalty are strung together with “and/or,” then each separate fact must support the aggravator, not just any of the facts taken together. Therefore, in this case, the first two aggravators (two counts of solicitation to commit murder) failed because they did not meet the statutory requirements. Although the third aggravator failed due to lack of specificity in the allegations, the court concluded that allowing the State to amend the notice of intent to cure this deficiency would not violate Hidalgo’s due process rights. Ergo, the court granted the petition in part to strike the first two aggravators, but also allowed the State to amend, as to the pecuniary gain aggravator, its notice of intent to seek the death penalty.