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Redeker v. Dist. Ct., 122 Nev. Adv. Op. 14 (Feb. 9 2006)¹

**CRIMINAL – APPEAL: AGGRAVATING CIRCUMSTANCES,
CRIMINAL PROCEDURE, DEATH PENALTY**

Summary

Arie R. Redeker, facing a capital murder trial, made a petition for a writ of mandamus or prohibition challenging the alleged aggravating circumstances that he was convicted of a felony involving the use or threat of violence to the person of another.

Disposition/Outcome

The Nevada Supreme Court issued a writ of mandamus instructing the district court to strike the alleged aggravating circumstance that Redeker was convicted of a felony involving the use or threat of violence to the person of another. Additionally, the court lifted the stay of proceedings it had previously granted.

Factual and Procedural History

In December of 2002, the State charged Redeker with murder with the use of a deadly weapon, alleging he strangled his girlfriend, Skawduan Lannan, to death with a ligature on October 22, 2002. Later that month the State filed notice of intent to seek the death penalty. In its notice, the State alleged two aggravating circumstances: the murder was committed by a person who was (1) under the sentence of imprisonment and (2) who had been convicted of a felony involving the use or threat of violence to the person of another.

In its notice, the State claimed Redeker’s prior 2001 conviction for second-degree arson as evidence to support the second alleged aggravating circumstance.² The notice did not include specific facts of the nature of the crime, but instead indicated the State would rely on police reports, witness Statements, charging documents, the Judgment of Conviction, the Guilty Plea Agreement, and the PreSentence Investigation Report associated with the case to establish the aggravating circumstance.

In December of 2003, Redeker moved to strike the aggravating circumstances and argued that second-degree arson was not a “felony involving the use or threat of violence to the person of another” as required by NRS 200.003(2)(b). At oral argument, counsel contended that the court should not look to the facts underlying the conviction for second-degree arson. The prosecutor opposed that contention and stated that Redeker had made threats upon Lannan’s life before setting the house on fire. After hearing argument the district court denied Redeker’s motion to strike.

¹ By Brandon P. Kemble

² In 2001, Redeker was convicted of second-degree arson after pleading guilty to setting fire to a house that belonged to him and Lannan on June 9, 2001.

On November 15, 2004, Redeker moved to dismiss the State's notice to seek the death penalty for failure to present aggravating circumstances. The motion also contended the State's notice failed to conform to SCR 250 (4)(c), which requires the State to allege with specificity the facts it will rely on to prove aggravating circumstances. When the district court did not expressly decide the motion, Redeker filed a petition with the Nevada Supreme Court on April 15, 2005 and upon order from the court, the State filed an answer. The court directed the district court to enter a written order resolving Redeker's November 15, 2004 motion and the district court did so, denying the motion on December 21, 2005.

Discussion

Alleging with specificity the facts supporting an aggravating circumstance

In his motion, Redeker 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 the notice in this case did not allege with specificity any facts to show that Redeker had a prior felony conviction involving the use or threat of violence to the person of another.

The court reasoned that the State's notice, which only contained a list of materials it would use to prove the alleged aggravator, did not allege the specific facts that made the second-degree arson a crime of violence or threatened violence against the person of another. The court rejected the State's argument from its opposition to Redeker's original motion to strike aggravating circumstances, that prior to the arson Redeker had made threats against Lannan's life. The court stated that a defendant "cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from outside the notice of intent to seek death."³

The State contended that since Redeker was aware of the facts on which the State relied, that it should be allowed to amend the notice as it would amend an information or indictment. The court rejected the State's contention and noted that to do so would allow the State to enjoy the benefits of the indictment/information process while avoiding the burdens.

Prior conviction of a felony involving the use or threat of violence to the person of another

The court determined that even if it were to allow the State to amend its notice to seek the death penalty with the facts it alleged, that the allegations would still not support the aggravator. The court addressed two questions in its analysis: (1) What evidence may be relied on to determine if a prior felony involved the use of threat of violence to the person of another, and (2) Did the evidence in the case before it show that Redeker's arson involved violence or threat of violence?

Prior to this case, the court had not addressed what evidence might be relied on to determine if a prior felony involved the use of violence or the threat of violence. NRS 200.033(2)(b), the relevant statute on the issue, neither specifically enumerates offenses

³ Redeker v. Dist. Ct., 122 Nev. Adv. Op. 14, 5 (Feb. 9 2006).

that involve the use or threat of violence nor does it indicate evidence appropriate for making the determination.⁴

Redeker argued that only the statutory elements of an offense should be considered to determine whether it involved violence. The statutory description of second-degree arson under NRS 205.015 indicates that second-degree arson is only a crime against property.⁵ Redeker argued that the statutory description entailed no use or threat of violence to the person of another.

The State relied upon decisions from North Carolina, Tennessee, and Florida that permit the consideration of evidence associated with a prior felony conviction to determine whether the offense involved violence.⁶ The court concluded that these cases occupied one side of the spectrum.⁷

The court noted the other end of the spectrum, as represented in decisions by the Arizona Supreme Court.⁸ There, the court determined that a sentencer could not look beyond the statutory elements of an offense to determine whether it involved violence or the threat of violence and that to constitute an aggravating circumstance a prior conviction must be for a felony that involves the use or threat of violence in its definition.⁹ Finally, the Arizona Supreme Court narrowed the class of death-eligible defendants and determined that a felony based on recklessness did not constitute one involving the use or threat of violence.¹⁰

The court determined United States Supreme Court decisions, represented the middle ground.¹¹ In *Taylor v. United States*, the United States Supreme Court determined that a sentencing court is generally prohibited “from delving into the particular facts disclosed by the record of conviction, thus leaving the court normally to ‘look only to the fact of conviction and the statutory definition of the prior offense.’”¹² In *Sheppard v. United States* the Court did carve out a narrow exception for burglary and allowed a

⁴ NEV. REV. ST § 200.033(2)(b) reads: “A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony. For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.”)

⁵ NEV. REV. ST § 205.015 reads: “A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any abandoned building or structure, whether the property of himself or of another, is guilty of arson in the second degree which is a category B felony and shall be punished by imprisonment in the State prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$10,000.”)

⁶ See *State v. McDougall*, 301 S.E.2d 308, 321 (N.C. 1983); *State v. Sims*, 45 S.W.3d 1, 11-12 (Tenn. 2001); *Brown v. State*, 473 So. 2d 1260, 1266 (Fla. 1985).

⁷ The Court distinguished one of its own decisions where it concluded evidence from a second-degree arson conviction to determine a defendant’s prior felony conviction included violence. However, in that case the defendant set fire to a home occupied by someone with whom he had a dispute and then the defendant menaced arresting officers with a knife. See *Dennis v. State*, 116 Nev. 1075, 1082-1083, 13 P.3d 434, 438-439 (2000).

⁸ See *State v. Gilles*, 662 P.2d 1007, 1018 (Ariz. 1983); *State v. McKinney*, 917 P.2d 1214, 1228 (Ariz. 1996).

⁹ *Gilles*, 662 P.2d at 1018.

¹⁰ *McKinney*, 917 P.2d 1214 at 1228.

¹¹ See *Shepard v. United States*, 125 S.Ct. 1254 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

¹² *Shepard*, 125 S.Ct. 1254 at 1258.

sentencing court to review some documents, but excluded the police report and the complaint application from the list of available documents.¹³

Instead of choosing one of the extremes, the Nevada Supreme Court followed the United States Supreme Court. In deciding Redeker's motion, the court announced its position declaring: ". . . NRS 200.033(2)(b) . . . does not restrict the determination of the character of a felony simply to consideration of its statutory elements. On the other hand, the statute itself does not indicate that no limits should be placed on the sort of evidence that can be considered in making that determination."¹⁴

In the case before it, the court considered the statutory definition, the charging document, the written plea agreement, the transcript of the plea canvass, and any explicit factual finding by the district court to which Redeker assented to determine whether second-degree arson involved the threat or use of violence.

The court found that since Redeker had pled guilty without admitting his guilt, he did not assent to the district court's factual findings to establish threat or violence. It also determined that the statutory definition of second-degree murder did not include an element of threat or violence and that the criminal information and pleas agreement were likewise void of indication that Redeker used or threatened violence against anyone. The court determined that this appropriate evidence did not show that Redeker was convicted of a felony "involving the use or threat of violence to the person of another,"¹⁵ as NRS 200.033(2)(b) requires.

The court determined that even if the district court had been correct in its consideration of the State's presentation beyond the appropriate evidence, that its findings were still an abuse of discretion. The court noted that a reasonable interpretation of the evidence did not permit a finding that the crime involved the use of violence because the threats Redeker issued two days before conducting the arson included both threats of violence and threats of arson that were not necessarily related. Additionally, other evidence showed that Redeker certainly knew Lannan was not in the home during the arson because he had doused several rooms in the house with gasoline. Furthermore, the court reasoned that the risk of harm from arson did not equate to a threat of harm. Finally, the court reasoned that Redeker had made specific threats against Lannan's life, but the evidence did not show those threats were involved in the arson.

Conclusion

The court determined that the State must plead facts supporting an alleged aggravating factor with specificity and that the State, while not limited to only the statutory description of the offense, was limited to appropriate evidence in determining whether an aggravating felony in death penalty case involved the threat or use of violence. In Redeker's case, the court issued a writ of mandamus to strike the felony aggravator because the State's notice of intent did not comply with specificity requirements and because the facts in the case did not support the alleged aggravator.

¹³ *Id.* at 1257.

¹⁴ Redeker v. Dist. Ct., 122 Nev. Adv. Op. 14, 5 (Feb. 9 2006).

¹⁵ *Id.*