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City of Las Vegas v. Walsh, 121 Nev. Adv. Op. 85, 124 P.3d 203
(Dec. 15, 2005)¹

EVIDENCE – AFFIDAVITS

Summary

This case analyzes the scope of NRS 50.315(4), which allows the submission of an affidavit to prove specific facts about blood testing by experts. The scope of the affidavit was challenged as well as the Defendant's Sixth Amendment right to confront witnesses against him.

Disposition/Outcome

The Nevada Supreme Court held that the information contained in the affidavit did not exceed the scope of the statute.

The court also held that the affidavit is considered testimonial in nature and would be barred under *Crawford v. Washington*, but statutory requirements may waive the right to confront so long as the statute adequately protects the defendant's right to confront.

Factual and Procedural History

Defendant Mike Gehner was charged with misdemeanor driving under the influence. The City submitted an affidavit from the nurse that withdrew Gehner's blood for testing, which stated all of the information required by NRS 50.315(4). Gehner argued that the contents of the affidavit exceeded the scope of the statute, and that the nurse's statement that no alcohol swabs or solutions had been used was inadmissible. Instead, Gehner wanted to call the nurse as a witness to ask her if any alcohol swabs or solutions had been used, which was already stated in the affidavit.

The municipal court agreed with Gehner's argument and struck out portions of the affidavit and required the nurse to testify. The City then filed a writ of mandamus seeking the District Court to compel the production of the affidavit. The District Court agreed with the municipal court's finding and denied the petition.

Discussion

Gehner argued that the affidavit exceeded the scope of the statute and that the submission of the affidavit denied him the right to confront witnesses under *Crawford v. Washington*.²

¹ By Laura Deeter

² 541 U.S. 36 (2004).

Statutory Interpretation

To interpret the statute the court looked at the plain language of the statute and legislative history to determine the legislative intent. The statute states that an affidavit by a person who withdraws a sample of blood for analysis by an expert is admissible to prove certain facts.³ Those facts include the occupation of the declarant, the identity of the person from which the sample was taken, the fact that the declarant had the sample in their sole custody or control and that it was in the same substantial condition, and the identity of the person that the sample was delivered to.⁴ The court also looked at subsection eight of the statute, which allows for the Committee on Testing for Intoxication to adopt regulations for the form of the affidavit.⁵

The regulations create an ambiguity as to whether the Legislature intended the affidavits to be narrow and cover only what is prescribed in NRS 50.315(4) or whether the committee can broaden the scope of the affidavit. The legislative history showed that the statute was created to prevent unnecessary appearances and testimony from healthcare professionals when the defense had no questions for cross-examination. In addition, the legislature looked at a sample affidavit which contained the same information about the use of alcohol based swabs and solutions. The Legislature knew such information may be included and left it to the discretion of the committee. Calling the nurse to testify would be contrary to the legislative intent and would not foster judicial economy.

Confrontation Clause

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution gives defendants the right to cross-examine witnesses against them.⁶ Under *Crawford*, a testimonial statement by a witness who does not appear at trial is inadmissible, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness about the statement.⁷ A testimonial statement is an ex-parte in-court testimony or equivalent, such as an affidavit.⁸ The test is whether an objective witness would reasonably believe that the statement would be used later in court.⁹ The affidavit in question was created to be used in court and prevent health care officials from having to testify, and would qualify as a testimonial statement which would be inadmissible under *Crawford*.

However, the Nevada Supreme Court held in *DeRosa v. District Court*¹⁰ that Confrontation Clause objections are waived by failure to comply with statutory procedures.¹¹ Under NRS 50.315(6) and (7) the defendant must establish before trial that there is a substantial and bona fide dispute of the facts stated in the affidavit and it is in

³ NEV. REV. STAT. § 50.315(4) (2004).

⁴ *Id.*

⁵ *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. 84 at 5.

⁶ *Id.* at 7.

⁷ *Walsh*, 121 Nev. Adv. Op. 85 at 8, *citing Crawford*, 541 U.S. at 68-69.

⁸ *Id.*

⁹ *Id.*

¹⁰ 985 P.2d 157 (Nev. 1999).

¹¹ *Walsh*, 121 Nev. Adv. Op. 85 at 9, *citing DeRosa*, 985 P.2d at 163.

the best interest of justice that the witness who signed the affidavit be cross-examined.¹² The defendant failed to raise the necessary objections required by statute and waived his rights under the Confrontation Clause. If there is no bona fide dispute as to the facts of the affidavit there is no reason to bring in a witness who will not be cross-examined, and the statute sufficiently preserves the defendant's rights under the Confrontation Clause.

Conclusion

The court reverses the judgment of the district court and grants the writ of mandamus compelling the production of the affidavit and directs the municipal court to determine whether Gehner waived his confrontation rights.

¹² NEV. REV. STAT. § 50.315(6)-(7) (2004).