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Summary of Carter v. State, 121 Nev. Adv. Op. 75

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Carter v. State, 121 Nev. Adv. Op. 75 (2005)[1]

CRIMINAL LAW AND PROCEDURE—JUDGMENT OF CONVICTION—JURY VERDICT

Summary

Appeal from a judgment of conviction, entered after jury verdict, for one count of attempted sexual assault.

Disposition/Outcome

Reversed and remanded with instructions. The rejection of Carter's proffered consent instruction mandates a reversal and remand for a new trial. However, in so doing, the Court retreats from past precedent, upon which the district court relied in refusing Appellant's request.

Factual and Procedural History

Appellant, Carter, was charged with sexual assault and attempted sexual assault. The victim alleged that she accompanied Carter to his Las Vegas apartment after he promised he would provide her with illegal drugs. She claimed that upon their arrival at his apartment he sexually assaulted her. Carter claimed that the sexual activity was consensual. Carter did not testify at trial, but interposed a consent defense.

Although the jury ultimately acquitted Carter of sexual assault, it convicted him of attempted sexual assault. The district court entered judgment upon the verdict, and sentenced Carter to serve a prison term of 62 to 155 months.

Carter appealed, claiming the district court erred in refusing a proposed instruction on consent; in its failure to admit the entirety of his taped interview with police detectives; in the admission of prior bad act testimony; and in giving a "flight" instruction.

Discussion

The Court addressed Carter's main appeal, regarding his rejected request for consent instructions. In addition, the Court addressed Carter's other contentions, regarding his taped interview, the admission of bad act testimony, and the "flight" instructions.

Theory of the Case Instruction

Carter's main contention was the court should have given an instruction regarding consent. In sexual assault cases, claims of consent raise specific questions that must be addressed as part of the trial court's instructions to the jury.[2] In *Honeycutt v. State*, the Court stated: "Because a perpetrator's knowledge of lack of consent is an element of sexual assault, we

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[2] *See* Margetts v. State, 107 Nev. 616, 619-20, 818 P.2d 392, 394 (1991).

conclude that a proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration."[3]

In the current case, Carter proffered an instruction on reasonable belief. In the proposed instruction, Carter requested that in the case the jury had a reasonable doubt as to a defendant's good faith belief of consent, the jury must give the defendant the benefit of the doubt, finding him not guilty of the charge. The district court refused Carter's instruction, claiming that it was sufficiently covered by other instructions. The instructions given by the district court did not address the significance of reasonable doubt that would require an acquittal. Until recently, this type of omission did not require a reversal.[4]

In *Honeycutt*, the defendant offered a consent instruction similar to Carter's. The Court approved the instruction, with the exception that the defendant add a provision explaining that a belief is not reasonable when based upon conduct produced by violence or fear. The Court in *Honeycutt* found that the district court did not error in refusing the instruction, since this provision was initially missing.

Retreat from Honeycutt

The Court held that because the *Honeycutt* holding required an unprecedented inclusion of language that undermined the defendant's defense in order to have a reasonable belief of consent, it created a trap, which exalts form over substance where a defendant's right to fair trial is at stake.[5]

Like *Honeycutt*, Carter's instruction omitted the "required" language. The Court holds that even though Carter's defense should have been aware of the *Honeycutt* holding, and thus, should have inserted the necessary provision, an instruction which does not include such provision should not be per se rejected as incomplete.

The *Honeycutt* holding is flawed because (1) it improperly rejected an instruction because it was an incomplete statement of law, even though it was legally correct; (2) it improperly implies defendant must proffer instruction that articulate both the defense and prosecution's theories; (3) it implies that failure to do so would invalidate instructions made in another context; and (4) it relieves district courts' obligations to give complete instructions. The Court held that a defendant is not required to proffer both parties' theory of the case in order to have an instruction given. In addition, district courts must give complete instructions, even though the requested instruction is viewed as incomplete. Thus, to the extent that *Honeycutt* is inconsistent with this view, the Court expressly overturns it.

However, this holding does not mean that a defendant will have an incomplete instruction given to the jury. In order to avoid such a happening, the State may request that additional language be added to the instruction. Also, the district court should complete the instruction, either by itself or with the assistance of the parties. Thus, the Court's retreat from *Honeycutt* does not mean that district courts must accept misleading, inaccurate, or duplicitous jury instructions.

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[3] 118 Nev. 660, 670, 56 P.3d 362, 369 (2002).

[4] *See* Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994).

[5] In reaching this conclusion, the Court also considered the fact that the defendant in *Honeycutt* was denied his consent instruction because of a technical failure to include language that the State could have easily requested.

Partial Reaffirmation of Honeycutt and a retreat from Stroup v. State

Although the Court overturned an aspect of the *Honeycutt* holding, *Honeycutt* remains valid authority insofar as it requires district courts to allow instructions on sexual assault cases regarding consent and reasonably mistaken belief as a defense.

Although the district court's instructions in the current case stated that consent was a defense, it failed to include an acquittal provision regarding reasonable doubt or reasonable mistaken belief. Such language is required under a reading of *Honeycutt* with the Court's recent decisions in *Runion v. State*[6] and *Crawford v. State*,[7] all of which unwind to a degree, the effect of the Court's 1994 decision in *Stroup*. Thus, under current authority, Carter's instruction was not fully covered by the district court.

The holding in *Stroup* implied that general elements instructions, coupled with standard reasonable doubt instructions, are adequate and make it unnecessary to explicitly include language regarding acquittal.[8] The dissent in *Stroup* argued that the basic instruction was insufficient when such an instruction failed to state that acquittal was required.[9] The Court has since adopted the dissent's view in *Honeycutt*, regarding sexual assault, as well as in *Runion*, regarding reasonable perceived danger from the decedent in a murder case.[10] In addition, the Court's recent decision in *Crawford* explicitly held that district courts must, upon request, include statements of the significance of a finding made in aid of a theory in defense instructions.[11]

In the current case, the district court rejected Carter's proffered instruction, which included "duty to acquit" language. Such a rejection is not in line with the Court's recent holdings in *Runion*, *Honeycutt*, and *Crawford*. If requested, the defendant's instructions must include the significance of findings made under the theory posited. Although Carter's instruction was only partial, it still accurately stated the applicable doctrine for his theory of the case, and the district court's other instructions failed to include a complete statement of that theory. Thus, Carter's conviction is reversed, and remanded for a new trial, in which the district court must give the complete *Honeycutt* instruction.

Investigator's Interview with Carter

Carter argues that the district court allowed portions of his taped interview which made him look badly, but did not allow the complete interview, which he believes would have helped his case. At trial, the State lodged a timely hearsay objection, in which it argued that Carter should not be able to elaborate upon his substantive version of events through his own hearsay statement. Carter argued that the tape was admissible under exceptions to the rule against admissions of hearsay. The Court held the district court properly excluded the tape on hearsay grounds.

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[6] 116 Nev. 1041, 13 P.2d 52 (2000).
[7] Nev. Adv. Op. 74 (Oct. 20, 2005).
[8] *Stroup* involved justifiable homicide instructions. The Court held that the instructions regarding justifiable homicide, explaining the elements of the crime, were sufficient, even without explicit acquittal provisions.
[9] *Stroup*, 110 Nev. at 529, 874 P.2d at 772 (Springer, J., dissenting).
[10] 116 Nev. at 1050, 13 P.3d, at 58.
[11] Nev. Adv. Op. 74 (Oct. 20, 2005).

Prior Bad Acts and Character Evidence

The district court admitted evidence that Carter used and distributed drugs, as well as the fact that Carter had been suspended from his employment. Carter argued this evidence prejudiced his opportunity to have a fair trial.

There is a general presumption that uncharged bad acts are inadmissible.[12] In addition, NRS 48.045(2) forbids the admission of prior bad acts to show that a person acted in conformity with charged conduct. The Court requires prescreening of such evidence under *Petrocelli v. State*[13] to determine relevancy, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, and whether it is proven by clear and convincing evidence.[14] A trial court's failure to conduct a *Petrocelli* hearing on the record may be cause for reversal, but reversal is not mandated absent any prejudicial effect.

The Court concluded that the district court did not err in admitting the evidence of illegal drug use. First, Carter did not timely object to the State's proffered evidence. Further, Carter actually elicited evidence of his own illegal drug use. A party who participates in an alleged error is estopped from any objection on appeal.[15]

The Court also rejected Carter's argument regarding statements indicating he had lost his job. The Court reasoned that because the statements were spontaneous and inadvertent statements, not solicited by prosecution, the problem was cured when Carter's counsel objected during the trial, and when the judge subsequently sustained the objection.

Flight Instruction

Carter contends the district court erred in giving the jury a flight instruction. It is proper for the district court to give a flight instruction when it is reasonable to infer flight from the evidence presented.[16]

In the current case, the State presented evidence that Carter's wife mislead detectives as to Carter's whereabouts. The State also presented evidence that Carter had concealed himself under a pile of clothing in his apartment when the police were searching for him. Thus, the Court concludes that there is ample evidence to support the district court's giving a flight instruction.

Conclusion

Carter was entitled to a complete instruction on the issue of reasonable belief of consent. The judgment of conviction is reversed and remanded for a new trial.

[12] Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001).
[13] 101 Nev. 46, 692 P.2d 503 (1985).
[14] Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).
[15] Jones v. State, 95 Nev. 613, 618, 600 P.2d 247, 250 (1979).
[16] Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).