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### Summary of Hymon v. State, 121 Nev. Adv. Op. 23

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*Nevada Law Journal*

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*Hymon v. State*, 121 Nev. Adv. Op. 23, 111 P.3d 1092 (2005)<sup>1</sup>

**CRIMINAL LAW**

**Summary**

In April 2001, Hymon stole a purse from a woman in the lobby of an auto repair shop. He ran, and two of the shop's mechanics pursued him. They caught up to him when he fell on the curb, but he stood and swung a four- to six-inch long pocketknife. They backed away, allowing him to escape, but the police apprehended him shortly thereafter.

After Hymon requested to represent himself, the district court conducted a *Faretta* canvass,<sup>2</sup> and concluded that Hymon was competent to waive his right to counsel. Hymon was uncooperative and unwilling to communicate with the prosecutor, so the district court revoked Hymon's right to represent himself and appointed counsel. At a calendar call in November 2001, Hymon claimed he was being represented against his will and denied his right to self-representation. The district court conducted another *Faretta* canvass, during which Hymon again gave appropriate responses. However, the district court was concerned with Hymon's understanding of his available defenses – one of his main reasons for wanting to represent himself was that his counsel would not present the defense he wanted (denial of due process). The district court allowed Hymon to represent himself, but also appointed standby counsel.

During the trial, Hymon was ordered to wear a stun belt because of a letter he had sent. The letter requested that the Civil Rights Volunteers make the district court judge recuse himself, and also stated, "If I have to, I will murder him." In trial, Hymon focused on the violation of his rights, and, as an example, opened his clothes to reveal the stun belt. Following a guilty verdict, the State presented certified copies of Hymon's prior convictions, and the district court found Hymon to be a habitual criminal. However, the State never requested to have the judgments of conviction admitted, and the district court never stated that they were admitted.

On appeal, Hymon asserted that the district court: (1) should have promptly disclosed that it had received a copy of the letter and conducted a hearing before requiring him to wear a stun belt, (2) abused its discretion by allowing Hymon to represent himself after performing an inadequate *Faretta* canvass, and (3) erred by sentencing Hymon as a habitual criminal when the judgments of conviction were not admitted into evidence.

The Nevada Supreme Court held that while the district court should have disclosed its receipt of the letter and held a hearing on the use of the stun belt, such error was harmless as there existed an essential state interest in compelling Hymon to wear a stun belt. The court also held that the district court's *Faretta* canvass was sufficient; that Hymon was competent to waive his right to counsel, and that such waiver was knowing, voluntary and intelligent. Finally, the court held that it was not error to sentence Hymon as a habitual criminal because it was clear that the prior convictions were introduced as evidence, argued by the parties, and considered by the court.

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<sup>1</sup> By Bryson D. Perkins

<sup>2</sup> In a *Faretta* canvass, the district court questions a defendant on the topics listed in SCR 253 to determine if the defendant is competent to waive his right to counsel, and is doing so freely, voluntarily, and knowingly. *See Faretta v. California*, 422 U.S. 806 (1975).

## **Issue and Disposition**

### **Issues**

(1) Stun Belt: Under what circumstances may a district court compel a defendant to wear a stun belt during the guilt phase of a trial?

(2) Faretta Canvass: What must a court determine in order to allow a defendant to waive his right to counsel, and represent himself?

(3) Habitual Criminals: Is it error for a court to sentence a defendant as a habitual criminal when copies of prior conviction judgments are not actually admitted into evidence?

### **Dispositions**

(1) Stun Belt: To compel a defendant to wear a stun belt, a district court must hold a hearing wherein it determines that an essential state interest exists. It must also consider less restrictive means of restraint. Additionally, the court must: make factual findings regarding the belt's operation; address the criteria for activating the belt; address the possibility of accidental activation; inquire into the belt's potential adverse psychological effects; and consider the health of the individual defendant. The court's rationale must be placed on the record, and the ultimate decision must be made by the court rather than by law enforcement.

(2) Faretta Canvass: A court must determine that a defendant is competent to waive his right to counsel, and that such waiver is made knowingly, voluntarily and intelligently. A court should conduct a *Faretta* canvass to make this determination and to apprise the defendant of the risks involved. However, the mechanical performance of a *Faretta* canvass is not necessary, and even the omission of a canvass is not error as long as the defendant was competent, and that the waiver was made knowingly, voluntarily and intelligently.

(3) Habitual Criminals: No. Where it is unclear whether certified copies of prior conviction judgments were admitted into evidence, but it is clear that such convictions were introduced, argued, and considered, it is not error for the court to sentence the defendant as a habitual criminal.

## **Commentary**

### **State of the Law Before *Hymon v. State***

#### **Stun Belt**

A stun belt is a means of prisoner restraint that is worn beneath the clothes and is not visible to the jury. When activated, which has happened accidentally in some cases, the belt delivers an electrical current through the body that can sometimes cause incapacitation, severe pain, uncontrolled defecation or urination, muscular weakness, heartbeat irregularities, and/or seizures.<sup>3</sup> Restraining a defendant during trial raises several constitutional concerns. The sight of physical restraints may have a significant effect on the jury by eroding the presumption of innocence which is an integral part of the defendant's right to a fair trial.<sup>4</sup> Notably, the United

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<sup>3</sup> See *Gonzalez v. Pliker*, 341 F.3d 897 (9th Cir. 2003).

<sup>4</sup> *Id.* at 899-900; *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002); *Dickson v. State*, 108 Nev. 1, 3, 822 P.2d 1122, 1124 (1992).

States Supreme Court has held that the Constitution forbids the use of visible shackles during the penalty phase of a capital proceeding, as well as during the guilty phase, unless the use is justified by an essential state interest.<sup>5</sup> Because a stun belt can be concealed beneath the defendant's clothing, this is less of a concern than the more traditional forms of restraint.

Nevertheless, other constitutional concerns may be elevated by the use of a stun belt. The defendant's anxiety is likely increased by the fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening. A defendant has a right to confer with counsel, to be present at trial, and to participate in his defense. All of these activities are impeded by the defendant's focus and anxiety being occupied by the possible triggering of the belt.<sup>6</sup> Many criminal trials rest on the credibility of the witnesses. The presence of a stun belt is likely to adversely affect the defendant's demeanor on the stand, making the stun belt significant.<sup>7</sup> Furthermore, all of these concerns are elevated even more when a defendant is representing himself. The defendant must focus intently on the proceedings so that he does not miss an issue or a possible objection. He may be concerned about voicing a vehement objection or actively cross-examining a witness. It is for these reasons that the use of a stun belt is subjected to close judicial scrutiny.<sup>8</sup>

#### Faretta canvass

The United States and Nevada Constitutions guarantee a defendant the right to self-representation.<sup>9</sup> Denial of that right is per se reversible error.<sup>10</sup> However, before allowing a defendant to waive counsel and represent himself, the trial court must ensure that the defendant is competent and that the waiver of counsel is knowing, voluntary, and intelligent.<sup>11</sup> Trial courts should conduct a *Faretta* canvass to apprise "the defendant fully of the risks of self-representation and of the nature of the charged crime so that the defendant's decision is made with a 'clear comprehension of the attendant risks.'"<sup>12</sup>

Supreme Court Rule 253(2) states that during a *Faretta* canvass the district court should inform the defendant of dangers, disadvantages and consequences of self-representation. The rule lists specific warnings that the district court should offer. Rule 253(3) states that the canvass may include questions about the defendant personally, and about the defendant's knowledge and understanding of the proceedings against him. Finally, Rule 253(4) directs the court to make findings on the record concerning the defendant's competency to waive counsel, and whether such waiver is done freely, voluntarily and knowingly.

The Nevada Supreme Court has "rejected the necessity of a mechanical performance of a *Faretta* canvass. Even the omission of a canvass is not reversible error if 'it appears from the whole record that the defendant knew his rights and insisted upon representing himself.'"<sup>13</sup> Deference is given to the district court's decision because "through face-to-face interaction in the

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<sup>5</sup> *Deck v. Missouri*, 125 S. Ct. 2007 (2005).

<sup>6</sup> *Durham*, 287 F. 3d 1297.

<sup>7</sup> *Gonzalez*, 341 F.3d at 900.

<sup>8</sup> *Durham*, 287 F. 3d at 1304; *Gonzalez*, 341 F.3d at 901.

<sup>9</sup> *Wayne v. State*, 100 Nev. 582, 584, 691 P.2d 414, 415 (1984).

<sup>10</sup> *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

<sup>11</sup> *Faretta*, 422 U.S. at 835.

<sup>12</sup> *Johnson v. State*, 117 Nev. 153, 164, 17 P.3d 1008, 1016 (2001) (citing *Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997) (quoting *Graves v. State*, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996))).

<sup>13</sup> *Graves*, 112 Nev. at 125, 912 P.2d at 238 (quoting *Wayne*, 100 Nev. at 585, 691 P.2d at 416).

courtroom, the trial judges are much more competent to judge a defendant's understanding than this court. The cold record is a poor substitute for demeanor observation."<sup>14</sup>

### Habitual criminality

As long ago as 1966, the Nevada Supreme Court established that in order for a defendant to be sentenced as a habitual criminal, the State must prove the defendant's prior convictions beyond a reasonable doubt.<sup>15</sup> By statute, a "certified copy of a felony conviction is prima facie evidence of conviction of a prior felony."<sup>16</sup>

### **Effect of *Hymon v. State* on Current Law**

#### Stun Belt

The Nevada Supreme Court clarified that in order for a district court to compel a defendant to wear a stun belt, the court must conduct a hearing to determine whether an essential state interest exists, such as special security needs or specific escape risks. As part of this determination, the court must consider less restrictive means of restraint. Additionally, the court must:

- 1) make factual findings regarding the belt's operation;
- 2) address the criteria for activating the belt;
- 3) address the possibility of accidental activation;
- 4) inquire into the belt's potential adverse psychological effects; and
- 5) consider the health of the individual defendant.

The district court's rationale must be placed on the record to enable the Nevada Supreme Court to determine if use of a stun belt was an abuse of discretion. Furthermore, the decision to use a stun belt must be made by the court, and not be made by law enforcement.

The *Hymon* court held that the district court's failure to hold a hearing was harmless error because the record sufficiently demonstrated an essential state interest in compelling Hymon to wear the stun belt. The record indicated that Hymon posed a substantial security risk in the courtroom and had also directly threatened the trial court judge. Any prejudice on the part of the jury was caused by Hymon ripping open his clothes during opening arguments, thus making the jury aware of the existence of the belt. The court instructed the jury that the belt was a standard security procedure and that they should not draw any inferences from it concerning the defendant's character or propensity for violence. Finally, the court made the ultimate decision to use the belt.

#### *Faretta* Canvass

Applying established precedent regarding a *Faretta* canvass and Nevada Supreme Court Rules, the *Hymon* court reiterated that to waive the right to counsel, a defendant must be competent and must waive such right knowingly, voluntarily and intelligently. Although the record seemed to indicate that the district court was under the impression that competency was enough, the *Hymon* court concluded that the record also supported its holding that Hymon's waiver was knowing, voluntary and intelligent.

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<sup>14</sup> Id. at 124, 912 P.2d at 238.

<sup>15</sup> *Hollander v. State*, 82 Nev. 345, 349-50, 418 P.2d 802, 804 (1966).

<sup>16</sup> NEV. REV. ST. § 207.016(5) (2004).

### Habitual Criminality

While the *Hymon* court noted that the better practice is for the district court to clearly enunciate that evidence has been admitted, it concluded that the failure to use precise words is not fatal. The court held that the district court did not commit error in sentencing Hymon as a habitual criminal because it was clear that the prior conviction documents were received into evidence, the parties argued them,<sup>17</sup> and the court considered them in making its determination.

### Unanswered Questions

The Nevada Supreme Court declared that in order to compel a defendant to wear a stun belt, the district court *must* conduct a hearing to determine whether an essential state interest exists. Yet, in *Hymon*, the district court held no such hearing. The *Hymon* court found this to be harmless error, since the record reflected that there was an essential state interest. It is unclear, then, how mandatory the hearing requirement really is. If the record in a future case clearly shows an essential state interest, but the court fails to hold a hearing, what would be the Nevada Supreme Court's ruling? Would it enforce the rule that a hearing *must* be held, or would it find the failure to be harmless error, as it did in *Hymon*?

### Conclusion

To compel a defendant to wear a stun belt, a district court must hold a hearing to determine if an essential state interest exists, and should consider less restrictive means of restraint. The court must make factual findings regarding the belt's operation; address the criteria for activating the belt; address the possibility of accidental activation; inquire into the belt's potential adverse psychological effects; and consider the health of the individual defendant. Additionally, the ultimate decision must be made by the court, and the court must put its rationale on the record.

In allowing a defendant to waive his right counsel, a district court must determine that the defendant is competent to waive this right, and that such waiver is done knowingly, voluntarily and intelligently. A Faretta canvass should be done to apprise the defendant of the attendant risks of self-representation. Questions during the canvass may include topics listed in the Supreme Court Rules.

Although it would be best to clearly enunciate that prior convictions are admitted into evidence, a district court may still sentence a defendant as a habitual criminal if it is clear that the court considered such convictions in making its determination.

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<sup>17</sup> In fact, Hymon successfully argued against the validity of one of the convictions.