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Summary of Middleton vs. Warden, 120 Nev. Adv. Rep. 74

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***Middleton vs. Warden*, 120 Nev. Adv. Rep. 74, 98 P.3d 694
(Oct. 14, 2004)¹**

**CRIMINAL LAW & PROCEDURE – APPELLATE
REPRESENTATION**

Summary

The Nevada Supreme Court removed Middleton's appointed appellate counsel due to substandard representation. On initial review, the Nevada Supreme Court ordered Middleton's counsel to submit an amended brief, limited to 80 pages. Counsel's "amended" brief was simply the original brief with the final few pages removed so as to meet the 80-page requirement. Counsel had repeatedly violated court orders, and the work product he ultimately submitted was unacceptable for representation of a client who was facing a death sentence.

Disposition/Outcome

Middleton's counsel was removed, and the denial of Middleton's habeas corpus petition was vacated. The case was remanded with instructions that the trial court appoint new post-conviction counsel to represent Middleton.

Factual and Procedural History

David Middleton was convicted, pursuant to a jury verdict, of two counts of first-degree murder and was sentenced to death. The Nevada Supreme Court affirmed Middleton's conviction and death sentences on direct appeal.²

Middleton originally filed a post-conviction habeas corpus petition in the district court in May 1999. In May 2000, the district court appointed Washoe County Public Defenders to Robert Bruce Lindsay and Ian Silverberg to represent Middleton.³ Later, the district court ordered for an amended petition to be filed on Middleton's behalf. Although one year and seven months had passed since their appointment, Lindsay and Silverberg informed the district court in December 2001 that they did not have enough time to work on the petition. In March 2002, after several missed deadlines, Lindsay and Silverberg filed a 305-page supplemental petition.

At the outset of an evidentiary hearing in June 2002, the district court summarily dismissed most of the claims raised in the petition. In November 2002, the district court issued a preliminary order denying Middleton relief on the remaining claims. In January 2003, the district court issued a final order denying Middleton all relief. Lindsay then took on the sole representation of Middleton on appeal to the Nevada Supreme Court.

¹ Summarized by Ryan Hall.

² See *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998); *Sheriff v. Middleton*, 112 Nev. 956, 921 P.2d 282 (1996).

³ See NEV. REV. STAT. 34.820(1) (requiring the appointment of counsel for a capital defendant's first post-conviction habeas corpus petition).

After six orders from the Nevada Supreme Court directing Lindsay to file an overdue opening brief, Lindsay finally submitted an 88-page opening brief on December 23, 2003. The court then issued an order directing Lindsay to file an amended brief of not more than 80 pages.⁴ The order noted that Lindsay may have misapprehended the procedural rules and case law governing the content, form, and citation requirements of briefs for post-conviction capital cases. The order also noted that Lindsay had asserted that the Nevada Supreme Court's decision in *State v. Haberstroh*⁵ had constrained him to limit the appendix of his brief. The court advised Lindsay that *Haberstroh* should not be read to deter including relevant appendix materials that may be helpful to understanding the nature of the case or the issues presented.

On February 10, 2004, Lindsay submitted an opening brief of exactly 80 pages. The Nevada Supreme Court later discovered that the "amended" opening brief was simply the original submitted brief with the final eight pages removed.

Discussion

The Nevada Supreme Court stressed that capital cases are distinguishable from other criminal cases not only by the severity of sentence given to the defendant but also by the lengthy proceedings and complex issues that such a sentence entails.⁶ The court acknowledged the unique burdens placed upon defense counsel who represent capital defendants.⁷ However, the Nevada Supreme Court noted that capital defense counsel contribute vitality to the court's deliberative process and assist the court in ensuring that capital cases receive a "just and expeditious final disposition."⁸

The Nevada Supreme Court mentioned that the highest standards of competence and diligence are expected of capital defense counsel in all stages of the criminal proceedings.⁹ When such standards are not met, the court must exercise its inherent authority to *sua sponte* remove counsel from representing a capital defendant.¹⁰

Lindsay had repeatedly violated court orders and procedural deadlines. Despite the generous amount of time afforded to Lindsay in which to complete and file his opening brief and appendix, the work product he ultimately submitted was wholly substandard and unacceptable.

⁴ See *Hernandez v. State*, 117 Nev. 463, 468, 24 P.3d 767, 770 (2001) (providing that an 80-page limit provides a capital appellant with an "ample and fair opportunity to obtain an adjudication on the merits"); NRAP 28(g) (providing that the length of appellate briefs shall not exceed 30 pages without this court's permission).

⁵ 119 Nev. 173, 69 P.3d 676 (2003).

⁶ SCR 250(1) ("This court places the highest priority on diligence in the discharge of professional responsibility in capital cases."); see also *Gardner v. Florida*, 430 U.S. 349, 357, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) (plurality opinion) (recognizing that death is a different kind of punishment from any other).

⁷ See *Young v. District Court*, 107 Nev. 642, 644, 818 P.2d 844, 845 (1991) (recognizing "the necessary latitude defense counsel must have in representing criminal defendants, especially in capital cases").

⁸ See SCR 250(1).

⁹ See *id.*; SCR 151 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); SCR 153 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

¹⁰ See *Young*, 107 Nev. at 646-47, 818 P.2d at 846-47; SCR 39.

The rules governing the proper format for briefs and appendices filed before the Nevada Supreme Court are set forth in NRAP 28 through NRAP 32.¹¹ The Nevada Supreme Court stressed that pervasive violations of the relevant NRAP provisions will not be disregarded, especially when such violations impair the court's ability to meaningfully dispose of the issues raised on appeal. Lindsay's opening brief and appendix contained many flagrant violations of the relevant NRAP provisions.

The opening brief submitted by Lindsay was disorganized and incoherent. Throughout the brief were multiple pages of citation to case law with little or no factual analysis or support.¹² Compounding such deficiencies were improper legal citations, typographical errors, and arguments with no discernable beginning or end.

Despite the court's explicit directives, Lindsay maintained his incorrect reading of *Haberstroh* and failed to include a relevant statement of facts in his opening brief.¹³ Also, Lindsay failed to provide supporting citations to the appendix.¹⁴ To comply with the 80-page limit, Lindsay made no effort to amend the opening brief and chose instead to tear out the final eight pages, omitting any discussion of four other issues listed in the brief's table of contents.

The appendix filed by Lindsay was also inadequate. Lindsay failed to include numerous documents and portions of the district court proceedings that appear essential to addressing the claims he raised.¹⁵ Other documents Lindsay included were incomplete, unsigned, marked up with personal notes, or not stamped by the district court.

These multiple NRAP violations indicated a clear disregard by Lindsay for the Nevada Supreme Court, the rules governing the practice of attorneys, and the obligations incumbent upon him as counsel for a client facing a death sentence. If Lindsay was physically or mentally unable to diligently submit a competent work product, then it was his obligation to withdraw as Middleton's counsel.¹⁶ His failure to do so had impaired the court's ability to achieve a meaningful disposition of Middleton's appeal.

SCR 250(2)(d) provides that counsel appointed to represent a capital defendant in a post-conviction appeal must be "capable and competent to represent the appellant." Lindsay's performance in Middleton's appeal fell far short of the capable and competent representation standard. Therefore, the Nevada Supreme Court was compelled to *sua sponte* remove Lindsay as Middleton's counsel. The Nevada Supreme Court further prohibited Lindsay from practicing before the court in any future cases without the court's express prior authorization.¹⁷ The Nevada Supreme Court also referred Lindsay to the State Bar of Nevada for disciplinary proceedings regarding his performance.¹⁸

¹¹ See SCR 250(7)(c).

¹² See NRAP 32(a) ("Except for quotations and footnotes, the lines [of a brief] shall be double-spaced.").

¹³ See NRAP 28(a)(3) (providing that a brief must contain "a statement of the facts relevant to the issues presented for review"); *Collins v. Murphy*, 113 Nev. 1380, 1385, 951 P.2d 598, 601 (1997).

¹⁴ See NRAP 28(e) ("Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.").

¹⁵ See NRAP 30(b)(3) (providing that an appellant's appendix must include "portions of the record essential to determination of issues raised" on appeal); NRAP 30(b)(2).

¹⁶ See SCR 166(1)(b).

¹⁷ See SCR 99; NRAP 28A. Lindsay may continue as counsel for the appellants in two cases presently pending before this court: *White v. State*, Docket No. 43223, and *Fiel v. State*, Docket No. 43709.

¹⁸ See SCR 104.

Conclusion

The Nevada Supreme Court removed Lindsay as counsel and vacated the district court order denying Middleton's habeas corpus petition. The Nevada Supreme Court instructed the district court to appoint new counsel to represent Middleton on remand.