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11-8-2007

### Summary of Nelson v. State, 123 Nev. Adv. Op. No. 50

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*Nevada Law Journal*

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#### Recommended Citation

Haze, Airene, "Summary of Nelson v. State, 123 Nev. Adv. Op. No. 50" (2007). *Nevada Supreme Court Summaries*. 771.

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*Nelson v. State*, 123 Nev. Adv. Op. No. 50 (2007)<sup>1</sup>

**CONSTITUTION LAW – CONSTITUTIONALITY OF A STATUTE**

**Summary**

Appeal of a district court judgment of conviction, upon a jury verdict, for conspiracy to commit robbery, robbery with use of deadly weapon, and failure to stop on signal of a police officer.

**Disposition/Outcome**

Affirmed. Nelson argued that the word “endangers” in NRS 484.348(3)(b) is vague. However, the Nevada Supreme Court held that NRS 484.348(3)(b) is not unconstitutionally vague because individuals of ordinary intelligence can easily discern whether their operation of a vehicle while fleeing a police officer places a person or property in danger. In addition, Nelson’s additional claims are without merit.

The Nevada Supreme Court affirmed the judgment of conviction, but remanded to the district court to correct the language in the judgment of conviction to properly identify the habitual criminal provision that were applied to each count.

**Factual and Procedural History**

A black two-door vehicle with a red stripe and two people stopped behind Paquette, as Paquette, and her friends Jason Minkler, and Alisha Chugg were driving to Paquette’s condominium. A man from the two-door vehicle exited the car, approached Paquette and demanded her purse. Chugg and Minkler exited the vehicle. Chugg returned to her vehicle when the man displayed his gun to her. Minkler also approached the man, pulled out his cellphone and dialed 911. After taking Paquette’s purse, the gunman and driver drove out of the apartment complex.

Approximately 20-25 minutes after Paquette’s purse was stolen, Officer Francis Shipp located a black Thunderbird with red stripes that matched Minkler’s description. Officer Shipp started pursuit with lights and sirens activated. However, the Thunderbird failed to yield. Officer Shipp accelerated to approximately 90 miles an hour but failed to keep pace with the Thunderbird. Another police vehicle driven by Officer Jonathan Boucher passed Shipp and continued pursuit of the Thunderbird. The Thunderbird continued to speed through two red lights before turning onto a road that ended in a fence erected at the end of a construction site.

By the time Shipp stopped the vehicle, Officer Boucher had his gun drawn at Matthew Neifeld who was standing near the passenger side of the Thunderbird and Nelson who was lying on the ground near the driver side. A search of the car recovered Paquette’s cell phone, credit cards, and three set of black gloves. Officers arrested both Nelson and Neifeld. Nelson was later found guilty in the District Court, by jury verdict, of conspiracy to commit robbery, robbery with use of deadly weapon, and failure to stop on signal of a police officer.

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<sup>1</sup> By Airene Haze.

## **Discussion**

In this appeal, Nelson primarily argued that the conviction of “failure to stop” under NRS 484.348(3)(b) was unconstitutional.<sup>2</sup> Nelson argued that the term “endanger” in NRS 484.348(3)(b) is unconstitutionally vague because it is not defined and is inadequate to give a person fair warning on whether a conduct is prohibited. However, the Nevada Supreme Court disagreed with this argument and concluded that NRS 484.348(3)(b) is not unconstitutionally vague. Further, the Nevada Supreme Court also finds Nelson’s additional claims without merit.

### **Constitutionality of NRS 484.348(3)(b)**

A statute is invalid for vagueness, and therefore violates the Due Process Clause under the Fourteenth Amendment, when the language fails to sufficiently define a criminal offense such that a person with ordinary intelligence is unable to understand what the statute prohibits.<sup>3</sup> In addition, a statute is unconstitutionally vague if it encourages arbitrariness and discriminatory application because of lack of specificity in its standard.<sup>4</sup>

Here, the Nevada Supreme Court disagreed with Nelson’s argument and concluded that the term “endangers,” as used in NRS 484.348(3)(b) is not unconstitutionally vague. The majority of states have concluded that the word “endangerment” is sufficiently specific to survive constitutional review.<sup>5</sup> The Nevada Supreme Court also concluded that the statute provides fair notice to person of ordinary intelligence that an individual is committing felony when he or she drives in a manner that endangers or is likely to endanger other person or property while fleeing from police with its lights and sirens activated<sup>6</sup>. Although indeterminable number of acts could fall under the statute, the language provides clear standard to an adjudicative body when a violation has occurred.

Additionally, the Nevada Supreme Court also held that the state proved beyond reasonable doubt that Nelson violated NRS. 484.343(3)(b). Nelson was traveling at speed in excess of 90 miles per hour through red traffic lights. Failure to stop on the red traffic lights in this speed clearly creates a possibility of violent contact with persons and property.

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<sup>2</sup> See NEV. REV. STAT. § 484.343(3)(b) (2005) (violating the statute constitute an individual fleeing from a police officer who is signaling for the person to stop his vehicle, and the individual must operate his vehicle in such manner as endanger or likely to endannger other persons or property.)

<sup>3</sup> State v. Colisimo, 122 Nev. \_\_, \_\_, 142 P.3d 352, 355 (2006).

<sup>4</sup> *Id.*

<sup>5</sup> See State v. Sarriugarte, 674 P.2d 82, 83 (Or. Ct. App. 1984) (determining that the statute’s language is as informative and capable of judicial application as many standard civil or criminal jury instructions.)

<sup>6</sup> See Commonwealth v. Pentz, 143 N.E. 322, 324 (Mass. 1924) (stating that “[t]o endanger the lives and safety of public by the operation of an automobile on a public way is not an intangible and shadowy act. It has specific relation to possible contact with human beings.)

## **Standard in Jury Disqualification**

Nelson also argued that the district court erred in failing to disqualify a jury member who allegedly had close relationship with the Clark County District Office.<sup>7</sup> Nelson contends that the jury member was a victim of identity theft case the Clark County District Office is prosecuting.

The Nevada Supreme court disagreed with Nelson's argument and concluded that the district court did not err by failing sua sponte excuse the jury member. The test for jury member removal is if the jury member's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."<sup>8</sup>

Here, during voir dire, the district court asked the jury member if there were any reasons that she cannot be completely fair and completely impartial during the hearing. The jury replied, "Absolutely not." The district court also questioned the jury member regarding her ability to perform duties determined she was not biased.

## **Use of Leg Restraints During Jury Selection Did Not Cause Error**

Nelson also argued that the use of leg bracelets during jury selection, which one of the jury members may have seen, undermined the presumption of innocence and inhibited communication with counsel. Nelson's objection to use of leg bracelets on first day of jury selection was denied. The district court overruled his objections and stated that "the indication is that he has quite a criminal record" and the district court also stated that as long as bracelets stay under the table, the jury will probably not see the bracelets. On the second day of the jury selection, Nelson reiterated his objections and this time the district court inquired the Court Services on why the leg bracelets were necessary. Court Services replied that Nelson was not dangerous. This time, Nelson's objection was sustained and had the leg bracelets removed but the district court denied motion for mistrial.

A defendant has the right to appear before the jury with the clothing of an innocent person because "[t]he presumption of innocence is incompatible with the garb of guilt."<sup>9</sup> Use of restraints during trial is unconstitutional unless "justified by an essential state interest, such as courtroom security that is specific to the defendant."<sup>10</sup>

The Nevada Supreme Court held that the district court erred in overruling Nelson's objection to leg restraint on the first day of jury selection. However, the Nevada Supreme Court also concluded that it is clear beyond reasonable doubt that the error was harmless. There was no evidence that juror saw Nelson wearing the leg bracelets. In addition, Nelson was not made to walk in front of jury with leg bracelets and Nelson was allowed to keep bracelets hidden under the table.

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<sup>7</sup> This issue was not preserved for appeal. The Nevada Supreme Court then must determine whether error was plain and affected Nelson's substantial rights.

<sup>8</sup> Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005)

<sup>9</sup> Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980).

<sup>10</sup> Hymon v. State, 121 Nev. 200, 208, 111 P.3d 1092, 1098 (2005).

## **Right to Preemptory Challenges- NRS 175.051(1)**

Nelson also contended that district court violated his due process rights and equal protections by denying him eight preemptory challenges because he was facing possibilities of life imprisonment due to habitual criminal allegations.<sup>11</sup>

The Nevada Supreme Court agreed with the State. The number of preemptory challenges depends on the sentence an individual faces if convicted of the primary offense, not the sentence an individual faces if adjudicated as a habitual criminal. The Nevada Supreme Court relied on *Schneider v. State*<sup>12</sup> and concluded that Nelson is not entitled to eight preemptory challenges under NRS 175.051(1). None of the offenses Nelson is charged with – conspiracy to commit robbery, robbery, and felony failure to stop – carried the possibility of life sentence.<sup>13</sup>

## **Unreliable Identification of Nelson as the Gunman is Irrelevant.**

Nelson also argued that Nevada Supreme Court must reverse his conviction because Paquette’s and Chuggs’s identifications of him as the gunman are not reliable as they were intoxicated at the night of incident.

The Nevada Supreme Court disagreed. Constitutional error is considered harmless where it is determined beyond reasonable doubt that verdict was “surely unattributable to the error.”<sup>14</sup> Here, the State only alleged that Nelson was the driver and not the gunman. The unreliable identifications are, therefore, irrelevant.

## **Rejection of Nelson’s Proposed Jury Instructions.**

Nelson argued that the district court erred in declining to use his recommended jury instructions because they were not duplicative and were necessary to fully explain the aiding and abetting law.<sup>15</sup> Nelson contends that under his proposed jury instructions, he would not have been convicted because there was no testimony that he knew the gunman had a gun or that he made an agreement to aid or abet with the gunman.

The Nevada Supreme Court disagreed and concluded that the district court did not err in declining to use Nelson’s proposed jury instruction. The Supreme Court held that proposed jury instructions 2 and 3 are duplicative because they repeat the principles of aider and abettor

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<sup>11</sup> See NEV. REV. STAT. § 175.051(1) (“If the offense is punishable by death or by imprisonment for life, each side is entitled to eight preemptory challenges.”; see also NEV. REV. STAT. § 207.010.

<sup>12</sup> 97 Nev. 573, 574-75, 635 P.2d 304 (1981).

<sup>13</sup> See NEV. REV. STAT. § 200.380; 199.480; 484.348.

<sup>14</sup> *Summers v. State*, 122 Nev. \_\_, \_\_, 148 P.3d 778, 789-90 (2006) (Rose, C.J., concurring and dissenting).

<sup>15</sup> Nelson offered the following instructions:

[Proposed Instruction 2] In order for a person to be held accountable for the crime of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the crime charged.

[Proposed Instruction 3] Unarmed defendant, charged as an aider or abettor or co-conspirator, cannot be held criminally responsible for use of a deadly weapon unless he has actual or constructive control over the deadly weapon. An unarmed defendant does not have constructive control over a weapon unless the State proves he had knowledge the armed offender was armed and he had the ability to exercise control over the firearm.

liability already submitted in jury instruction number 8.<sup>16</sup> In addition, Nelson's proposed jury instruction number 3 is not the law in Nevada. An unarmed defendant with knowledge of the firearm and benefits from its use may be liable for aiding and abetting the armed defendant.<sup>17</sup> Further, an unarmed defendant who benefits from the firearm even though he does not have the ability to exercise control over the firearm may also be liable for actions of the armed defendant.

### **Nelson's Habitual Criminal Sentence**

The district court's judgment of conviction stated that Nelson was adjudicated under the "Large Habitual Criminal Statute." Nelson argued that he was improperly adjudicated on count 2, robbery with the use of a deadly weapon, under NRS 207.010(1)(b). The State argued that Nelson was adjudicated under NRS 207.012(1) for count 2.

Under NRS 207.010(1)(b), the State must prove that the defendant had been convicted of three prior felonies. However, under NRS 207.012(1), the district court shall sentence the defendant as a habitual felon if two qualifying prior convictions were found.

The Nevada Supreme Court concluded that Nelson was sentenced consistent with NRS 207.012 for count 2 and NRS 207.010(1)(a) for counts 1 and 3. However, the Supreme Court is remanding to district court to correct the language in the judgment of conviction as required by NRS 176.105 to properly identify which what habitual criminal provisions were applied to each count.

### **Conclusion**

The Nevada Supreme Court concluded that NRS 484.348(3)(b) is not unconstitutionally vague. Nelson's additional arguments on appeal also lacked merit, and the Supreme Court, therefore, affirmed the district court's judgment of conviction. However, the Supreme Court is remanding to district court to correct the language in the judgment of conviction.

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<sup>16</sup> Jury instructions number 8 states:

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

<sup>17</sup> Jones v. State, 111 Nev. 848, 852, 899 P.2d 544, 546 (1995).