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Moultrie v. State, 131 Nev. Adv. Op. 93 (Dec. 24, 2015)

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Recommended Citation

Ramey, Cassandra, "Moultrie v. State, 131 Nev. Adv. Op. 93 (Dec. 24, 2015)" (2015). *Nevada Supreme Court Summaries*. 927.

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CRIMINAL LAW: JUDICIAL DISCRETION IN FILING AN INFORMATION BY
AFFIDAVIT

Summary

The Court of Appeals determined that the district court did not abuse its discretion by allowing the State to file an information by affidavit more than 15 days after the preliminary examination concluded, when the justice court committed an “egregious error,” and “the defendant was discharged but not prejudiced by the delay.” Further, the Court defines “egregious error” as when “a charge was erroneously dismissed or a defendant was erroneously discharged based on a magistrate’s error.” Due to the justice court’s egregious errors in the preliminary examination that resulted in appellant’s discharge, the Court found that the district court was not in error by granting the State’s motion to file an information by affidavit. The judgment of conviction by the district court is affirmed.

Background

Deputy Sheriff Matthew Kirkland arrested appellant Matthew Moultrie for drug possession with intent to sell. Moultrie was a passenger in a car stopped by Kirkland for a traffic violation. The driver of the car orally consented to a search of the car. During the search, Kirkland discovered a backpack that contained “fifty dollars, a glass pipe, and a plastic bag holding a crystalline substance.” Kirkland believed that this substance was methamphetamine, and that it belonged to Moultrie. Moultrie initially claimed that the backpack and items did not belong to him, but confessed to ownership of the items and intent to sell them after being advised of his *Miranda* rights. The substance later tested positive for amphetamine.

The Justice Court of Esmeralda Township held a preliminary examination, with the State calling Kirkland and another deputy as its witnesses. During the examination, Moultrie objected on hearsay grounds to Kirkland’s testimony of the driver’s oral consent to search the car. The justice court sustained the hearsay objection, as well as Moultrie’s further objection that any evidence obtained during the search was “fruit of the poisonous tree.” The justice court allowed the hearing to proceed, but ultimately excluded any testimony describing the evidence seized during the search.

The State charged Moultrie in the criminal complaint with a category C felony but did not allege a prior conviction or produce any evidence at the preliminary hearing that demonstrated a prior conviction existed. “It is a category C felony if the defendant has a prior conviction and is convicted under NRS 453.337(2)(b).” During its rebuttal closing argument, the State made a motion to amend the complaint to instead charge Moultrie under NRS 453.337(2)(1), a category D felony for first time offenses. The justice court denied the States motion to amend its complaint, and discharged Moultrie because the State did not meet the burden of proof for a class C felony.

63 days after the justice court discharged Moultrie, the State made a motion for leave to file an information by affidavit in the district court, and included a proposed information charging Moultrie with the category D felony, asserting “egregious error by the justice court.” Moultrie

¹ By Cassandra Ramey

opposed the motion, stating that it was untimely, filed without good cause for delay, and prejudicial. Moultrie further responded that the justice court did not commit an “egregious error” and therefore the State had no basis to file an information by affidavit. The district court granted the State’s motion 34 days after it was filed, concluding that the State had presented sufficient evidence to support a finding of probable cause for a category D felony during the preliminary hearing. Further, the district court also concluded that “(1) the State’s delay in filing the motion did not prejudice Moultrie, (2) the justice court committed egregious error by sustaining Moultrie’s hearsay objection, and (3) the justice court committed egregious error by denying the State’s motion to amend the complaint.”

Moultrie pleaded guilty as charged but reserved the right to appeal the district court’s order granting the State’s motion to file an information. The district court sentenced Moultrie to 19-48 months in prison, but the court suspended this sentence and placed Moultrie on probation for five years. Moultrie then appealed.

Discussion

Timeliness of the motion

Moultrie contends that the district court erred in permitting the State to file an information by affidavit when the State filed its motion 63 days after his discharge by the justice court. The Court of Appeals disagreed, stating that “[i]t is within the discretion of the district court to grant a motion to file an information by affidavit.”² Further, the Court stated that in order to establish that the district court erred by granting a motion to file an information by affidavit more than 15 days after the preliminary examination, “the defendant must demonstrate actual prejudice resulting from the untimely filing,”³ and that the prejudice alleged cannot be “hypothetical or speculative.”⁴

Here, the State did not motion for leave of court to file an information by affidavit until 63 days after the preliminary examination, and district court granted the motion a total of 97 days after the preliminary examination. Moultrie alleged that this delay was prejudicial because he was unaware that he could be recharged, and so did not consult counsel or pursue any defenses.

Moultrie failed to show how the lack of preparation was prejudicial to his defense, or how the opportunity to consult counsel or establish a defense during the delay would have benefited his case. Because of this failure to show prejudice, the district court held and the Court of Appeals affirmed that his claim of prejudice was speculative and did not warrant denial of the motion. Thus,

² NEV. REV. STAT. §173.035(2) (2013) states in part: “If, however, upon the preliminary examination the accused has been discharged... the Attorney General when acting pursuant to a specific statute or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case... by leave of the court first had, file an information, and process must forthwith be issued thereon.” The Court notes that pursuant to NRS 173.035(3) and NRS 173.045, there is a 15-day time limit in which to file an information when the defendant has been held to answer. However, if the defendant has been discharged, an information by affidavit can only be filed if the State first obtains leave of court. Therefore, when the defendant has been discharged the State is in an “untenable position,” because it is impossible for the State to comply with NRS 173.035(3) without judicial action. The only deadline the State could meet in this circumstance is the deadline to motion for leave to file the information.

³ See, e.g., *Berry v. Sheriff, Clark Cnty.*, 93 Nev. 557, 558-59, 571 P.2d 109, 110 (1977); *Thompson v. State*, 86 Nev. 682, 683, 475 P.2d 96, 97 (1970).

⁴ See *Wyman v. State*, 125 Nev. 592, 601, 217 P.3d 572, 579 (2009).

the Court concluded that the district court did not abuse its discretion in its findings that Moultrie failed to demonstrate actual prejudice resulting from the delay in filing.

Egregious error

Moultrie also asserted that the district court erred by finding that the justice court committed an egregious error in its ruling, and allowing the State to file an information by affidavit based upon this error. The Court, reviewing the district court's determination of egregious error de novo, stated: "[a]n information by affidavit may be filed to correct a magistrate's egregious error but not to correct deficiencies in evidence at the preliminary examination."⁵ The Nevada Supreme Court has long used the term "egregious error," when discussing the proper time to file an information by affidavit, but it has never explicitly defined the term. The Court here takes the opportunity to provide a clear definition of the term "egregious error" and its proper applications. The Court first examines the purpose of NRS 173.035(2), citing *Maes v. Sheriff, Clark Cnty.*⁶, in which the Supreme Court held that the statute "provides a safety valve against an arbitrary or mistaken decision of the magistrate."

The Nevada Supreme Court has applied the term egregious error "when a charge was erroneously dismissed or a defendant was erroneously discharged based on a magistrate's error."⁷ In each of these cases, the error by the magistrate was a plain error, defined in *Patterson v. State* as an error "so unmistakable that it reveals itself by a casual inspection of the record."⁸ Therefore, the Court definitively defines a magistrate's error as egregious "when the magistrate commits plain error that affects the outcome of the proceedings."

Hearsay objection and exclusion of evidence

The State did not address Moultrie's claims as to the validity of the search, instead responding that the justice court's hearsay ruling in regards to Kirkland's testimony about the driver's consent to search the car, and the suppression of any evidence relating to the search was egregious error, therefore allowing for the filing of an information by affidavit. The district court agreed that the justice court erred by sustaining the hearsay objection, preventing the justice court from considering admissible evidence when making the probable cause determination. Upon review, the district court determined that the evidence excluded by the justice court was sufficient to hold Moultrie to answer.

The Court here held that the "justice court's decision to exclude all evidence obtained from the search of the backpack as fruit of the poisonous tree was error," and that in general a motion to suppress evidence must be filed to exclude evidence on constitutional grounds.⁹ The Court found further error with the justice court's hearsay ruling; as the State offered Kirkland's testimony to establish why Kirkland continued with the search of the car. Therefore, Kirkland's testimony was

⁵ State v. Sixth Judicial Dist. Court, 114 Nev. 739, 71-42, 964 P.2d (1998).

⁶ 86 Nev. 317, 319, 468 P.2d 332, 333 (1970).

⁷ Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976); Feole v. State, 113 Nev. 628, 631, 939 P.2d 1061, 1063 (1997).

⁸ 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995).

⁹ The Court notes that they are not holding that a motion to suppress evidence must be filed in justice court before a constitutional objection is raised during a preliminary examination, but rather that in this case no such motion was filed in justice or district court, and "without a motion or suppression hearing the alleged illegal search and seizure cannot be a basis to reverse the judgment of the district court."

not hearsay because it did not go to the truth of the matter asserted.¹⁰ The Court concluded that the justice court's error regarding the hearsay ruling was "plain from a casual inspection of the record and resulted in Moultrie's discharge," and therefore affirmed the district courts finding that the justice court committed egregious error.

Motion to amend the complaint

The Court also disagrees with Moultrie's contention that the district court erred in finding that the justice court committed egregious error by denying the State's motion to amend the complaint, stating that the error in the complaint of referring to a category C (second offense) felony compared with a category D (first-time offense) felony was immaterial in the preliminary examination. Because the offered amendment to the complaint would have required Moultrie to defend the same underlying crime and Moultrie had sufficient notice of the charges, granting the motion would not have affected his substantial rights. Further, "[a] justice court may permit the State to amend the complaint to conform to the evidence presented."¹¹ The State presented sufficient evidence at the preliminary hearing to show that Moultrie had committed a first-time offense of possession of a controlled substance with the intent to sell. Because the district court was not in error by finding that the justice court committed egregious error by preventing the State to amend its complaint, the Court here concludes that the district court did not abuse its discretion by granting the motion to file an information by affidavit under NRS 173.035(2).

Conclusion

The Court concludes that the district court did not abuse its discretion in finding that Moultrie failed to demonstrate actual prejudice "resulting from the delay in filing the motion for leave to file an information by affidavit," and that further, there was no error by the district court in finding that the justice court committed egregious error that resulted in Moultrie's discharge. Therefore, there was no abuse in discretion by the district court in granting the State's motion to file an information by affidavit and the Court of Appeals affirmed the district court's judgment of conviction.

Concurrence

Tao, J., Concurring

Judge Tao, concurring with the court *dubitante*, agrees that the majority opinion addresses the only arguments presented in Moultrie's appeal. However, he is uncertain whether any court has the discretion to waive a deadline to file an information by affidavit under the plain language of the applicable statutes. The 15 day deadline of NRS 173.035(3) "applies to the filing of any information in district court regardless of whether the defendant (a) was held to answer the charges and bound over for trial as a result of a preliminary hearing, (b) was bound over to district court because he waived his right to a preliminary hearing, or (c) was discharged from custody after all

¹⁰ See *People v. Nelson*, 212 Cal. Rptr. 799, 803 (Ct. App. 1985) (holding that oral words of consent are not offered to prove the truth of the matter, rather they are relevant as words of authorization; they are therefore nonhearsay).

¹¹ *Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005).

charges were dismissed during the preliminary hearing and the State now seeks to reinstate the charges in district court by way of information by affidavit.”

The statutory language of NRS 173.035(3) states that the information “must” be filed no later than 15 days after the holding or waiver of the preliminary hearing. “When a statute says ‘must,’ we are required to rigorously interpret that word as meaning that the Legislature intended to deprive courts of the discretion to refuse to do what the statute directs.”¹² Because “‘must’ means ‘must,’” an information of any kind cannot be filed more than 15 days following a preliminary hearing under NRS 173.035(3)— unless the Legislature chose to give discretion in another applicable statute. Here, NRS 178.556 provides some discretion: stating that the district court “may” dismiss an information that was not filed before the expiration of the 15-day deadline *when* the defendant was held to answer. The Nevada Supreme Court has interpreted NRS 178.556 to mean that a district court has some discretion to permit a late filed information to proceed when a defendant has not suffered prejudice, or even if the State cannot show “good cause” for the delay.

In this case, the district court interpreted this statute as allowing equal discretion for when a defendant was discharged as when the defendant was held to answer. However, NRS 178.556(1) states that this discretion applies only when the defendant has been held to answer for the charges. Therefore, Judge Tao believes that the question raised by this appeal can be characterized as: “whether, notwithstanding the text of NRS 173.035(3) and 178.556, a district court also possesses the same, or at least similar, discretion to waive the deadline when the State seeks to fill an information by affidavit more than 15 days after a defendant has been discharged. . . .” Interpreting this question as “strict constructionists,” of the applicable statutes, the answer is no.

“Where the Legislature has expressly prohibited the exercise of judicial discretion, we do not have the power to create it ourselves except perhaps in the most compelling of circumstances.” Here, NRS 173.035(3) limits judicial discretion, except when permitted under NRS 178.556. NRS 178.556 only allows discretion when a defendant has been called to answer, and states nothing about defendants who have already been discharged. Using a “strict constructionist” interpretation, the district court does not possess any discretion to permit the filing of an information more than 15 days after the discharge of a defendant, even if the State had “good cause” and there was little prejudice to the defendant. Additionally, Nevada Supreme Court precedent also suggests that a district court only has discretion to permit filing an information after the defendant has been called to answer.¹³ There is no existing judicial precedent in Nevada that “contemplates or creates discretion to permit the late filing of an information by affidavit more than 15 days after a defendant was discharged rather than held to answer the charges.”

There is a distinction between filing an information when a defendant has been bound to answer, and filing an information when a defendant has already been discharged. The filing of an information after the defendant has been bound over occurs as a “ministerial act” after a judicial finding that the charges were supported by probable cause. On the contrary, the filing of an information after a defendant has been discharged would require a judicial officer overruling another judicial officer’s determination that the charges lacked probable cause, or that the State’s pleadings were insufficient in some manner that required dismissal. Judge Tao states that it would be “utterly illogical for the Legislature to have decided that there ought to be a very tight,

¹² NEV. REV. STAT. § 0.025(1)(c) defines “must” as expressing a requirement. *See Goudge v. State*, 128 Nev. __, __, 287 P.3d 301, 304 (2012) (“the word ‘shall’ imposes a duty on a party to act and prohibits judicial discretion”); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (“as it is used here, ‘must’ is a synonym of ‘shall.’”)

¹³ *See Berry*, 93 Nev. 557, 571P.2d 109; *Thompson*, 86 Nev. 682, 472 P. 2d 96.

nondiscretionary deadline for the State to make this request and thereby force the defendant to again face charges that were already dismissed.”

Because of this, Judge Tao would interpret NRS 173.035(3) as “creating an absolute statutory bar to the filing of an information by affidavit more than 15 days after the defendant has been discharged from custody after a preliminary hearing, without any inquiry into the presence or absence of either ‘good cause’ or prejudice.”