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Harvey v. State, 136 Nev. Adv. Op. 61 (Oct. 1, 2020)

Brady Bathke

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POST-TRIAL MOTIONS – HEARINGS AND DECISIONS

Summary

In a case of first impression, the Nevada Supreme Court considered whether NRS 175.101 precludes a judge other than the trial judge from deciding post-trial motions when there is no evidence that the trial judge is absent, deceased, sick, or disabled. Appellant Alfred Harvey requested that the trial judge in his case, Senior Judge James Bixler, preside over a post-trial motion. However, Judge Douglas Smith heard the post-trial motions and denied them. There was no evidence that Judge Bixler was prevented from hearing the post-trial motions because of being absent, deceased, sick, or disabled. The Court reversed Judge Smith's order denying Harvey's post-trial motions and remanded for Judge Bixler, the trial judge, to hear and decide the motions.

Background

The State charged Harvey with robbery with the use of a deadly weapon. At trial, the jury sent a note to Judge Bixler to elaborate on the element of force or violence or fear of injury necessary for a robbery conviction. Judge Bixler responded that the Court was not free to supplement the evidence and did not inform either party about the note. The jury found Harvey guilty of robbery but did not convict him on the deadly weapon enhancement.

After Harvey discovered the jury note, he moved for a new trial and to reconstruct the record. Harvey requested that Judge Bixler preside over both post-trial motions, but Judge Smith presided over the motions and declined Harvey's request. Judge Smith denied both of Harvey's motions and stated that Judge Bixler did not remember the jury question or whether he informed the parties of the jury question at trial. After Harvey appealed his conviction and the post-trial orders, the court of appeals affirmed his conviction and the denial of his post-trial motions.² Harvey filed a petition for review and the Nevada Supreme Court granted the petition.

Discussion

NRS 175.101 provides that a trial judge must preside over post-trial motions unless the trial judge is absent, deceased, sick, or disabled.³ The statute's meaning is clear on its face, so the Court does not need to go beyond the statute's plain language.⁴ Judge Bixler was not absent or sick when Harvey filed the post-trial motions, but the parties disagree whether Judge Bixler's failure to remember the jury note is a disability under the statute.

The State argues that Judge Smith was allowed to preside over the post-trial motions because under NRS 175.101, Judge Bixler's failure to remember the jury note qualifies as a

¹ By Brady Bathke.

² *Harvey v. State*, Docket Nos. 72829-COA & 75911-COA, *22 (Order of Affirmance, Sept. 18, 2019).

³ NEV. REV. STAT. § 175.101 (2020).

⁴ *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

disability. On the other hand, Harvey argues that the “disability” in the statute must be a physical disability that prevents a trial judge from performing his or her judicial duties. The Court declines to adopt either interpretation.

Both the statute and a dictionary define “disability” by whether an individual is unable to perform some function or duty.⁵ The Court rejects the State’s argument because Judge Bixler’s failure to remember the jury note did not impair his ability to hear and decide Harvey’s motions. The Court also rejects Harvey’s argument because limiting the meaning of “disability” under the statute to just a physical disability would require a revision of the statute itself.

The State also argues that the statute did not require the trial judge to preside over post-trial motions, but that the statute provides a mechanism for substituting judges when a judge is absent, deceased, sick, or disabled. The Court rejects this argument because the statute clearly prevents a judge other than the trial judge to preside over post-trial motions unless the trial judge is absent, deceased, sick, or disabled.

Moreover, the State argues that Nevada caselaw precludes the application of NRS 175.101 in this case. The State relies on *Halverson*, but the Court rejects this argument because that case was decided in the context of a *quo warranto* petition challenging a chief district judge’s authority over another district judge’s action.⁶ The Court instead offers case law that provides a trial judge is required to preside to the conclusion of all proceedings, unless there is a statute to the contrary.⁷

Conclusion

NRS 175.101 and Nevada case law both clearly state that the trial judge is required to preside over post-trial motions unless the trial judge is absent, deceased, sick, or disabled. Under the statute, the term “disability” contemplates a physical, mental, or other impairment that prevents the trial judge from performing his or her duties. Judge Smith erred in declining Harvey’s request for Judge Bixler to preside over his post-trial motions, because there was no evidence that Judge Bixler was disabled. The Court reversed Judge Smith’s order denying Harvey’s post-trial motions and remanded for Judge Bixler, the trial judge, to hear and decide the motions. The Court also concludes that Harvey’s material variance argument is without merit.

⁵ NEV. REV. STAT. § 175.101 (2020); Disability, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶ *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007).

⁷ *Ham v. Eighth Judicial Dist. Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977).