

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

7-2021

Bolden (Jason) v. State, 137 Nev. Adv. Op. 28 (Jul. 08, 2021).

Greer Sullivan

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

**CRIMINAL LAW: STATUTORY INTERPRETATION OF THE AFFIDAVIT
REQUIREMENT OF NRS 173.035(2)**

Summary

When the State seeks and obtains leave from a district court to proceed against the accused by information, it must support that motion with an affidavit of any person who has knowledge of the commission of an offense and is a competent witness to testify. This affidavit requirement can be satisfied with a preliminary hearing transcript. The district court may grant this leave on the State's showing that the justice court committed egregious error in dismissing.

Background

The Appellee, the State, filed a criminal complaint against the Appellant, James Bolden, and the matter proceeded to a preliminary hearing in justice court. The Appellant was charged after he approached Brenton and Bryston Martinez outside of a Las Vegas apartment building and fired seven shots. The shots made contact with Brenton and the wall of an occupied apartment. Immediately after this incident the Appellant was identified as the shooter by Brenton after police showed him a photo. Bryston told the police that he saw the shooter and provided a description that matched the Appellant.

Both Brenton and Bryson Martinez testified at the preliminary hearing but gave testimony that contradicted their original statements to the police. Bryston denied having seen the shooter, despite telling the police he had on the day of the shooting. Brenton testified that he did not recognize the Appellant and that he had no recollection of what the shooter looked like, despite positively identifying him on the day of the shooting. The justice of the peace noted the inconsistency between the brothers' statements to the police and their subsequent testimony at preliminary hearing. She found the brothers to lack credibility because of these inconsistencies. She additionally found their statements about drinking and using drugs on the day of the shooting undermined the reliability of their statements to the police. For those reasons, the justice of the peace did not find probable cause and sua sponte dismissed all the charges against the Appellant.

The State filed a motion under NRS 173.035(2), seeking leave to proceed by information.² The State supported its motion by attaching a copy of the transcript of the preliminary hearing from justice court. The motion was granted unopposed. At trial, Brenton positively identified the Appellant as the shooter. That identification along with the 911 call and Bryston's description of the shooter were all admitted into evidence. The jury convicted the Appellant of illegal possession of a firearm, battery with a deadly weapon, and seven counts of discharging a firearm at or into an occupied structure.

Discussion

The Appellant failed to oppose the State's motion for leave and as such forfeited all but plain error review. In order for the court to consider the forfeited error the appellant must

¹ By Greer Sullivan.

² See NEV. REV. STAT. § 173.035(2) (2007).

demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual interpretation; and (3) the error affected the defendant's substantial rights. The Court found that the appellant's substantial rights were potentially affected.

The only procedure that was not in line perfectly with the requirements of NRS 173.035(2) was the State's use of a preliminary hearing transcript instead of an affidavit. The Appellant argued that because a preliminary hearing transcript is not an affidavit that the district court should have rejected the State's motion. The Court concedes that the statute refers only to an affidavit and does not provide affidavit equivalents. However, the Court found that under NRS 53.045, which allows a court to consider certain unsworn declarations in lieu of an affidavit, a preliminary hearing transcript qualified as a declaration that satisfies NRS 53.045.

The Court discussed a similar case of statutory construction from California where an anti-SLAPP statute allowed for the court to consider "supporting and opposing affidavits" when ruling on a special motion to dismiss.³ A grand jury transcript was found to be an acceptable substitute under a similar California statute that permitted certain unsworn declarations as affidavit equivalents.⁴ The California court in *Sweetwater*, found that the grand jury transcript was an acceptable substitute because it is at least as reliable as an affidavit. The Court applied this to the current case and found that a certified preliminary hearing was an acceptable substitute because when looking at the policy purposes of this statute there would be no reason to prohibit use of an acceptable affidavit substitute in order to employ strict compliance with the affidavit requirement. The Court found that the district court did not err in granting the State's motion for leave because the certified preliminary hearing transcript provided an accurate way for the district court to determine whether the justice of the peace made an egregious error in determining probable cause.

The Court additionally upheld the district court's finding that the justice of the peace made an egregious error in not finding probable cause. The preliminary hearing is not a trial and if an inference of criminal agency can be drawn from the evidence then it is proper for the justice of the peace to draw it. The slight or marginal evidence standard at the preliminary hearing does not permit the justice of the peace to dismiss charge where evidence permits the finder of fact to draw an inference of criminal agency. Despite conflicting evidence, the State presented enough evidence for the inference of criminal agency and the justice of the peace committed an egregious error by preventing a jury from making a credibility argument. The Court additionally held that the State presented sufficient evidence to support the conviction because the Appellant was identified as the shooter in a 911 call and Brenton's photo identification, which were both made shortly after the shooting. This evidence supported a rational juror finding the Appellant was the perpetrator beyond a reasonable doubt.

Conclusion

The State's motion for leave to proceed to district court after the justice of the peace dismissed all charges substantially complied with NRS 173.035(2) and demonstrated that the justice of the peace committed an egregious error. Additionally, there was substantial evidence to support the jury's verdict. The Court affirmed the judgement of conviction.

³ See *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 6 Cal. 5th 931, 434 P.3d 1152 (2019), *see also* Cal. Civ. Proc. Code § 425.16(b)(2) (West 2016).

⁴ Cal. Civ. Proc. Code § 2015.5 (West 1983).