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Burns v. State, 137 Nev. Adv. Op. 50 (Sep. 23, 2021)

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Criminal Law: SCOPE OF A MID-TRIAL WAIVER OF APPELLATE RIGHTS

Summary:

On appeal from a judgment of conviction, the Nevada Supreme Court considers the scope of a mid-trial waiver of appellate rights.

Background:

Appellant David Burns was charged with conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, two counts of robbery with the use of a deadly weapon, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. These charges arose from a home robbery in which a woman was shot and killed, and her twelve-year-old daughter was shot but survived. After the State filed a notice to seek the death penalty, the case proceeded to a jury trial.

Burns and the State presented a Stipulation and Order (Agreement) for the district court's approval which contained two provisions. First, if the jury were to find him guilty of first-degree murder, Burns agreed to waive a penalty hearing before the jury and agreed to a sentence of life without parole. Second, in exchange for Burns' waiver of "all appellate rights stemming from the guilt phase of the trial", the State agreed to withdraw the notice of intent to seek the death penalty. The district court approved the Agreement.

After the jury found Burns guilty on all charges, the district court sentenced Burns to life without the possibility of parole for the first-degree murder conviction. Burns' counsel, believing that Burns would have a better likelihood of success in a postconviction habeas proceeding, declined to file a direct appeal because of the waiver. The court held that Burns' trial counsel was ineffective for not filing a direct appeal. Thus, Burns filed this untimely direct appeal under NRAP 4(c). The appeal considers the scope of Burns' mid-trial waiver of appellate rights and then the merits of the nonwaived claims.

Discussion:

Burns' waiver covered all allegations of error except those related to voir dire, closing arguments, and sentencing

The State claimed that Burns waived the right to appellate review of every error he raises in his appeal because the scope of "the guilt phase of the trial" referenced in the agreement encompasses them all. Burns challenges the scope of the appeal waiver, not its validity. Although the Agreement did not include a guilty plea, it is a contract to the same extent as a written plea agreement. Holding that contract principles apply when analyzing a written guilty plea agreement, the court decided to construe the Agreement from its plain language and enforce as written, noting that any ambiguities must be construed against the State.

¹ By Kalin Olson.

The Agreement did not explain what constitutes “the guilt phase of the trial”. Typically, this phrase is used to distinguish between the parts of a bifurcated criminal trial when guilt is determined versus sentencing. It is fairly clear when the guilt phase of a trial ends, but much less clear when the guilt phase of a trial actually begins. The lack of clarity led the court to conclude that the Agreement was ambiguous in that respect, and, construing the ambiguity in the defendant’s favor, Burns’ *Batson*² claim is outside the scope of his waiver.

In this case, "the guilt phase of the trial" in the Agreement's waiver provision encompassed Burns' claims stemming from every part of the proceedings after the jury was impaneled up until the verdict was returned. This shows that the waiver in the Agreement includes closing arguments. However, during a discussion about the Agreement, Burns' counsel stated that Burns was not waiving review of any misconduct that may occur during closing arguments. With this understanding, the Court concludes that all of Burns’ claims, except those related to voir dire, closing arguments, and sentencing, fall under the appeal waiver’s scope.

The district court did not err in denying a Batson challenge during jury selection

Burns alleges that the district court improperly denied his challenge to the State’s peremptory removal of a prospective juror. This allegation is governed by the three-step analysis given by the Supreme Court in *Batson*: Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Burns objected to the State’s use of a peremptory challenge to remove Juror 91, who did not identify his race, but stated that he had emigrated from India. After examining whether Burns made a prima facie case of racial discrimination, the Court ruled that he did not meet the step one standard of a showing of discrimination. Even if Burns had met the standard of showing, the Court found that the juror’s answers to the death penalty questions were sufficient justifications to show that there had not been a showing under step three of the *Batson* analysis. The district court did not err in denying a *Batson* challenge during jury selection where defense counsel offered no explanation besides anecdotes from other cases counsel had argued and references to other matters before the court

The State did not engage in reversible prosecutorial misconduct during closing arguments

Burns claims that the State engaged in multiple instances of prosecutorial misconduct during its closing arguments. The Court determines whether the prosecutor’s conduct was improper and, if so, whether the conduct warrants reversal.³

² *Batson v. Kentucky*, 479 U.S. 79 (1986).

³ *Valdez v. State*, 124 Nev. 1172 (2008).

Referring to defense counsel

During its rebuttal argument, the State made comments to which Burns objected, saying the comments were disparaging counsel. The court overruled and Burns alleges that this was a reversible prosecutorial misconduct of a constitutional dimension. While disparaging remarks directed toward defense counsel, the comments made by the State were not directed at opposing counsel with the purpose to belittle them and did not amount to misconduct.

Referring to a non-testifying witness

Prosecutorial comments on the defense's failure to produce evidence or call witnesses are generally improper, as such comments tend to shift the burden of proof to the defense,⁴ but are permissible when they go to the defense's theory of what happened. When Burns referenced a non-testifying witness during his closing argument, the prosecution's response was permissible on the evidence at hand and whether it substantiated the defense theory.

PowerPoint display

The State used a PowerPoint presentation during its rebuttal closing argument with a slide that contained an illustration purporting to set out facts that disprove any notion of coincidence, defense counsel objected and was overruled. The court concluded that the slide alleging "a circle of guilt" was not an error of a constitutional dimension and did not substantially affect the verdict.

Burns' agreement to a specific sentence precludes his arguments that the sentence was unreasonable and unconstitutional

While not barred by the appeal waiver, Burns' challenge to the life-without-parole sentence is barred by his stipulation to that sentence as part of the Agreement. The court saw no reason to treat the Agreement any differently than a plea agreement, and because Burns received the benefit of his bargain, he cannot challenge the sentence on appeal.

Conclusion:

Burns' mid-trial waiver applied to the entirety of "the guilt phase of the trial," including all parts of the trial up to the jury's verdict as to his guilt, covering all of his claims raised on appeal, except those regarding voir dire, closing arguments, and an unreasonable sentence. Burns' convictions were affirmed because the district court did not err in denying a Batson challenge during jury selection where defense counsel offered no explanation besides anecdotes from other cases counsel had argued and references to other matters before the court, and the State did not engage in reversible prosecutorial misconduct during closing arguments because the prosecution's response was a permissible comment on the evidence at hand and whether it substantiated the defense theory, not impermissible shifting of the burden of proof.

⁴ Whitney v. State, 112 Nev. 499 (1996).