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Vernon Newson, Jr., v. The State of Nevada, 139 Nev. Adv. Op. 9 (Mar. 30, 2023)¹
CRIMINAL LAW: A DISTRICT COURT MAY NOT INVOKE GENERAL COVID-19
PANDEMIC CONCERNS WHEN DISPENSING WITH A DEFENDANT’S RIGHT TO IN-
PERSON CONFRONTATION.

Summary

To determine whether remote testimony by way of video-conferencing satisfies a defendant's constitutional right to confrontation, a district court must find that (1) permitting a witness to testify remotely is necessary to further a compelling public policy interest, and (2) the testimony is otherwise reliable. In this case, the Nevada Supreme Court held that although efforts to curtail the spread of the COVID-19 virus may constitute a compelling public policy interest, a district court must make specific findings as to why permitting a particular witness to testify remotely furthers this interest. Here, the district court erred in not requiring such findings of necessity before allowing two witnesses to testify remotely at appellant’s murder trial. However, because the error was harmless beyond a reasonable doubt, the judgment of conviction was affirmed.

Background

During an argument, Appellant Vernon Newson, Jr., fatally shot his girlfriend Anshanette McNeil in a car in which two children were present. At his initial trial, Newson was convicted of murder with the use of a deadly weapon; two counts of child abuse, neglect, or endangerment; and ownership or possession of a firearm by a prohibited person. On appeal, the Nevada Supreme Court reversed and remanded Newson’s first-degree murder conviction, concluding that the district court abused its discretion by failing to give the jury a voluntary manslaughter instruction proffered by the defense.²

On remand, the State moved to have two witnesses testify via video-conference call. The State justified their motion by referencing an administrative order of the Eighth Judicial District Court that directed district court judges to “accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person [as to COVID-19] under current CDC guidelines.”³ However, the State did not point to any COVID-19 related concerns for either witness and instead supported their motion with general vocational and cost concerns. Despite Newson’s objection, the district court granted the State’s motion without making any findings as to why it was necessary for the witnesses to testify remotely.

After both witnesses testified virtually, Newson moved for a mistrial, citing technical difficulties as materially affecting the jury’s ability to assess the witness’s demeanor and credibility. Invoking the COVID-19 pandemic generally, the district court denied Newson’s motion for a mistrial. The jury convicted Newson of first-degree murder with the use of a deadly weapon. This appeal followed.

¹ By Jordan Marchello.

² *Newson v. State*, 461 P.3d 246 (Nev. 2020).

³ *In the Administrative Matter Regarding All Court Operations in Response to COVID-19*, Administrative Order 21-04 at 4 [hereinafter AO 21-04].

Discussion

The district court violated Newson’s right to confrontation by permitting Marshall and Officer Santana to testify remotely

The Court first addressed whether the district court violated Newson’s constitutional right to confrontation by permitting the two witnesses to testify via video-conference call. Newson argued that the district court should not have summarily ordered that the witnesses may appear remotely without making any case-specific findings of necessity, and that the witnesses’ convenience does not justify such an allowance.

Invoking the sacrosanct nature of the requirement, the Court reiterated that “[f]ace-to-face confrontation is the foundation upon which the United States Supreme Court’s Confrontation Clause jurisprudence evolved,”⁴ and that the right of confrontation may be satisfied by remote testimony only if (1) having a witness testify remotely “is necessary to further an important public policy,” and (2) “the reliability of the [witness’s] testimony is otherwise assured.”⁵ Such remote testimony may only be used after the trial court hears evidence and makes a case-specific finding that remote testimony is necessary.⁶

Case-specific findings, as opposed to general concerns related to the COVID-19 pandemic, are required before permitting witnesses to testify remotely

Newson argued that the District Court’s failure to make case-specific findings before allowing virtual testimony was an impermissible error. Despite the district court failing to make the requisite findings of necessity under *Lipsitz*, the State nevertheless argued that preventing the spread of COVID-19 is a sufficiently compelling public policy interest to support the remote testimony in this case. The Court disagreed. Referencing other courts that have considered the issue,⁷ the Court held that abstract concerns relating to the COVID-19 pandemic generally are not an adequate justification for dispensing with a defendant’s right to in-person confrontation. Although preventing the spread of COVID-19 constitutes a compelling public policy interest, a district court must make a case-specific finding of necessity prior to invoking the pandemic to justify a witness testifying remotely. Here, the district court impermissibly failed to identify any specific circumstances which would necessitate remote testimony in this case.

Convenience, efficiency, and cost-savings generally do not justify permitting witnesses to testify remotely

Newson further argued that the witnesses’ convenience does not justify an allowance of virtual testimony. Despite invoking AO 21-04 in its motion to allow the witnesses to appear remotely, the State only supported its motion with reasons related to the witnesses’ ability to travel and other personal or job-related concerns. In agreeing with Newson, the Court cited “a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face

⁴ Chavez v. State, 213 P.3d 476, 483 (Nev. 2009); see also U.S. Const. amend. VI; Nev. Const. art. 1, § 8(1).

⁵ Maryland v. Craig, 497 U.S. 836, 850 (1990); Lipsitz v. State, 442 P.3d 138, 143 (Nev. 2019) (applying the standard set forth in *Craig* to two-way audiovisual communication).

⁶ *Lipsitz*, 442 P.3d at 143.

⁷ See, e.g., C.A.R.A. v. Jackson Cty. Juvenile Office, 637 S.W.3d 50, 65–66 (Mo. 2022) (where case-specific finding of necessity is witness specific); see also, e.g., People v. Hernandez, 488 P.3d 1055, 1058 (Colo. 2021) (where case-specific finding of necessity can relate to the state of the pandemic in the trial court’s locality at the time of trial).

confrontation.”⁸ Because neither general concerns related to the COVID-19 pandemic nor concerns of convenience, efficiency, or cost-savings justify permitting the remote testimony, the district court’s reliance upon such factors in permitting the witnesses’ remote testimony was a violation of Newson’s right to in-person confrontation.

Reversal is not warranted because the district court’s error was harmless beyond a reasonable doubt

The State argued that even if the district court erred in allowing the witnesses to testify remotely, Newson’s conviction should nevertheless be affirmed because the error was harmless beyond a reasonable doubt. The Court agreed, stating that where a Confrontation Clause error has occurred, “reversal is not required ‘if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”⁹ In such an analysis, the Court considers “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution’s case.”¹⁰

Here, the court concluded that the error was harmless because (1) the defense had conceded that Newson shot McNeil; (2) Newson wanted one of the two witnesses to testify, and viewed that testimony as critical to his defense; (3) Newson was able to cross examine the witness, and elicited the same testimony as was provided in the initial trial; and (4) Newson himself testified at trial, allowing the jury to assess his own demeanor and credibility.

Conclusion

For a Nevada district court to satisfy a defendant's constitutional right to confrontation, a district court judge must find that (1) permitting a witness to testify remotely is necessary to further a compelling public policy interest, and (2) the testimony is otherwise reliable. Although COVID-19 related concerns may constitute a sufficiently compelling public policy interest in this analysis, a district court judge must make case-specific findings of necessity to justify dispersing with a criminal defendant’s right to in-person confrontation. In this case, neither general concerns related to the spread of the virus, nor concerns related to convenience, cost-saving, or efficiency are sufficient to overcome the defendant’s constitutional protection. The district court’s allowance of witnesses to testify without making such requisite findings violated Newson’s right to confrontation. However, because such error was harmless beyond a reasonable doubt and did not contribute to the jury’s verdict, the judgment of conviction was upheld.

⁸ State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014); see also Ayyan Zubair, Note, *Confrontation After Covid*, 110 CALIF. L. REV. 1689, 1699, 1714–15 (2022).

⁹ Medina v. State, 143 P.3d 471, 477 (Nev. 2006) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

¹⁰ *Id.* at 477 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).