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Morgan vs. State of Nevada., 134 Nev. Adv. Op. 27 (May 3, 2018)

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CRIMINAL PROCEDURE: ERRORS THAT REQUIRE DISSMISAL OF CHARGES

Summary

The Court determined that a defendant is not entitled to cross examine examiners who find him incompetent at a competency hearing where neither party subpoenaed the examiner to appear at said competency hearing. The Court further decided that the State's failure to transport an incompetent Defendant to competency treatment within seven days of receiving a court order did not warrant the dismissal of charges against the Defendant. The Court also held that the District Court did not commit a structural error when Defendant moved to strike the jury venire. The Court went on to decide that Defendant was not entitled to a new jury venire when the Defendant fails to show that the underrepresentation of a distinctive group meets the requirements articulated in *Williams v. State*.² The Court further determined that the District Court did not abuse its discretion in determining how voir dire was conducted when the Court asks peremptory questions of the potential jurors before the parties could strike jurors for cause or use their peremptory challenges. The Court held that a party may not strike a juror based on the juror's sexual orientation, but that a party may strike a juror for non-discriminatory reasons. The Court further decided that the district court did not err in correcting Morgan's counsel's closing statements when counsel misstated a fact. Finally, the Court found that there was sufficient evidence to uphold Morgan's ultimate conviction.

Background

The State charged Morgan with one count of robbery and one count of battery after Morgan stole various goods from a convenience store and pushed an employee (Maria). On December 1, 2014, Morgan was removed from his initial arraignment hearing for spitting and a competency hearing was set for later that month. At the competency hearing, one examiner determined that Morgan was competent to stand trial while the other examiner determined Morgan was not competent to stand trial. A third examiner found Morgan to be competent to stand trial. Morgan challenged his competency by requesting another hearing. In February 2015, Morgan called only one witness to testify at his competency hearing—the examiner who had found him incompetent to stand trial during his first hearing. Neither Morgan nor the State requested to have the other two examiners from the first hearing present at the second hearing. The district court determined that Morgan was competent to stand trial. Morgan's counsel subsequently requested another competency hearing. At the third competency hearing, two examiners found Morgan to be incompetent to stand trial, and the district court ordered that he be transferred to Lake's Crossing Center so that he may be treated and later able to stand trial. After 100 days, Morgan had still not been transferred. Morgan filed a motion to dismiss the charges against him based on this delay. The district court denied the motion.

In February 2016, Morgan's trial took place. During jury selection, Morgan moved to strike the jury venire and requested an evidentiary hearing after only three African-Americans were selected for the forty-five person venire. While the district court initially denied this motion, it later granted the motion for an evidentiary hearing after one of the African-American venire

¹ Ron Evans.

² *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

members was ineligible to serve on the jury. After the evidentiary hearing the district court once again denied Morgan's motion.

The district court conducted voir dire. The district court explained that it would first ask the jury panel general questions. The Court would then seat thirteen members and the parties could ask the jurors questions. The parties were then permitted to strike jurors for cause. After striking for cause, each party was permitted to use peremptory challenges. However, if a party failed to make a peremptory challenge, they lost their opportunity to do so. Morgan challenged this process, but his challenge was ultimately futile.

The State used one of their peremptory challenges to strike a juror who happened to be a homosexual. Morgan challenged this strike by claiming that it was based on the juror's sexual orientation. Finally, during closing arguments, the district court required Morgan to correct his statement that Maria was still a manager at the convenience store he robbed. The jury ultimately found Morgan guilty of the charges the State had brought against him.

Discussion

The district court did not err with respect to Morgan's competency hearing

Morgan claimed that the district court violated his constitutional right to due process and his right to cross-examine at his second competency hearing because he was unable to cross-examine the two examiners who found him competent at his first competency hearing. The Court rejected this argument. The Court first noted that the district court ultimately found Morgan to be incompetent at his third competency hearing. The Court further stated that Morgan had not objected to the two examiners in question not being present at his second competency hearing. The Court stated that since Morgan had not objected below, they would review for plain error.

The Court found that, pursuant to *Scarbo v. Eighth Judicial District*,³ since neither party had subpoenaed the two examiners in question to be present at the second competency hearing, the law did not require either party to be present at the hearing. The Court noted that Morgan's right to cross-examine only applies to witnesses present at the hearing. The Court also noted that Morgan's counsel had been presented with all the examiner's findings prior to the hearing, and thus Morgan had the opportunity to subpoena these experts if he wished. The fact is simply that Morgan failed to do so. The Court therefore held that there was no structural error, and the district court did not err with respect to Morgan's competency hearing.

The district court did not err by rejecting Morgan's motion to dismiss the charges

The Court noted that following a consent decree, the State had been ordered to transport Morgan to competency treatment within seven days of receiving the court order. However, the State waited over one hundred days before transporting Morgan. Morgan argued that this violated his due process rights under the fourteenth amendment and moved to have the charges against him dismissed.

The Court noted that it grants broad discretion to the district court on whether to dismiss charges and will not disturb a decision not to dismiss charges absent an abuse of discretion. The Court noted that in the present instance, the district court had to balance its deterrent interest with the interest of society in prosecuting those who violate its laws. The Court noted that the decision

³ *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122, 206 P.3d 975, 978 (2009).

to dismiss charges with prejudice is an extreme remedy, and usually requires aggravating circumstances. The Court found that here, aggravating circumstances did not exist, and therefore the district court did not err in rejecting Morgan's motion to dismiss.

The district court did not err with respect to jury selection

The Court noted that Morgan made four contentions regarding jury selection. Morgan argued that: (1) the district court should not have made a ruling on his motion to strike jury venire before having an evidentiary hearing; (2) he was entitled to a new jury venire; (3) the district court abused its discretion in conducting voir dire; and (4) the district court erred in overruling his *Batson* challenge. The Court analyzed each of these contentions separately.

The district court did not commit structural error when Morgan moved to strike the jury venire.

The Court stated that they review whether a district court's decision constitutes structural error *de novo*. The Court noted that they have previously held that "when a defendant moves the court to strike jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the court to deny the defendant's challenge before holding that hearing to determine the merits of the motion."⁴ Morgan submitted his motion for an evidentiary hearing and to strike the jury venire after learning that one of the three African-American jurists had been found to be ineligible to serve on the jury.

The district court set up an evidentiary hearing despite knowing that the jury commissioner had not inquired about race, creed, or color. Following the evidentiary hearing, the Court denied Morgan's motion to strike the jury venire. The Court found that based on the district court's actions, the standard set forth in *Buchanan* was met, and therefore the district court did not commit structural error.

Morgan was not entitled to a new venire.

Morgan argued that he was entitled to a new venire because based on the racial makeup of Clark County, the venire should have included five African-Americans, but only included three. The Court stated that in deciding whether the venire violated Morgan's Sixth and Fourteenth Amendment right to "a venire selected from a fair cross section of the community" the Defendant must show that (1) the group that was excluded is a distinctive group, (2) that the representation of this group in the venire is neither fair nor reasonable, and (3) that the unfair or unreasonable exclusion is based in systematic exclusion in the jury-selection process.⁵

The Court stated that the two parties agreed that the first prong of the test was met, as African-Americans are undoubtedly a distinctive group. However, the Court found that the representation was fair and reasonable after calculating absolute and comparative disparities pursuant to the ruling in *Evans v. State*.⁶ The Court found that in the present instance, this prong had not been satisfied as there was only an absolute disparity of 5.1% and comparative disparity

⁴ *Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014).

⁵ *Williams v. State*, 121 Nev. 934, 939—940, 125 P.3d 631 (2005).

⁶ *Evans v. State*, 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996).

of 43.2%. Thus, Morgan's venire did not violate his right to a venire selected from a fair cross section of the community. The Court therefore held that Morgan was not entitled to a new venire.

The district court did not abuse its discretion in determining the manner in which voir dire was conducted.

Morgan argued that the district court erred in not allowing him to use all his peremptory challenges on the worst jurors. Morgan conceded, however, that many courts use the peremptory challenge system that the district court employed. Morgan primarily asserts that it was unreasonable for the Court to force him to use his peremptory challenges without knowing the next juror in the pool that would take the excluded juror's place. The Court disagreed. The Court reasoned that since the district court had asked the entire jury panel twenty general questions before the parties questioned the jury pool themselves and started using their challenges, the parties were sufficiently aware of the candidates that would likely take the place of any stricken juror. The Court thus determined that Morgan was not unreasonably restricted in using his peremptory challenges. The Court therefore held that the district court did not abuse its discretion in determining the manner in which voir dire was conducted.

The district court properly overruled Morgan's Batson challenge.

Morgan made a *Batson* challenge against the state's decision to strike juror No. 24, one of the two identifiable gay members of the jury. The Court noted that although the district court never determined whether Morgan had presented a prima facie of discrimination, it denied the challenge anyway. The Court first took a moment to hold that sexual orientation should be recognized under *Batson* (a matter of first impression for the Court).

The Court then went on to apply the three-step analysis articulated in *Batson*.⁷ The Court stated that under such an analysis, (1) the opponent of a challenge must make a prima facie case of discrimination, (2) the proponent of the challenge then bears the burden of asserting a neutral reason for the challenge, and (3) the trial court must determine whether the opponent has proven "purposeful discrimination."⁸ The Court determined that Morgan failed to make out a prima facie case of discrimination. The Court considered various factors in coming to this conclusion such as: The State did not use a peremptory strike against the other identifiably gay member of the jury, the nature of the State's questions and statements and questions during voir dire did not suggest any discriminatory intent, and finally, that the crime at issue did not involve an issue particularly sensitive to the gay community.

The Court went on to note that even if Morgan had met his burden under the first step of the analysis, the State asserted a neutral reason for wanting to exclude juror No. 24. Primarily, the State asserted that it was concerned by the potential juror's approval of the media's criticism of the police. Therefore, the Court held that the district court properly overruled Morgan's *Batson* challenge.

The district court did not err with respect to closing arguments

⁷ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁸ *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006).

During Morgan's counsel's closing argument, he stated that Maria was still a manager at the store Morgan allegedly robbed. The State objected, as evidence that Maria was still a manager there had not been introduced at trial. The district court instructed Morgan to correct his statement to the jury. Morgan argued that this instruction violated his Sixth Amendment right to counsel.

The Court noted that Maria had testified at the trial, and neither party had asked her whether she was still a manager at the store. Thus, there was no evidence that Maria was still the manager at the store. The Court therefore held that the district court did not err when it instructed Morgan to revise his statement because his statement was inaccurate based on the facts presented at trial.

There was sufficient evidence for Morgan's conviction

Morgan argued that there was insufficient evidence to sustain his conviction because the State failed to present any evidence that the Store was missing any inventory. However, the Court found that there was enough evidence presented in the form of video surveillance and testimony that a reasonable fact finder could find the essential elements of the crime. The Court pointed out that the State's evidence included video surveillance of Morgan committing the alleged crime, the store manager's testimony, and the arresting police officer's testimony. The Court held that based on this evidence, there was sufficient evidence for Morgan's conviction.

Conclusion

The Court was presented with many issues of criminal procedural law, and held that (1) the district court did not err during Morgan's competency hearing, (2) the district court did not err in rejecting Morgan's motion to dismiss the charges brought against him, (3) that the district court did not err during the jury selection process, (4) that the Court did not err regarding Morgan's counsel's closing arguments, and (5) that there was sufficient evidence for Morgan's conclusion. Of particular importance is that the Court also determined, as a matter of first impression, that discrimination under *Batson* includes discrimination based on sexual orientation.