

Criminal Opinions 2018

**Nevada Supreme Court
Nevada Court of Appeals**

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2018 Opinion Numbers

Total Number of Published Opinions = 109

Total Number of Criminal law/Procedure Opinions = 36

Nevada Supreme Court Opinions = 28

Nevada Court of Appeals Opinions = 8

Jury Selection: *Batson*

The exclusion of a person from a jury on the basis of race violates the Equal Protection Clause.

Batson's three-step analysis:

1. Prima facie showing;
2. Race-neutral explanation; and
3. “Sensitive inquiry” into such circumstantial and direct evidence of intent.

Jury Selection: *Batson*

Morgan v. State

Extends *Batson* to sexual orientation.

Batson has previously been expanded to prohibit striking a juror solely on the basis of gender.

Jury Selection: *Batson*

Cooper v. State

Discussing first-step of *Batson* analysis and necessary prima facie showing.

- Not an onerous showing.
- Not required to meet ultimate burden of proof.
- If evidence does not raise inference of discriminatory purpose, *Batson* inquiry ends.

Jury Selection: *Batson*

Williams v. State

Race-neutral reason need not be persuasive or even plausible at step 2.

But must be more than blanket denial of discriminatory motive or a general assertion of personal integrity.

Jury Selection: *Batson*

Williams v. State

District courts should adhere to *Batson's* three-step analysis, and not conflate steps 2 and 3.

Court's reasoning should be clear, particularly regarding determination whether purposeful discrimination has been proven.

Jury Selection: Bias

Sayedzada v. State

District courts must strike for cause any juror whose *voir dire* answers demonstrate the juror's views would prevent or substantially impair the juror's ability to be impartial and apply the law.

Three types of bias: actual, implied, and inferred.

Bias

Sayedzada v. State

1. Actual: where juror demonstrates a state of mind that prevents him or her from being impartial or unable to follow the law;
2. Implied: a “matter of law” determination dependent on person’s background or relationship to parties or case; and
3. Inferable: a risk of partiality **sufficiently significant** to warrant judicial exercise of discretion to

Jury Selection: Right to Public Trial

Jeremias v. State

Defendant's family ordered to leave the courtroom during *voir dire*.

Violated his right to a public trial, because court had inadequate reasons for the closure, and did not consider other reasonable measures.

However, the violation was “unquestionably trivial.”

Jury Selection: Venire Information

State v. Second Judicial Dist. Court (Ojeda)

Upon defense **motion**, the district court must order the State to disclose any venire member criminal history information it acquires from a government database that is unavailable to the defense.

Jury Instruction: Theft & Joint Accounts

Natko v. State

Defendant and victim were joint account holders, and the defendant transferred money from their joint account into her personal account, then later replaced the money.

Jury Instruction: Theft & Joint Accounts

Natko v. State, cont.

Defendant charged with exploitation of an older person and theft.

Jury instruction that “a person’s status as a joint account holder does not by itself provide lawful authority to use or transfer another’s assets for their own benefit” was improper.

Jury Instruction: Inverse “flight” instruction

Starr v. State

If a jury can be instructed that fleeing the scene is a fact that can imply guilt, does remaining at the scene suggest innocence warranting an inverse flight instruction?

The Court of Appeals says no: “The assertions are not symmetrical because criminal trials are not symmetrical.”

The presumption of innocence eliminates the need for an inference suggesting innocence.

Evidence: Other Acts (Delinquency)

In the Matter of N.J. a Minor Child

District court allowed admission of juvenile's prior bad acts at a delinquency evidentiary hearing.

Nevada Supreme Court upheld district court's ruling under NRS 62D.420 and not under NRS 48.045.

Expert Witnesses

Mathews v. State

Defense biomechanics expert was not allowed to testify in a child abuse case.

Nevada Supreme Court reversed because trial court failed to consider all of the relevant factors regarding expert testimony required by NRS 50.275 and *Hallmark v. Eldridge*.

Prior Testimony

State v. Eighth Judicial Dist. Court (Baker)

Defendant charged with sexually motivated coercion and lewdness with a minor.

At preliminary hearing, he waived his right to cross examine the victim.

Prior Testimony

State v. Eighth Judicial Dist. Court (Baker), cont.

Prior to trial, victim committed suicide, and state's motion to use her preliminary hearing testimony was improperly denied.

Where defendant waives his opportunity to cross-examine at preliminary hearing, and had necessary discovery, admitting the prior testimony at trial does not violate the 6th amendment.

Prior Inconsistent Statements

Richard v. State

The victim described his attacker to police at the hospital. By trial, the victim was unwilling to identify the defendant. On direct, the prosecution did not ask the victim about his earlier statements to police about the identity of his attacker.

On cross, the defense referenced the victim's earlier voluntary statement to police, and impeached him with it.

Prior Inconsistent Statements

Richard v. State, cont.

On redirect, the State referenced the victim's earlier physical description of the defendant; this reference drew no objection.

Prior Inconsistent Statements

Richard v. State, cont.

In order for a statement to constitute non-hearsay as a prior inconsistent statement or prior identification, the declarant must testify and be subject to cross-examination concerning the prior statement (harmless error)

Other Act Evidence

Hubbard v. State

Although intent is automatically at issue in specific intent crimes,

other act evidence to prove intent is not automatically admissible; the offered evidence must be relevant to the issue of intent without relying on propensity inference, and probative value must not be substantially outweighed by risk of unfair prejudice.

Mistrial

Granada-Ruiz v. Eighth Judicial Dist. Court

Double jeopardy does not bar retrial if defendant consented to mistrial.

Defendant's consent to a mistrial need not be in the form of a writing or in verbal approval; consent may be implied from the totality of the circumstances.

Probable Cause

State v. Sample

PBT was conducted without Sample's consent after police observed erratic driving and other indicia of intoxication. Sample admitted to drinking.

Police obtained a search warrant for Sample's blood, and the PBT result was referenced in the warrant application. The district court suppressed the blood result, finding that because Sample did not consent to PBT, warrant was improperly obtained.

Probable Cause

State v. Sample, cont.

The Nevada Supreme Court agreed that the PBT constituted a search pursuant to *Birchfield v. North Dakota*.

However, because warrant was independently supported by the officer's other observations of intoxication, suppression of blood result was error.

Suppression: Private Actor

Mooney v. State

District Court's denial of pretrial motion to suppress affirmed by Court of Appeals where third party's actions were "sufficiently independent" as to constitute private conduct.

Suppression: Private Actor

Mooney v. State

Whether a private party should be deemed an agent of the State requires consideration of two factors:

1. Whether the State knew of and acquiesced in the private individual's intrusive conduct; and
2. Whether the private individual performing the search or seizure intended to assist law enforcement or had some other independent motive.

Consent to Search

Lastine v. State

District Court's denial of pretrial motion to suppress reversed by Court of Appeals where third party lacked actual and apparent authority to consent to search of bedroom; and where law enforcement officers made no inquiry regarding the scope of the third party's authority in the home.

Third party consent

Lastine v. State

Actual authority is a legal condition that requires:

1. the defendant and third party to have mutual use of and joint access to or control over the property at issue; or
2. Defendant's assumption of the risk that the third party might consent to a search of the property.

Third party consent

Lastine v. State

Apparent authority exists where the law enforcement officer who has conducted a warrantless search or seizure based on a third party's consent *reasonably believed that the third party had actual authority to give consent.*

Law enforcement officers cannot use the “apparent authority” doctrine where they fail to make sufficient inquiry into the consenting party's use, access, or control over the area or item to be search.

Appeal: Order Granting Motion to Suppress

State v. Brown

Upon a showing of good cause, the State may appeal an order granting a motion to suppress under NRS 177.015(2).

Must make a preliminary showing of:

1. The **propriety of the appeal**; and
2. Whether there may be **a miscarriage of justice** if the appeal is not entertained.

Appeal: Order Dismissing Complaint

Warren v. Eighth Judicial District Court

Justice court dismissed a complaint after finding that the state had not met its burden at preliminary hearing.

State tried to file an information by indictment, but did not meet requirements. (NRS 173.035)

Appeal: Dismissal of Complaint

Warren v. Eighth Judicial District Court

State appealed to district court, and district court found justice complaint was dismissed in error.

Warren filed writ petition. Nevada Court of Appeals declined to consider the petition.

Warren then sought rehearing by the Nevada Supreme Court.

Appeals: Order Dismissing Complaint

Warren v. Eighth Judicial District Court

Held:

- 1) State's ability to pursue information by affidavit or indictment after dismissal were not exclusive remedies.
- 2) A justice court's order dismissing a felony or gross misdemeanor complaint is a final judgment from which State may appeal.

Controlled Substances

Andrews v. State

Weights of different controlled substances may not be aggregated together to form single offense under NRS 453.3385.

Separation of Powers

State v. Second Judicial Dist. Court (Hearn)

Sentencing decisions are within the discretion of the judiciary. Any prosecutorial power over the district court's disposition at sentencing is offensive to the separation of powers doctrine.

Capturing images

Coleman v. State

NRS 200.604 prohibits a person from knowingly and intentionally capturing an image of another person's private area without consent.

Copying, without permission, an existing and consensually recorded video depicting sexual acts does not violate the statute.

Theft through fraud

Ibarra v. State

NRS 205.270 defines the crime of larceny from the person as:

1. A person who, under circumstances not amounting to robbery, with the intent to steal or appropriate to his or her own use, takes property from the person of another without the other person's consent, is guilty

...

Theft through fraud

Ibarra v. State

Fraudulently obtained permission-to-use does not equal consent-to-take.

The Nevada Supreme Court **held**: A defendant who through fraud persuades a person to let him use her property, asking to borrow the property temporarily while intending to steal it permanently, takes the property “without the other person’s consent” for purposes of NRS 205.270(1).

Sentencing Enhancements

State v. Second Judicial Dist. Court (Kephart)

Where a plea agreement allows a defendant to plead guilty to first offense for a second domestic battery conviction, it is reasonable for a defendant to expect first-offense treatment of the conviction for all purposes, **unless** the defendant receives a warning, or explicitly agrees that the State may count the conviction as a second offense for future enhancement purposes.

Aider/Abettor Liability

State v. Plunkett

Defense attorney allowed inmates to use her cell phone during visits, and was indicted for conspiracy to unlawfully possess a portable communication device.

Aider and abettor liability applies broadly, and defense attorney was liable as a principal in the commission of the crime.

Home Invasion

Dunham v. State

Dunham broke into Stateline vacation condominium owned by his estranged wife, whose primary residence was in California. At issue was whether or not the vacation condominium qualified as an “inhabited dwelling” for purposes of the home invasion statute.

Held: vacation condominium is an inhabited dwelling, even when it is not occupied, as long as the owner or lawful occupant intends to use it as a residence or sleeping place in the future.

Right to Self-Representation

Guerrina v. State

Defendant asked to represent himself 24 days prior to the scheduled trial date, but wanted to continue the trial date.

A request for self-representation may be properly denied as untimely under *Lyons v. State*, if granting it will delay trial.

The End

Thank you