

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACOB MOORE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50443

FILED

MAY 19 2009

TRAGIEK. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge

On May 9, 2006, Richard Duarte was killed in Sparks, Nevada. Duarte was killed by a gunshot wound to the head. The shot was fired at intermediate range at a point above the ear at eye level. On September 19, 2006, appellant Jacob Moore Smith was charged with the open murder of Duarte with the use of a firearm.

A two-day trial was held in the Second Judicial District Court before the Honorable Steven R. Kosach. Smith was found guilty of first-degree murder with the use of a firearm by a jury. A sentencing hearing was conducted in front of Judge Kosach who sentenced Smith to life in prison without the possibility of parole to run consecutively with a life sentence without the possibility of parole for the use of a firearm.

As the parties are familiar with the facts of this case, we do not recount them except as they are pertinent to our disposition.

Discussion

On appeal, Smith argues that his conviction should be reversed and his sentence vacated because: 1) the justice court abused its discretion in denying Smith's motion to represent himself, 2) Smith's

sentence was excessive and improperly influenced by religious factors, and 3) statements made by the district court judge show a personal bias against Smith.¹ We conclude that Smith's arguments are without merit and will address each in turn.

Smith's motion to represent himself

A preliminary examination was held on March 29, 2007, in the Justice Court of Sparks Township. During the preliminary hearing, the district court heard Smith's motion to waive counsel and represent himself.

Justice of the Peace Mary Kandaras conducted a self-representation canvass at the preliminary hearing. After conducting the canvass, Kandaras denied Smith's motion to represent himself because she determined that Smith was not legally qualified to represent himself. Upon the denial of Smith's motion, Kandaras conducted a preliminary hearing and bound Smith over for trial.

Smith argues that the justice court abused its discretion in denying his motion and request to represent himself, which forced continued legal representation upon him. Smith further argues that the

¹Smith also raises the following arguments on appeal: 1) the district court erred in failing to give defense counsel additional time to prepare, 2) Smith's counsel was ineffective because he failed to invoke the rule of exclusion, 3) the prosecutor committed misconduct by helping the police to continue coercing defense witnesses, 4) the prosecutor unlawfully shifted the burden of proof to Smith, 5) the prosecutor committed misconduct by misinforming the jury on the legal standard of first-degree murder, 6) the district court erred by refusing to give a jury instruction on circumstantial evidence, and 7) Smith's conviction should be reversed because of cumulative error. After careful review, we conclude that none of these separate arguments warrant reversal.

justice court abused its discretion because it denied his motion based on the belief that he did not understand the nature or significance of the legal proceedings. Smith contends that the justice court's stated reason for denying his motion for self-representation was in violation of our holding in Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) (holding that when conducting a canvas, the only question for the court to examine is whether the defendant "competently and intelligently" chose self-representation, not whether he was able to "competently and intelligently" represent himself). Smith therefore argues that because the justice court abused its discretion, his conviction in the district court is invalid.

Without conceding that Smith's argument is correct, the State argues that Smith waived his right to self-representation by failing to renew his motion to waive counsel at the district court level. The State further contends that by failing to renew his motion Smith acquiesced to his publicly appointed counsel because the justice court informed him of his right to renew the motion. We agree with the State's argument in light of our recent decision in Hooks v. State, 124 Nev. ___, 176 P.3d 1081, 1086-87 (2008) (holding that it was reversible error for a district court to fail to perform a Faretta canvass when a criminal defendant asserted the right to self-representation even if a canvass had been performed by the justice court).

In reviewing a lower court's denial of a motion to waive counsel and represent one's self, we will reverse a conviction only if the court abused its discretion. See Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 236-37 (2001).

A criminal defendant has an unqualified right to self-representation under U.S. Const. amend. VI and Nev. Const. art. 1 §8, as

long as the defendant has given a “voluntary and intelligent waiver of the right to counsel.” Lyons v. State, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990) (abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001)). “However, a defendant may be denied his right to self-representation where his request is untimely, the request is equivocal, the request is made solely for the purpose of delay, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel.” Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997).

When a criminal defendant chooses self-representation in Nevada, district courts are required to instruct defendants pursuant to Supreme Court Rule 253, which sets forth numerous factors relevant to a defendant’s decision to waive his right to counsel. Specifically, SCR 253 requires the district court to conduct a “canvass” of the defendant to determine whether the defendant understands the consequences of his/her decision, and whether the decision of the defendant is given voluntarily. A district court abuses its discretion if it fails to perform a canvass under SCR 253 when a criminal defendant asserts the right to self-representation. The district court is required to conduct a canvass under SCR 253 when a criminal defendant asserts his right to self-representation, even if a canvass was previously performed by the justice court and failure to do so constitutes an abuse of discretion. Hooks at ____, 176 P.3d at 1086-87.

However, when a motion for self-representation has been made in the justice court, a criminal defendant must reassert a claim to self-representation at the district court level. Although Smith asserted his right to self representation in the justice court, and the justice court

arguably erred in denying his motion, Smith failed to reassert his right in the district court even after the justice court told him he had the right to do so. Without an affirmative assertion of his right, the district court has no reason to perform a canvass. Therefore, the district court had no obligation to act without Smith's assertion of his right. Thus, we conclude that Smith's failure to reassert his claim to self-representation in the district court was a waiver of his Sixth Amendment right to self-representation.

Sentencing issues

Smith argues that his sentence is invalid due to the district court's use of improper sentencing factors. Smith contends that it was improper for the district court to consider the prosecutor's statements referencing the Bible and that the district court's own statements towards him show a personal bias.

A sentencing judge is afforded wide discretion in imposing a sentence. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (citing Deveroux v. State, 96 Nev. 388, 389-90, 610 P.2d 722, 723 (1980)). Therefore, absent a showing of abuse of discretion, we will not disturb the district court's determination of sentence on appeal. Id.

The prosecutor's reference to Biblical times

During the sentencing hearing, the State asked for a sentence of life without the possibility of parole. During the State's argument, a reference was made by the prosecutor to the Code of Hammurabi and the Bible in the context that a convicted criminal pays back what he took from society.

Smith argues that it was an abuse of discretion for the district court to consider the prosecutor's argument at sentencing referring to the Bible. Specifically, Smith takes issue with the prosecutor's statement that

“[o]ur society, going back to, as you know, the Codes of Hammurabi back in the 18th Century, B.C., through the Bible to our current statutes, Your Honor, recognize that a criminal defendant pays back to the victim what he has taken.” We disagree because Smith failed to object to this statement and the improper reference to the Bible does not rise to the level of plain error. See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (holding that under NRS 178.602, we may consider a claim of prosecutorial misconduct that was not objected to in the district court if the claim amounts to plain error that affected the defendant’s substantial rights).

The district court’s discretion during sentencing allows the court to consider almost all of the evidence available, including evidence inadmissible at trial, to ensure that the penalty fits the crime of which the defendant was convicted. Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996). However, the consideration of statements made by a prosecutor referring to the Bible during sentencing that direct a particular sentence is improper. See Young v. State, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004).

While the prosecutor’s statements referring to the Bible were improper, Smith failed to object to these statements at the sentencing hearing. Because Smith failed to object to the statements, we address his claim for plain error. See Rowland at 38, 39 P.3d at 118.

We conclude that the prosecutor’s misconduct cited by Smith does not rise to level of plain error because the statement did not affect his substantial rights. See Young at 972, 102 P.3d at 578. Smith failed to show that the district court based the sentence on the Biblical reference or even that the district court took the prosecutor’s statements into

consideration. Therefore, because Smith failed to demonstrate that his rights were violated, we affirm Smith's conviction and sentence on this issue.

Judge Kosach's inappropriate statements during sentencing

Smith next argues that his sentence is invalid because of an alleged personal bias Judge Kosach had against him. Specifically, Smith points to three instances to show a personal bias and possible judicial misconduct by Judge Kosach.

Upon making his sentencing ruling, Judge Kosach made three comments directed at Smith. First, Judge Kosach stated that he almost puked when he heard Smith testify that Smith had not committed the crime but "some black man did it." Second, Judge Kosach called Smith "Mr. Braid Man, Mr. Tough Guy" in reference to what he had seen and heard from Smith during the trial and Smith's denial of killing Duarte. Third, when Smith attempted to speak during the State's argument, Judge Kosach told Smith to "[s]hut up. You'll get your chance to say it. This is argument. Just shut up."

While we agree with Smith that Judge Kosach's conduct was deplorable, we do not agree that Judge Kosach's comments warrant a reversal of Smith's sentence. We include this issue in order to address Judge Kosach's inappropriate conduct, which we have found is not an isolated incident.

"The right to a fair trial incorporates the right to have a trial presided over by a judge who is free from bias or prejudice." Wesley v. State, 112 Nev. 503, 509, 916 P.2d 793, 798 (1996). When a defendant fails to object to judicial misconduct below, we review such claims for plain error. Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). "In conducting plain error review, we must examine whether there was 'error,'

disqualification. Millen v. Dist. Ct., 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006); Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997).

NCJC Canon 2A states that “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

We apply an objective test to determine the reasonableness of questioning a judge's impartiality, so that “whether a judge is actually impartial is not material.” PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 436, 894 P.2d 337, 340 (1995), overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 260, 112 P.3d 1063, 1069-70 (2005). Additionally, we have concluded that “an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays a ‘deep-seated favoritism or antagonism that would make fair judgment impossible.’” Kirksey v. State, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) (quoting Liteky v. United States, 510 U.S. 540, 555 (1994)).

While Judge Kosach’s statements at the sentencing hearing were unacceptable, we conclude they do not provide a basis for reversing Smith’s sentence. The sentence ordered by Judge Kosach was within the sentencing statute and consistent with the sentence set by the jury in their verdict.² Also, because Smith was given an appropriate sentence, judicial economy dictates that resentencing would be a waste of judicial resources. Thus, we conclude that Smith’s sentence will stand.

²We further note that the jury was not influenced by Judge Kosach’s comments because the comments were made at the sentencing hearing after the jury had rendered their verdict.

cc: Hon. Steven R. Kosach, District Judge
Thomas L. Qualls, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

We take this opportunity to admonish Judge Kosach to discontinue this type of disreputable conduct. As we recently decided another case involving inappropriate comments made by Judge Kosach to another defendant at sentencing,³ we wish to send a clear message that we will not tolerate this type of behavior from the bench.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

³See Monsour v. State, Docket No. 48800 (Order Affirming in Part, Vacating in Part and Remanding, May 30, 2008) (where Judge Kosach stated to the defendant at sentencing “Mr. Monsour, some time, some time, man, you will get it. Probably the only way you will get it is when I sentence you to life in prison.” Judge Kosach also addressed the mother of the victim at the sentencing hearing by stating “[r]emember this old saying, ‘vengeance is mine sayeth the Lord.’”)

cc: Hon. Steven R. Kosach, District Judge
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