

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY JOE FLETCHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35919

FILED

JUL 05 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary, conspiracy to commit robbery, and robbery with the use of a deadly weapon. The district court sentenced appellant to 36 to 120 months for burglary, 28 to 72 months for conspiracy, and 36 to 156 months for robbery, plus an equal and consecutive term for the deadly weapon enhancement. The court ordered that all of the sentences be served concurrently.

Appellant's sole contention is that the district court abused its discretion in precluding appellant from presenting alibi testimony based on appellant's failure to comply with the notice provisions of NRS 174.233.¹ We disagree.

In the morning on the second day of appellant's trial, defense counsel requested an ex parte conference with

¹NRS 174.233 was substituted in revision for NRS 174.087.

the trial judge regarding alibi evidence that had just been brought to her attention. Counsel informed the court that her investigator had just that morning received a phone call from appellant's girlfriend, Roshanda Turner, and that Turner said she would testify that she was with appellant at the time when the charged offenses allegedly occurred. Counsel stated that she was surprised by this information and suggested that the court could grant a continuance to permit the State to prepare for cross-examination or allow Turner to testify without a continuance if the State would waive the notice requirement.² Counsel also acknowledged that the court could exclude Turner's testimony due to the lack of notice. Counsel further admitted, upon inquiry by the court, that she had met with appellant on numerous occasions and discussed the case with appellant but that appellant had not provided her with the names of any individuals that could provide an alibi. Based on this information, the district court excluded the alibi evidence offered by appellant.

NRS 174.233(1) provides, in relevant part, that "a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than 10 days before trial or at such other time as the court may direct, file and serve upon the prosecuting attorney a written notice of his intention to claim the alibi." Where a defendant fails to

²The State apparently refused to waive the alibi-notice requirement.

file and serve the notice required by subsection (1), "the court may exclude evidence offered by the defendant to prove an alibi, except the testimony of the defendant himself." NRS 174.233(4). The primary purpose of the alibi-notice statute is to "counter-balance the ease with which an alibi can be fabricated, the government's interest in protecting against a belated defense and the 'suspect nature' of alibi testimony." *Williams v. State*, 97 Nev. 1, 3, 620 P.2d 1263, 1265 (1981) (quoting *Eckert v. State*, 96 Nev. 96, 101, 605 P.2d 654 (1980)); see also *Williams v. Florida*, 399 U.S. 78, 81 (1970) ("Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate."). Although strict compliance with the statute is contemplated, this court has held that the exclusion of alibi testimony may be an abuse of discretion where "on the facts presented, requiring strict compliance with the statute would defeat the ends of justice and fair play which is the policy underlying the statute." *Founts v. State*, 87 Nev. 165, 170, 483 P.2d 654, 657 (1971).

Appellant argues that the district court abused its discretion in excluding the alibi evidence because a short continuance would have cured any prejudice to the State and because the evidence had probative value to the defense. Appellant relies on Founts and Williams, wherein this court concluded that the district court abused its discretion in excluding alibi evidence based on noncompliance with the

alibi-notice statute. We conclude that these cases are distinguishable.

In Founts, this court found an abuse of discretion where the State had been orally notified several days before trial began that the defendant intended to offer alibi testimony and the offer of proof at trial indicated that the alibi testimony directly contradicted that of the sole witness against the defendant. 87 Nev. at 170, 483 P.2d at 657. In Williams, this court found an abuse of discretion where the defendant had filed written notice with the court seven days prior to the scheduled trial date and the proffered testimony from four alibi witnesses directly contradicted the State's sole eye-witness. 97 Nev. at 4, 620 P.2d at 1265-66.

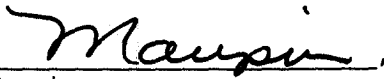
Here, appellant did not provide any notice, written or oral, prior to trial. The first mention of a potential alibi witness came on the morning of the second day of the trial. Moreover, the State's evidence in this case included eyewitness identification of appellant and physical evidence linking appellant to the charged offenses.³ Thus, this case

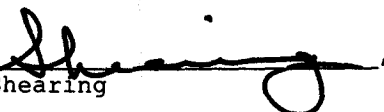
³The victim testified that he went into a convenience store to prepay for gas and that when he returned to his vehicle and started pumping the gas, a man approached him and asked for a dollar. As the victim turned to say no, appellant exited the victim's car from the driver's side door with a gun drawn and told the victim to "Give it up." The victim gave appellant his wallet. The victim identified appellant at a physical lineup. Additionally, a latent fingerprint obtained from the handle on the passenger side door to the victim's car was matched to appellant. (The victim testified that the passenger side door was closed when he went inside the store to pay for the gas, but that it was ajar when he returned to the car and was approached by appellant's companion).


is distinguishable from Founts and Williams. Based on the circumstances of this case, we conclude that the district court did not abuse its discretion in excluding the proffered alibi testimony due to appellant's failure to comply with NRS 174.233. See Reese v. State, 95 Nev. 419, 423-24, 596 P.2d 212, 215-16 (1979) (concluding that district court did not abuse discretion in excluding alibi testimony offered by defendant's parents where defendant did not provide notice until day of trial).

Having considered appellant's contention and concluded that it lacks merit, we

ORDER this appeal dismissed.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk