

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARVIE LEE HILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67862

FILED

APR 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of child abuse and 12 counts of open or gross lewdness. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Marvie Hill claims the district court erred by refusing to consider his motion to admit a witness' preliminary hearing testimony because it was untimely filed. Hill recognizes that, pursuant to the holding in *Hernandez v. State*, 124 Nev. 639, 188 P.3d 1126 (2008), a party must demonstrate good cause for filing an untimely motion to admit preliminary hearing testimony. He asserts, however, that applying the good-cause test set forth in *Hernandez* to a criminal defendant violates the defendant's Sixth Amendment right to present a defense and confront witnesses. He therefore requests this court to limit the holding in *Hernandez* to instances when the State files an untimely motion and he proposes an alternate test for use when it is the defendant who files an untimely motion to admit preliminary hearing testimony. Hill asserts, even if this court were to apply the good-cause test in *Hernandez*, the

district court erred by refusing to consider his motion because he demonstrated good cause for the late filing of the motion.

In *Hernandez*, the Nevada Supreme Court held

[I]f a motion to admit preliminary hearing testimony is untimely, the proponent of the testimony must support the motion with an affidavit or sworn testimony demonstrating good cause for the untimely motion. Good cause to allow an untimely motion exists only when the proponent has exercised reasonable diligence to procure the attendance of the witness before the expiration of the motion deadline.

Id. at 642, 188 P.3d at 1128-29.

A defendant has a Sixth Amendment right to present his own witnesses to establish a defense. *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988). However, “[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system.” *Id.* at 412-13 (quoting *United States v. Nobles*, 422 U.S. 225, 241 (1975) (emphasis omitted)). “The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent’s case.” *Id.* at 410-11. As the Supreme Court of the United States has noted

the Compulsory Process Clause [of the Sixth Amendment] cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying

them in advance of trial adds little to these routine demands of trial preparation.

Id., at 415-16.

The time provisions for seeking to admit preliminary hearing testimony serve the public interest and do not place an undue burden on a defendant. And requiring a defendant to show good cause for failing to comply with the time provisions is not inconsistent with the Constitution and does not violate a defendant's Sixth Amendment rights. Therefore, we decline to limit the holding *Hernandez*. We further conclude, to the extent Hill argues refusal to consider his motion resulted in an unconstitutional exclusion of the evidence, this claim lacks merit.

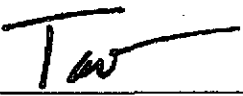
Hill filed his motion on the sixth day of trial and the district court denied the motion because Hill failed to demonstrate good cause for filing an untimely motion. See NRS 174.125(1), (3) (To be timely in a jurisdiction that has two or more judges, motions that may delay or postpone the time of trial must be made 15 days prior to trial unless the opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds prior to trial. For good cause shown, the district court may permit a motion to be made at a later date.) See also EDCR 3.28 (requiring parties to make motions to admit evidence no later than the calendar call for a trial or seven days prior to trial, and granting district courts discretion to not hear untimely motions).


The district court found Hill did not engage in reasonable due diligence prior to trial to secure the witness for trial. Hill did not subpoena the witness nor did he inform the district court at calendar call there were any problems with securing witnesses or that a material witness warrant was necessary. Instead, Hill waited until trial began to attempt to locate the witness. We note, Hill called this particular witness

at the preliminary hearing and was aware during the entire process this witness would be necessary for trial. We conclude the district court's findings are supported by the record and support a finding Hill did not exercise due diligence in securing the witness' presence at trial. Therefore, Hill failed to demonstrate good cause and the district court did not abuse its discretion in refusing to consider the untimely motion to admit the preliminary hearing transcript. Accordingly, we

ORDER the judgment of conviction AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michael Villani, District Judge
Justice Law Center
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Because we conclude the district court did not err in declining to consider Hill's untimely motion, we decline to reach Hill's contention the district court erred by not admitting the preliminary hearing testimony.