

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BAYZLE DYLAN MORGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80590-COA

FILED

JAN 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Bayzle Dylan Morgan appeals from a judgment of conviction, pursuant to a guilty plea, of conspiracy to commit burglary, burglary while in possession of a deadly weapon, robbery with use of a deadly weapon of a victim 60 years of age or older, and first-degree murder with use of a deadly weapon of a victim 60 years of age or older. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Morgan murdered 75-year-old Jean Main by repeatedly pistol-whipping her in the head and shooting her in the back of the head from two feet away.¹ After murdering Main, Morgan ransacked her home, taking all the valuables he could find. Law enforcement matched blood at the scene to Morgan and, after conducting a search pursuant to a warrant, police officers found several of Main's stolen items in Morgan's constructive possession.

Judge Michelle Leavitt presided over the majority of Morgan's case, including various pretrial motions. Thereafter, due to administrative reasons, Morgan's case was transferred to Judge Eric Johnson for trial. While in front of Judge Johnson, Morgan moved the district court to compel

¹We do not recount the facts except as necessary to our disposition.

the production of 51 corrective action reports (CARs) from 2001 to 2014 from the Las Vegas Metropolitan Police Lab (LVMPD).² CARs detail instances in which LVMPD administratively reviews alleged departmental lab errors. Judge Johnson granted the request and ordered LVMPD to turn over the 51 CARs by 5:00 p.m. on April 11, 2018. On that same day, but before LVMPD had produced the CARs, Morgan voluntarily pleaded guilty. Judge Johnson conducted a detailed and thorough canvass after Morgan signed a guilty plea agreement. Nowhere in the guilty plea agreement or during Judge Johnson's canvass did Judge Johnson say or indicate he would sentence Morgan, and nowhere does the record reflect that Morgan expected Judge Johnson to sentence him.

After LVMPD learned of Morgan's plea, the State moved the district court to vacate its order for production of the CARs. Judge Johnson granted the State's request and vacated his earlier order, deeming it moot because Morgan would no longer be able to impeach LVMPD's credibility at trial with the CARs. Morgan's case was then transferred back to Judge Leavitt.

While in front of Judge Leavitt, Morgan moved to recuse Judge Leavitt, transfer his case back to Judge Johnson, and moved twice to withdraw his guilty plea. Morgan also moved for Judge Leavitt to compel production of the 51 CARs for sentencing. Judge Leavitt denied Morgan's request to transfer his case back to Judge Johnson and both of his requests to withdraw his guilty plea. Chief Judge Linda Bell heard the motion to recuse Judge Leavitt and denied it, finding no basis for disqualification. Judge Leavitt granted Morgan's motion to compel production in part by

²No CARs occurred in Morgan's case.

ordering LVMPD to make available 13 of the 51 CARs that included references to two forensic analysts who had worked on Morgan's case.

On appeal, Morgan challenges three of the district court's rulings. First, its denial of his two motions to withdraw his guilty plea; second, its denial of his motion to recuse Judge Leavitt; and third, its failure to make additional CARs available for sentencing.

Morgan first argues the district court erred by not allowing him to withdraw his guilty plea prior to sentencing because NRS 176.165 allows him to withdraw his plea any time before sentencing if there is a fair and just reason. Morgan argues there are three fair and just reasons that support his motions to withdraw his plea: (1) he decided to plead guilty because he assumed Judge Johnson (not Judge Leavitt) would sentence him, (2) he did not want to be sentenced by Judge Leavitt, and (3) production of the CARs was outstanding at the time he pleaded guilty. Morgan argues that without the CARs, his plea was not voluntary or intelligent and the CARs would have been useful for mitigation purposes at sentencing. In addition, Morgan argues he was innocent and the State would not have been prejudiced if the district court allowed him to withdraw his guilty plea.

We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). NRS 176.165 allows a defendant to move to withdraw a guilty plea before sentencing and grants the district court discretion to permit such a request for any substantial reason that is fair and just. *Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1280-81 (2015). To determine whether permitting withdrawal would be fair and just, the district court must consider the totality of the circumstances. *Id.* at 603, 354 P.3d at 1281.

In addition, defendants do not have an absolute right to be sentenced by the judge who accepted their guilty plea. *Dieudonne v. State*, 127 Nev. 1, 7, 245 P.3d 1202, 1206 (2011). Such a right would only exist if

[a]t the time of sentencing, there [was] an acknowledgment that a promise made by the court or by the prosecutor led to an express agreement that the defendant would be sentenced by that particular jurist. A clear statement must be made that the plea was entered in expectation of, and in reliance upon, the sentence being imposed by the same judge who took the plea in order to assert such a right.

Id. at 8, 245 P.3d at 1207.

The district court did not abuse its discretion by denying Morgan's motions to withdraw his guilty plea. First, Morgan failed to set forth any substantial fair and just reason to allow him to withdraw his plea. He gives several reasons. The first is that he preferred to be sentenced by Judge Johnson, but there was never a promise in the guilty plea agreement or made during the district court's canvass that Judge Johnson would sentence him. The Nevada Supreme Court made clear in *Dieudonne* that a defendant does not have a right to be sentenced by the same judge who took his or her plea absent a promise or agreement.

Morgan's second proffered fair and just reason to allow him to withdraw his guilty plea was the district court's refusal to compel the production of the CARs. However, this argument fails because Morgan voluntarily pleaded guilty *before* production of the CARs was due. The district court ordered LVMPD to turn over the 51 CARs before 5:00 p.m. on April 11, 2018, but Morgan voluntarily pleaded guilty earlier that same day. Morgan does not allege that the State only extended the plea offer before the production of the CARs in order to avoid producing them, or that there

was a deadline on the offer tied to the production of the CARs; as far as the record shows, Morgan was free to wait until after the CARs deadline to accept the plea bargain but chose not to. Moreover, Morgan argued several times that the purpose of obtaining the CARs was to impeach the credibility of LVMPD and to show errors in its protocols *at trial*. Thus, Morgan intended to use this evidence to suggest reasonable doubt as to his guilt—however, when Morgan pleaded guilty to the robbery and murder, the evidence became irrelevant because guilt was no longer an issue. Morgan’s argument that the evidence would demonstrate mitigation is equally futile because Morgan admitted he killed Main and proffers no explanation why anything in the CARs would have been relevant to mitigate his sentence once he admitted that he was guilty. In any event, notwithstanding these flaws in reasoning, the district court nonetheless did allow for 13 of the 51 CARs to be used at sentencing.

Additionally, there is no evidence in the record demonstrating that Morgan entered into the agreement unknowingly and involuntarily. The district court conducted a lengthy canvass, during which it carefully reviewed each charge and consequence with Morgan, and even had Morgan explain what was occurring in his own words. Morgan also agreed he murdered Main, thereby demonstrating his lack of innocence. Accordingly, we conclude the district court did not abuse its discretion in denying Morgan’s requests to withdraw his guilty plea.

Next, Morgan argues the district court erred by denying his motion to recuse Judge Leavitt. He argues Judge Leavitt acted with bias towards him and that she has a history of abusing her discretion and violating the constitutional rights of defendants.

We review a district court's decision not to recuse itself for an abuse of discretion. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1988). “[T]he test for whether a judge’s impartiality might reasonably be questioned is objective and presents a question of law [such that] this court will exercise its independent judgment of the undisputed facts” *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (alterations in original) (citation and internal quotation marks omitted). “Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Rippo v. Baker*, ___ U.S. ___, ___, 137 S. Ct. 905, 907 (2017) (internal quotation marks omitted). “Because a judge is presumed to be impartial, the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.” *Ybarra*, 127 Nev. at 51, 247 P.3d at 272 (internal quotation marks omitted).

We conclude that the district court did not abuse its discretion in denying Morgan’s motion to recuse Judge Leavitt. Morgan failed to establish sufficient factual grounds warranting Judge Leavitt’s disqualification. Morgan cites to cases in which the Nevada Supreme Court found Judge Leavitt had abused her discretion. Yet, Morgan failed to demonstrate a connection between those cases and his. Further, Chief Judge Bell reviewed the matter and denied Morgan’s motion for recusal as she found there was no showing of bias. The appellate record corroborates this finding.

Finally, Morgan argues the district court erred in not ordering the production of all of the requested CARs from LVMPD. Morgan relies on NRS 174.235(1) and *Brady*³ to argue that he was entitled to the CARs.

We review a district court's decision to admit or deny evidence for an abuse of discretion. *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008), *abrogated on other grounds by State v. Eighth Judicial Dist. Court (Baker)*, 134 Nev. 104, 107, 412 P.3d 18, 22 (2018). "*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). "[A]fter a specific request for evidence, a *Brady* violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome." *Id.* (emphasis omitted). NRS 174.235(1)(b) requires the State to allow the defendant to review and copy any

[r]esults or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

We conclude that the district court did not abuse its discretion in denying Morgan's motion to compel production of the CARs. Morgan's reliance on NRS 174.235(1) fails because this statute by its own terms applies to trial and not sentencing, and it requires the State to turn over evidence "made in connection with the particular case," and the CARs he requested were not made in connection with his case but rather they all

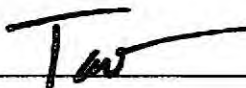
³*Brady v. Maryland*, 373 U.S. 83 (1963).

related to other cases and investigations. Furthermore, Morgan has not demonstrated how the unrelated CARs would have resulted in a different sentence had the information been presented. Finally, the district court did allow for the production of 13 of the requested CARs that included references to forensic examiners who worked on Morgan's case, but even those were not actually connected to Morgan's case but rather only referenced examiners who happened to work on his case. Consequently, the district court did not abuse its discretion in limiting production of the remaining CARs.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
The Law Office of Kristina Wildeveld & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk