


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES ROBERT BONETTI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87333-COA
FILED
OCT 17 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

James Robert Bonetti appeals from a judgment of conviction, entered pursuant to a guilty and a no contest plea, of two counts of possession of child pornography (first offense). Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

As an initial matter, Bonetti argues the district court erred by imposing a special sentence of lifetime supervision. The State concedes that the district court erred by imposing a requirement of lifetime supervision as part of Bonetti's sentence and contends the judgment of conviction should be amended to remove this requirement. We agree. NRS 176.0931 requires a district court to include in sentencing a special sentence of lifetime supervision for persons convicted of certain enumerated offenses. A conviction under NRS 200.730(1) for possession of child pornography (first offense) is not among the offenses enumerated in NRS 176.0931. Therefore, we reverse the imposition of the special sentence of lifetime supervision, and we remand for the district court to enter an amended judgment of conviction that removes the special sentence of lifetime supervision.

Next, Bonetti argues the district court erred by denying his motion to disqualify the district court judge as untimely. As relevant to this

matter, NRS 1.235(2)(a) requires a party who seeks to disqualify a judge for actual or implied bias or prejudice to file an affidavit “[n]ot less than 20 days before the date set for trial or hearing of the case.” A party can file a motion for disqualification pursuant to Nevada Code of Judicial Conduct (NCJC) Rule 2.11 after the deadline established by NRS 1.235(2) but the motion must be “based on new information learned or observed after the cutoff date,” *Debiparshad v. Eighth Jud. Dist. Ct.*, 137 Nev. 691, 696, 499 P.3d 597, 601 (2021), and must be filed “as soon as possible” after the moving party becomes aware of the new information, *Towbin Dodge, LLC v. Eighth Jud. Dist. Ct.*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005).

Bonetti sought to disqualify the district court judge from sentencing pursuant to NCJC Rule 2.11. Bonetti filed his motion on August 28, 2023, less than 20 days before the date set for the sentencing hearing on September 14, 2023. Nonetheless, Bonetti contends his motion was timely because NRS 1.235(5) requires a copy of the affidavit to be served upon the judge at the time the affidavit is filed, and Department 1 of the Fifth Judicial District was closed on Friday, August 25, 2023, the last day he was permitted to file his motion.¹ Bonetti contends that service would have been impracticable on August 25, 2023, due to the closure and that this court should treat Fridays in Department 1 in the Fifth Judicial District as non-judicial days for the purposes of filing a motion to disqualify.

Bonetti does not contend that the Fifth Judicial District Court Clerk’s Office was closed on August 25, 2023, such that he was unable to

¹Bonetti attached a declaration to his motion to disqualify. Bonetti filed the declaration in lieu of an affidavit pursuant to NRS 53.045. The parties do not dispute that NRS 1.235 applies to Bonetti’s motion and declaration.

file his motion and declaration on that date. Bonetti also failed to demonstrate that he could not effectuate service on August 25, 2023. See NRS 1.235(5) (“Service must be made by delivering the copy to the judge personally or by leaving it at the judge’s chambers with some person of suitable age and discretion employed therein.”). Indeed, the State argues that Bonetti did not attempt to file or serve his motion and declaration on August 25, 2023, and Bonetti conceded this point by failing to file a reply to the State’s argument.² See *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that, when respondents’ argument was not addressed in appellants’ opening brief and appellants neglected to file a reply brief, “such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents’ position”). Moreover, there is no statute or district court rule that includes a judicial department’s closure as a nonjudicial day,³ and this court may not expand upon this authority to include such days. See *Douglas v. State*, 130 Nev. 285, 293, 327 P.3d 492,

²We note that Bonetti’s motion to disqualify and declaration did not provide any cause for filing the motion less than 20 days before the sentencing hearing. See NRS 178.476 (stating a district court may, for cause shown, enlarge the period in which an act is required or allowed to be done). We also note that Bonetti’s motion to disqualify did not assert that his motion was timely because Department 1 of the Fifth Judicial District was closed on Friday, August 25, 2023, and Bonetti did not seek reconsideration of the district court’s order denying his motion or otherwise challenge the district court’s timeliness decision below.

³NRS 1.130(1) states that nonjudicial days include Sundays and legal holidays. The Fifth Judicial District does not have local rules; thus, the District Court Rules generally apply. See DCR 5. Under those rules, nonjudicial days include Saturdays, Sundays, and legal holidays. See DCR 4.

498 (2014) (stating “courts should not add things to what a statutory text states or reasonably implies”).

Bonetti does not allege that he filed his motion as soon as possible after he became aware of new information. To the contrary, the record indicates that Bonetti sought to disqualify the judge because the judge had previously declined to accept the parties’ plea negotiations. Bonetti’s motion was based on statements made by the judge in 2019 and 2020, and Bonetti had previously filed a petition for a writ of mandamus based upon these same statements, which was granted. *See Bonetti v. Fifth Jud. Dist. Ct.*, No. 83634, 2022 WL 3336141 (Nev. Aug. 11, 2022) (Order Granting Petition). Bonetti filed his motion to disqualify approximately one year after the supreme court issued its order granting Bonetti’s petition. Therefore, Bonetti’s motion was not based on new information, and we conclude the district court did not err by denying Bonetti’s motion as untimely.

Finally, Bonetti argues that the district court judge abused her discretion when she failed to recuse herself because her impartiality could reasonably be questioned. As previously discussed, Bonetti did not timely file his motion to disqualify; therefore, he did not properly preserve this claim below, and we review this claim for plain error. *See Rives v. Farris*, 138 Nev. 138, 142, 506 P.3d 1064, 1068 (2022) (“[I]t is well-established that a timely objection . . . is sufficient to raise and preserve an issue for appellate review.”); *see also Gunera-Pastrana v. State*, 137 Nev. 295, 297, 490 P.3d 1262, 1266 (2021) (stating unpreserved claims of judicial misconduct and unpreserved constitutional errors are reviewed for plain error). To demonstrate plain error, an appellant must show that: “(1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current

law from a casual inspection of the record; and (3) the error affected [their] substantial rights.” *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

Bonetti contends the district court judge should have recused herself pursuant to NCJC Rule 2.11(A) because (1) she stated in multiple hearings her belief that the parties’ plea agreement improperly limited her sentencing authority and erroneously refused to accept the plea agreement until ordered to do so by the Nevada Supreme Court, and (2) she imposed the maximum possible prison sentence and erroneously imposed a special sentence of lifetime supervision.

NCJC Rule 2.11(A) requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” The Nevada Supreme Court has held that disqualification under NCJC Rule 2.11(A) requires bias arising from an extrajudicial source, and thus, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 108, 506 P.3d 334, 338 (2022) (quotation marks omitted); *see also Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (stating “remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence”).

None of Bonetti’s asserted grounds for disqualification identify extrajudicial bias; thus NCJC Rule 2.11(A) does not apply to Bonetti’s

claims. *See Canarelli*, 138 Nev. at 110, 506 P.3d at 339 (“Accordingly, because nothing in the record indicates that the question of partiality comes from an extrajudicial source, we do not apply NCJC Rule 2.11(A).”). Moreover, a casual inspection of the record does not reveal that the district court judge’s statements or sentencing decision displays a deep-seated favoritism or antagonism that would make fair judgment impossible. The district court stated that its concerns regarding the plea agreement stemmed from the seriousness of the allegations and the initial charges brought, which included, among other charges, several counts of sexual assault of a minor. This does not indicate any deep-seated antagonism toward Bonetti. *Cf. Cameron*, 114 Nev. at 1283, 968 P.2d at 1170-71 (stating the fact that a district court judge is offended by the facts of the crime committed does not indicate the judge has “any personal feelings of animosity toward” the defendant). The district court also repeatedly stated at the sentencing hearing that it had not predetermined Bonetti’s sentence, that it had listened to the argument of counsel and considered the evidence before it, and that determining Bonetti’s sentence was “tough” and “difficult.”

Although the district court erred by imposing a special sentence of lifetime supervision, the court advised Bonetti that he could be subject to lifetime supervision at the change of plea hearing, and neither the State nor defense counsel corrected the court at that time.⁴ Therefore, it is not clear

⁴We note there appears to have been confusion as to whether a special sentence of lifetime supervision was required in this matter. The district court appeared to recognize in a prior hearing that lifetime supervision was “off the table when it comes to pleading to the child pornography charges,” and the superseding guilty plea agreement states that Bonetti “may be subject to lifetime supervision requirements” but also that “IT APPEARS

from a casual inspection of the record that the erroneous imposition of a special sentence of lifetime supervision was the result of any deep-seated antagonism toward Bonetti. Accordingly, Bonetti fails to demonstrate the district court judge plainly erred by failing to recuse herself from the sentencing hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Westbrook

[BONETTI IS] NOT PURSUANT TO NRS 176.0931(c)(1) as this is [his] first offense of this nature and Lifetime Supervision appears applicable as a violation of NRS 200.730 if it is a second or subsequent offense.”

BULLA, J., concurring in part and dissenting in part:

Although I concur with the majority's conclusion that the district court erred by imposing a special sentence of lifetime supervision, I respectfully dissent from the majority's conclusion that the district court did not err by denying Bonetti's motion to disqualify the judge as untimely.

The district court denied Bonetti's motion on the single ground that it was untimely as it was not filed at least 20 days before the sentencing hearing as required by statute. *See* NRS 1.235(2)(a). However, NRS 1.235(5) requires that an affidavit specifying the facts upon which the disqualification is sought be filed and served on the same day. Service may only be accomplished by personally serving the judge or by leaving a copy at the judge's chambers with some person of suitable age and discretion employed therein. NRS 1.235(5).

I agree with the majority that Bonetti's motion and declaration were required to be filed and served by Friday, August 25, 2023, and Bonetti did not accomplish this until Monday, August 28, 2023, one judicial day late. The State correctly points out that the Fifth Judicial District Court Clerk's Office was open on August 25 and, thus, Bonetti could have filed his motion and declaration on that day. The problem is that filing the motion and declaration would have only partially complied with the statute, as Bonetti was also required to serve the motion and declaration on that same day. *See* NRS 1.235(5). Because the district court judge that Bonetti was seeking to disqualify closed her department on that Friday, neither the judge nor the judge's staff was available to accept service of the motion and declaration on the day they were required to be served, making service impractical if not impossible. For this reason, the closure was tantamount to a nonjudicial day. *Cf.* NRS 178.472 (stating that, in computing any period

of time, the last day of the period “shall be included, unless it is a Saturday, a Sunday, or a nonjudicial day, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a nonjudicial day”). I reject the notion that Bonetti could have personally served the judge at some undisclosed location on August 25, 2023, to comply with the statutory requirements. The statute clearly contemplates that a judge or the judge’s staff would be available to accept service during business hours.⁵ The record is unclear as to whether the district court provided a means for alternative service on Fridays when its department was closed.

Thus, this court is left with two unsatisfactory options. First, affirm the denial of Bonetti’s motion as untimely, which is the majority’s decision. This effectively deprives Bonetti of his statutory right to file his motion on the 20th day prior to his sentencing hearing; a right he was entitled to regardless of how diligently he pursued his motion. This essentially results in Bonetti having one less day to file his motion and declaration than what is permitted by statute.

The second option is to accept the August 28 filing and service date as timely, and reverse and remand this matter to be resolved on the merits by a different district court judge. *See* NRS 1.235(6)(a). This is the option I support, even though it is unsatisfactory because it means the motion and declaration were filed less than 20 days before the sentencing hearing. I would suggest, however, that the sentencing hearing could have been continued to facilitate resolving Bonetti’s motion on the merits, which

⁵I would note that the Eighth Judicial District Court requires its judicial departments to be open during business hours Monday through Friday. *See* EDCR 1.21 (“Each department shall remain open on judicial days during standard court hours which are from 8:00 a.m. to 5:00 p.m.”).

I support based on the nature of the motion and the department's closure on Friday. In supporting this option, I take no position on the merits of Bonetti's motion. These must be considered by the court below in the first instance.

Therefore, I would reverse and remand this matter to a different district court judge to resolve Bonetti's motion on the merits.


_____, J.
Bulla

cc: Hon. Kimberly A. Wanker, District Judge
SDS Chartered, LLC
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk