IN THE SUPREME COURT OF THE STATE OF NEVADA

SAUL LOPEZ,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHAEL CHERRY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 39939

FILED

MAY 22 2003

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING PETITION

This is a petition for a writ of mandamus or, in the alternative, a writ of prohibition challenging the district court's order directing Lopez' counsel to provide copies of competency evaluations to the State. The evaluations were submitted to the court in support of counsel's request that Lopez be found incompetent to stand trial and that he be referred to the Lakes Crossing mental facility.

Saul Lopez was arrested and charged with first-degree murder and child abuse in connection with the stabbing death of his ex-wife, Maria Lopez. At a hearing on June 6, 2002, Lopez' defense counsel provided the court with reports compiled by two psychologists retained by the defense that had examined Lopez and determined that he was incompetent to stand trial. Based on the reports issued by these two

doctors, the court declared Lopez incompetent and referred him to Lakes Crossing for treatment.

The State did not dispute the findings, but requested copies of the reports. Defense counsel agreed to send the reports directly to Lakes Crossing, but resisted the State's efforts to obtain copies of the reports. The court ordered the defense to provide the State with copies of the reports.

On July 19, 2002, Lopez filed a writ petition with this court. In the petition, Lopez requests that this court issue a writ to compel the district court to vacate its order that Lopez' mental competency reports be provided to the State.

Lopez relies on the language of NRS 178.415[1] in support of his claim that he was obligated to supply the competency reports to the court only, not to the State. He further argues that broad interpretation of NRS 178.415 would result in a violation of his Fifth Amendment right against self-incrimination, his Sixth Amendment right to counsel, and his due process rights.

Here, the district court never ordered competency evaluations. Neither the court, nor the State, questioned or objected to the defense's contention that Lopez was incompetent or to the qualifications or findings of defense experts. The record does not reflect that any doubt was

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[1]NRS 178.415(2) provides, in pertinent part that "[a]t a hearing in open court, the judge shall receive the report of the [court-ordered] examination and shall permit counsel for both sides to examine the person or persons appointed to examine the defendant."

expressed by the defense, the State, or the court that Lopez was incompetent.

Lopez contends that the State is not entitled to the reports because they are: (1) the result of attorney work product; (2) protected by attorney-client and psychologist-patient privilege; and (3) would violate his constitutional rights.

Lopez reasons that the competency results were the result of defense counsel's work and preparation in his case. However, the evaluations were introduced into evidence to demonstrate that Lopez was not competent to stand trial. Thus, the competency reports are not attorney-client work-product.

The competency reports were the product of various psychological examinations and were compiled to determine whether Lopez could stand trial and effectively assist his counsel. These examinations were performed and submitted to the district court to eliminate the need for court-ordered evaluations to assess Lopez' competence to stand trial. Because they are part of the record in the case, the State is entitled to copies.

Although the State cannot use the information contained therein at trial, they are nevertheless entitled to copies of the reports once Lopez submits them to the court. Defense counsel may, however, redact

any privileged material before providing the reports to the court. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Agosti

_____, J.
Leavitt

_____, J.
Becker

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender
Clark County Clerk

ROSE, J., with whom SHEARING, J., agrees, dissenting:

The hearing held on June 6, 2002, was not a competency hearing pursuant to NRS 178.415 because the district court did not appoint the mental health experts and no evidence was presented, as the State conceded that Lopez was incompetent to stand trial. This case is similar to Bishop v. Warden in which the district court ordered a psychiatrist to evaluate the defendant, but failed to comply with the provisions of NRS 178.415 concerning a full competency hearing.[1] This court concluded that because the record did not reflect that the district court entertained a reasonable doubt as to Bishop's sanity, it was not obliged to follow the procedures designated in NRS 178.415.[2] As in Bishop, NRS 178.415 is not applicable in this instance.

Because the psychiatrists were retained by the defendant through the public defenders' office, the necessity of producing their reports should be governed by the general criminal discovery statute, NRS 174.245, and related case law. NRS 174.245 requires the defendant to permit the prosecuting attorney to inspect any statement by a witness the defendant intends to call in his or her case in chief. This court recently interpreted the term "case in chief" to mean the initial presentation of evidence by the defendant.[3] Additionally, NRS 174.245(2) states that the prosecuting attorney is not entitled to reports prepared on behalf of the defendant or his attorney in defense of the case, or reports that are protected from disclosure pursuant to the Nevada or United States

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[1]94 Nev. 410, 411, 581 P.2d 4, 5 (1978).

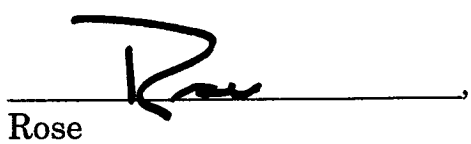
[2]Id.

[3]Floyd v. State, 118 Nev. ___, ___, 42 P.3d 249, 258 (2002).

Constitution. Accordingly, NRS 174.245 should protect the reports from disclosure at least until the defense determines that the psychiatrists will be called in Lopez's case in chief.

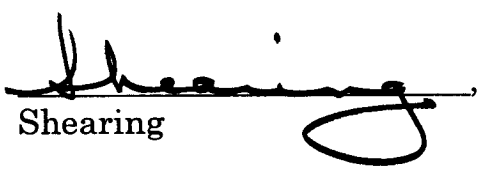
The majority emphasizes that the reports were voluntarily presented to the district court at the hearing, and thus, became part of the record. However, the defense did not voluntarily submit the reports. In fact, the heavily redacted reports were only submitted after the district court ordered the defense to do so, and the reports remained under the seal of the district court. Contrary to the majority's assertion, the submission of the reports did not constitute testimonial use of the reports nor did it waive any claims of privileges. Moreover, the State has not had full access to the reports simply by copying the filed reports, as the majority maintains.

The State may have proceeded with the informal process and now feels abused by Lopez's refusal to provide the reports of his psychiatric examination. Although I have some sympathy for the State, I am obligated to follow the law concerning the discovery of reports prepared for a defendant or his attorney in defense of the case. Thus, pursuant to NRS 174.245, the State can only obtain the reports if the defense decides to call the psychiatrists in Lopez's case in chief. Accordingly, I respectfully dissent.



_____, J.
Rose

I concur:



_____, J.
Shearing