

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
HAROLD THOMAS BRINKLEY,
Respondent.

No. 41969

FILED

SEP 02 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a criminal information with prejudice. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant The State of Nevada charged respondent Harold Thomas Brinkley with burglary and home invasion for the forcible entry into a home where he formerly resided with Michelle Paige, his former girlfriend. At the time of the incident, Brinkley was inebriated and threatened to kill Paige. After the justice court and district court dismissed the charges against Brinkley without prejudice in two separate cases, the State filed a new complaint in justice court. The justice court dismissed the home invasion charge, but bound Brinkley over to district court on the burglary charge. A week before trial in district court, Brinkley moved to dismiss. He alleged the State willfully disregarded procedural rules in violation of his right to a speedy trial. The district court agreed and dismissed the information with prejudice.

On appeal, the State argues that the district court erred in granting Brinkley's motion because the motion was time-barred and there was no evidence that the State willfully violated Brinkley's procedural rights. We disagree.

FACTS

Although they never married, Brinkley and Paige knew each other for twelve years and cohabitated off and on, along with six children. Brinkley had fathered three of these children, two with Paige and one with another woman; Paige had three children from a prior relationship. Brinkley did not continuously live with Paige because he had a drinking problem and became violent when he drank. As a result of his alcohol addiction, Brinkley spent three months in jail on a DUI charge in 2002. Brinkley has an extensive criminal record, including drug possession, burglary, robbery and conspiracy to commit robbery, battery, and nine failures to appear.

The lease for the house where they resided listed Brinkley, Paige, and Paige's father as the residents. Paige and Brinkley shared a house key when Brinkley stayed at the house, and the trash and electric bills were in Brinkley's name. While Brinkley did not regularly pay rent, he occasionally gave money to Paige for household expenses and groceries. Brinkley also had some clothes and other effects at the house.

On December 12, 2002, at about 3:40 a.m., Paige was asleep at home with her children when she received a call from Brinkley. He demanded that she pick him up from a 7-Eleven store in five minutes "or else." Realizing that Brinkley was drunk, Paige hung up the phone and called 911 because she was afraid Brinkley would show up at the house. On prior occasions, Brinkley had become violent toward her, and Paige feared he would do it again. Soon thereafter Brinkley arrived at the house and began kicking the doors. Paige hid under a bunk bed and continued calling the police. Before the police arrived, Brinkley broke into the house

and proceeded to look for Paige, shouting obscenities and threatening to kill her. The police apprehended Brinkley before he could harm Paige.

On December 16, 2002, the State filed a criminal complaint in justice court charging Brinkley with burglary and home invasion. The court set a preliminary hearing for December 30, 2002. On that date, although she was under subpoena, Paige failed to appear in court. The State's process server had received information that Paige would be out of town until January 6, 2003. The State claimed that Paige and one of her children were essential witnesses and moved for a continuance under Bustos v. Sheriff,¹ which the justice court granted. The court set the new hearing date for January 15, 2002.

On January 15, 2002, Paige again failed to appear. Believing that Paige was avoiding service, the State advised the court that it was ready to proceed based on the testimony of the police officers who responded to the 911 call. However, the justice court was concerned because the State had previously represented that it could not proceed without Paige and continued the preliminary hearing until January 21, 2002. The court threatened to dismiss the case with prejudice if the State failed to produce Paige at the next hearing. Later that same day, the State served Brinkley with a notice of intent to seek a grand jury indictment. On January 21, 2003, the justice court dismissed the case without prejudice.

On January 24, 2003, while still in custody on unrelated charges, Brinkley contacted Lynda Gudeman, the State's grand jury coordinator. Brinkley told Gudeman that he wished to testify before the

¹87 Nev. 622, 491 P.2d 1279 (1971).

grand jury and present exculpatory evidence. Gudeman asked Brinkley to contact her upon his release from the city jail on January 27, 2003, so she could arrange transportation and advised him to discuss his desire to testify with his public defender. On January 27, 2003, Brinkley contacted Gudeman again and told her that he no longer wished to testify, but still wanted to present exculpatory evidence to the grand jury. Gudeman explained that Brinkley had to deliver any exculpatory evidence to the district attorney's office no later than February 7, 2003.

The State had originally planned to convene the grand jury on February 13, 2003. However, upon hearing that Brinkley was about to get out of jail, Paige called the district attorney's office and inquired as to how the State intended to protect her. In light of Paige's concerns and Brinkley's desire not to testify, the State moved up the grand jury proceeding to February 4, 2003, without notifying Brinkley. On February 4, 2003, the grand jury heard Paige's testimony about the incident and returned a true bill, indicting Brinkley for burglary and home invasion. During the proceeding, the State informed the jury that it had received a letter from Brinkley indicating that Brinkley possessed exculpatory evidence, including the house lease and utility bills. The house lease and utility bills were not presented to the grand jury. The grand jury subsequently indicted Brinkley for burglary and home invasion. On February 5, 2003, the State filed the indictment with the Eighth Judicial District Court, Department 14. On February 12, 2003, Brinkley appeared in district court, pleaded not guilty, and invoked his right to a speedy trial within sixty days. Judge Donald Mosley set the trial for April 14, 2003. Judge Mosley also set bail at \$100,000, cash only.

On April 7, 2003, Brinkley moved to dismiss the indictment, alleging that the State failed to notify him of the date, time, and place of the grand jury hearing. Pursuant to the January 27, 2003, communication with Gudeman, Brinkley understood that he was to deliver any exculpatory evidence he wished to present to the grand jury to the district attorney's office by February 7, 2003. Because the grand jury proceeding took place on February 4, 2003, Brinkley could not submit his purported exculpatory evidence.

On April 10, 2003, in open court, the State filed an opposition to Brinkley's motion to dismiss. The State alleged that Brinkley's motion was untimely because Brinkley brought it on the eve of the calendar call in violation of NRS 34.700,² the grand jury notice was not inadequate because Brinkley waived his right to testify, and the State mentioned Brinkley's exculpatory evidence during the grand jury proceeding. After hearing oral argument, Judge Mosley concluded that the State did not give Brinkley an adequate opportunity to submit his evidence and dismissed the case without prejudice to allow the grand jury to reconvene if the State so decided. Because Judge Mosley was concerned about Paige, he declined Brinkley's request for release on his own recognizance and set a bail hearing for April 15, 2003.

At the April 15, 2003, bail hearing, Judge Mosley asked if the grand jury would reconvene shortly, and the State answered affirmatively. Because Paige was afraid that Brinkley would kill her and Brinkley had a significant criminal record, Judge Mosley declined to release Brinkley

²Allegedly, Brinkley's motion was a pretrial petition for a writ of habeas corpus because it challenged the district court's jurisdiction to proceed.

from custody. The judge stated that although he had dismissed the charges against Brinkley the week before, Brinkley could still remain in custody because his detention was tantamount to an arrest. Judge Mosley also remarked that he was not uncomfortable keeping Brinkley in custody pending a speedy resolution of the matter. The judge set bail at \$10,000 and ordered that if Brinkley posted bail and left custody, he could not contact Paige.

On April 16, 2003, instead of reconvening the grand jury, the State filed a new criminal complaint in justice court. On April 24, 2003, at a status hearing, defense counsel informed Judge Mosley about the State's new filing. The State asked the judge to take the matter off calendar. Judge Mosley inquired if Brinkley was in custody on the justice court matter and, upon hearing that Brinkley was out of custody on his own recognizance on that matter, ordered that the State release Brinkley the following day on his own recognizance. On April 25, 2003, Brinkley left custody and was placed on house arrest, pending a detention hearing on May 13, 2003.

On May 13, 2003, Brinkley's house arrest terminated because he had contacted Paige via telephone on May 7, 2003, in violation of Judge Mosley's "no contact" order. On May 21, 2003, Brinkley filed a pro per motion to dismiss, insisting that he had remained in custody on dismissed charges.

On May 28, 2003, the justice court dismissed Brinkley's home invasion charge, but bound Brinkley over to district court on the burglary charge and remanded him to custody. The justice court set a \$10,000 bail for Brinkley's release and commanded Brinkley to appear in the Eighth Judicial District Court, Department 6, on June 4, 2003, for an

arraignment and further proceedings. At the same proceeding, defense counsel informed the court that Brinkley had written a motion to dismiss based on his allegedly improper detention without pending charges. The justice court stated that it had no jurisdiction to hear the motion and Brinkley needed to address the matter in his appearance before Judge Joseph Bonaventure in Department 6. On May 30, 2003, the State filed a criminal information charging Brinkley with burglary. On June 4, 2003, Brinkley appeared in Department 6, pleaded not guilty, and invoked his right to a speedy trial. The case was set for trial on July 21, 2003.

On June 26, 2003, while his counsel was out of town, Brinkley filed a pro per habeas petition, alleging that he should have been released from custody after Judge Mosley dismissed the grand jury indictment. On July 2, 2003, Judge Bonaventure ordered the State to reply to the habeas petition. On July 14, 2003, before the State had replied, Brinkley's counsel filed a motion to dismiss, alleging that the State willfully failed to comply with procedural rules, in violation of Brinkley's constitutional right to a speedy trial. The motion set forth the following grounds: (1) the State failed to give Brinkley adequate notice of the grand jury proceeding; (2) the State held Brinkley's May 28, 2003, preliminary hearing well over the fifteen-day cutoff for a defendant in custody; (3) the State swore that Paige was an essential witness, but then claimed it was ready to proceed without her; and (4) the State wrongfully disregarded Judge Mosley's instructions to reconvene the grand jury and filed a new complaint in justice court.

On July 16, 2003, the State opposed Brinkley's motion as untimely and rejected Brinkley's contentions that the State willfully violated Brinkley's constitutional rights. Brinkley countered that the

motion was not untimely because it raised constitutional issues. Judge Bonaventure stated that the motion was procedurally time-barred, but he nevertheless decided to entertain it. Concluding that the State had willfully disregarded procedural rules in violation of Brinkley's right to a speedy trial, Judge Bonaventure dismissed the case with prejudice. Consequently, the judge vacated the July 21, 2003, trial date and released Brinkley from custody. This appeal followed.

DISCUSSION

Standard of review

We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion.³ The same standard of review applies to the district court's decision regarding a motion to dismiss an information.⁴

Timeliness of Brinkley's motion to dismiss

The State argues that the district court erred in considering Brinkley's motion to dismiss because it was time-barred. We disagree.

NRS 178.556(1) provides that a defendant is entitled to a trial within sixty days after the arraignment on the indictment or information. If the prosecution fails to do so or fails to request a postponement, the court may dismiss the indictment or information.⁵ Under NRS 174.105(1), "[d]efenses and objections based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, or in the indictment, information or complaint, . . . may be

³McNelson v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

⁴U.S. v. Doe, 149 F.3d 945, 947 (9th Cir. 1998).

⁵NRS 178.556(1).

raised . . . by motion before trial." (Emphasis added.) Furthermore, "[a]ny defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."⁶ "Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."⁷

The State advances Eighth Judicial District Court Rule (EDCR) 3.20 for the proposition that the district court abused its discretion in considering Brinkley's motion. We find this argument unpersuasive. Under EDCR 3.20(a),

[u]nless otherwise provided by law or by these rules, all motions must be served and filed not less than 15 days before the date set for trial. The court will only consider late motions based upon an affidavit demonstrating good cause and it may decline to consider any motion filed in violation of this rule.

EDCR 3.20 does not jurisdictionally preclude the district court from hearing a motion presented less than fifteen days before trial because it contains the language "[u]nless otherwise provided by law." This language permitted the district court to hear the motion because NRS 174.105(1) provides that a party may raise "[d]efenses and objections based on defects in the institution of the prosecution . . . by motion before trial." (Emphasis added.) Additionally, NRS 174.095 permits a party to raise defenses that the district court can determine without trying the general issue "before trial by motion." Since NRS 174.105(1) and NRS 174.095 do not contain

⁶NRS 174.095.

⁷NRS 174.105(3).

time limits, a district court may consider such motions at any time before trial. Brinkley's motion fell under the statutes' purview because it pertained to the State's alleged failure to comply with procedural rules, not to the merits of Brinkley's burglary charge. In light of this conclusion, we need not address the State's other contentions on the issue.

Dismissal with prejudice

The State argues that the district court abused its discretion in dismissing the information with prejudice because the State did not willfully disregard procedural rules in violation of Brinkley's right to a speedy trial. We disagree.

"Pursuant to NRS 178.562(2), if a defendant is not bound over, the state may: (1) seek leave to file an information by affidavit in the district court . . . ; or (2) seek an indictment by a grand jury."⁸ However, further proceedings are impermissible where the State exhibits willful disregard for or conscious indifference to procedural mandates in violation of the defendant's constitutional right to a speedy trial.⁹

In granting Brinkley's motion to dismiss, the district court stated:

Defendant argues State asked for numerous continuances, blatantly disregarded court rules, thus violating defendant's right to a speedy trial. You take a close look at the case and look at Austin, the defendant must show willful failure to comply with rules by State in order to

⁸State of Nevada v. District Court, 114 Nev. 739, 743, 964 P.2d 48, 50 (1998).

⁹Sheriff v. Marcus, 116 Nev. 188, 191, 995 P.2d 1016, 1018 (2000); State v. Austin, 87 Nev. 81, 83, 482 P.2d 284, 284-85 (1971).

substantiate the motion. And that's willful failure. I don't say they purposely did it, but willful could be a lot of things in this case. I don't think the State was right out to get or infringe upon the rights of Mr. Brinkley, but sometimes willful failure occurs in some of these cases.

The State says they abided by all the Court rules. It's a close case. Defendant has been kept in custody a long time here. I find this particular case under Austin and this particular fact pattern that there is willful failure to comply with important procedural rules in this case under Austin, and I'm compelled to grant the defendant's motion to dismiss the case.

...

... with prejudice.

While the district court did not expressly state its reasons for finding that the State willfully failed to comply with procedural rules, the district court's decision seems to rest on State v. Austin.¹⁰ We will first address each alleged occurrence of State misconduct, and then we will turn to Austin.

A. Original justice court proceeding

According to Brinkley, the first violation of his rights occurred when the State unjustifiably failed to produce Paige at the original justice court proceeding and failed to submit a written affidavit in support of its December 30, 2002, request for a continuance. We conclude that Brinkley's contentions have merit.

¹⁰87 Nev. 81, 482 P.2d 284 (1971) (holding that a district court properly dismissed an indictment where the prosecution exhibited conscious indifference to procedural rules in violation of the defendant's right to a speedy trial).

Under Hill v. Sheriff, the party seeking a continuance due to absence of witnesses must submit a written affidavit stating: (a) the names and addresses of the absent witnesses; (b) the party's efforts to secure their presence; (c) the witnesses' purported testimony and whether the party can elicit the same testimony from other witnesses; (d) when the party first received information that the witnesses would not attend the proceedings; and (e) that the party's request for a continuance is in good faith and not for purposes of delay.¹¹ However, in Bustos, we affirmed the district court's decision to waive the Hill requirement because the prosecution had issued and served subpoenas upon the witnesses almost a month before the preliminary hearing and the prosecution did not learn of their unavailability until the hearing.¹² We stated that the prosecution had no reason to anticipate that the witnesses would disobey the subpoenas and had no time to prepare a written affidavit in support of its request for a continuance.¹³ We concluded that in such circumstances the prosecutor could orally establish good cause for a continuance by providing sworn testimony on the matter.¹⁴

The record indicates that at the December 30, 2002, hearing, the district attorney was duly sworn, informed the justice court of the efforts the State process server had expended in locating Paige, explained that Paige was an essential witness, and orally requested a continuance.

¹¹85 Nev. 234, 235-36, 452 P.2d 918, 919 (1969).

¹²Bustos v. Sheriff, 87 Nev. 622, 623-24, 491 P.2d 1279, 1280-81 (1971).

¹³Id. at 624, 491 P.2d at 1280.

¹⁴Id. at 624, 491 P.2d at 1280-81.

The district attorney also stated that the State was "somewhat surprised" by Paige's failure to appear and submitted that his continuance request was In good faith. However, on December 24, 2002, the State had an indication that Paige would not appear at the hearing because the State's process server learned that Paige would be out of town until January 6, 2003. Despite the Christmas holidays and the weekend, the State had enough time to prepare a written affidavit and should have done so. Unlike Bustos, where the prosecution learned of the witnesses' unavailability at the hearing and had no reason to anticipate the witnesses would fail to appear, the State learned of Paige's intentions several days before the hearing. Consequently, the State's failure to prepare a Hill affidavit is not an excusable procedural violation.

B. Grand jury notification

The second alleged violation occurred when the State failed to properly notify Brinkley of the advancement of the grand jury proceeding date and deprived Brinkley of an opportunity to present exculpatory evidence. We agree.

Under NRS 172.241(1), a person whose indictment the district attorney intends to seek before a grand jury, who is not under a subpoena to appear before the grand jury, may testify if he requests to do so and waives his privilege against self-incrimination in writing. The State "shall serve reasonable notice upon a person whose indictment is being considered by a grand jury."¹⁵ A notice is adequate when it:

- (a) Is given to the person, his attorney of record or an attorney who claims to represent the person and gives the person not less than 5

¹⁵NRS 172.241(2).

judicial days to submit his request to testify to the district attorney; and

(b) Advises the person that he may testify before the grand jury only if he submits a written request to the district attorney and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.¹⁶

Initially, the State had scheduled the grand jury proceedings for February 13, 2003. Accordingly, the State's grand jury coordinator told Brinkley to submit, by February 7, 2003, any exculpatory evidence he wished the jury to consider. During the same communication, Brinkley stated that he no longer wished to testify. Upon hearing that Brinkley was about to get out of jail, Paige called the district attorney's office and inquired as to how the State intended to protect her. In light of Paige's concerns and Brinkley's desire not to testify, the State moved the grand jury proceeding to February 4, 2003. It is undisputed that the State failed to apprise Brinkley of the new date.

While NRS 172.241 is silent as to a defendant's right to present exculpatory evidence, this right is inherent in the defendant's right to testify. Although the State argues that Brinkley's waiver of the right to testify also waived the notice requirement, this argument is unpersuasive. Brinkley indicated that he wished to present evidence at the grand jury proceeding and the State should have notified him of the new date. Although Brinkley did not submit his request in writing, this is not dispositive in light of the fact that Brinkley was in custody. While the State may request the court's permission to withhold notice if the notice

¹⁶Id.

could endanger life or property,¹⁷ there is no evidence that the State requested such permission. The State violated Brinkley's procedural rights by failing to notify him of the new grand jury hearing date.¹⁸

C. State v Austin

Considering the alleged violations above, we now turn to Maes v. Sheriff¹⁹ and State v. Austin.²⁰ In Maes, the prosecution willfully violated the defendants' procedural rights because the prosecutor asked the justice court for an opportunity to present a motion for a continuance, supported by a written affidavit, but subsequently failed to move for a

¹⁷NRS 172.241(3)(b).

¹⁸The third alleged violation of Brinkley's rights was the State's decision to file another complaint for the same offense after the justice court allegedly dismissed the case for failure to show good cause for continuing the preliminary hearing. The subsequent refileing was also allegedly improper because Judge Mosley dismissed the case for the grand jury to reconvene, not to give the State an opportunity to file another complaint. We conclude that these arguments lack merit. The justice of the peace in the original justice court proceeding dismissed the case because the State served Brinkley with a notice of intent to seek a grand jury indictment. Furthermore, the record indicates that Judge Mosley did not mandate reconvening of the grand jury. In dismissing the indictment, Judge Mosley stated, "Clearly, this man was not given an opportunity to supply his evidence. I'm going to allow him – allow the Grand Jury to reconvene on this matter, if the State so elects[,] to allow him to supply proper evidence or testify, if that's his desire." (Emphasis added.) Judge Mosley continued, "So I'm going to strike the presentment at this juncture and allow it to be resubmitted to the Grand Jury, if that's the decision the District Attorney wants to make." (Emphasis added.)

¹⁹86 Nev. 317, 468 P.2d 332 (1970).

²⁰87 Nev. 81, 482 P.2d 284 (1971).

continuance or submit the promised affidavit.²¹ In Austin, during the 129-day period between the charged offense and the return of an indictment, a justice of the peace dismissed the State's complaint due to repeated procedural violations. The justice court had granted the State three continuances because the State was unprepared to proceed for failure to subpoena witnesses. The justice court, however, denied the State's fourth request for a continuance and dismissed the proceedings when the district attorney suggested that she "'would like more time' because the State was inexplicably 'unable to locate' certain physical evidence that should have been in its possession."²² The district court subsequently dismissed the indictment. In upholding the district court's decision, we stated that both dismissals were appropriate under Hill, which required that a party demonstrate a good cause for a continuance by a written affidavit, and under Maes, which barred subsequent prosecutions for the same offense where the original proceeding had been dismissed for willful failure to comply with procedural mandates.²³ In further analyzing Maes, we concluded that a willful failure to comply with procedural rules did not require intent or bad faith and that a conscious indifference to procedure in violation of the defendants' rights sufficed.²⁴

While the State's conduct at the original justice court proceeding may or may not have risen to the Austin level, as indicated

²¹Maes, 86 Nev. at 318-20, 468 P.2d at 332-33.

²²Austin, 87 Nev. at 82-83, 482 P.2d at 284.

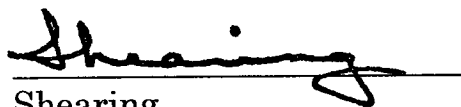
²³Id. at 83, 482 P.2d at 284-85.


²⁴Id. at 83, 482 P.2d at 285.

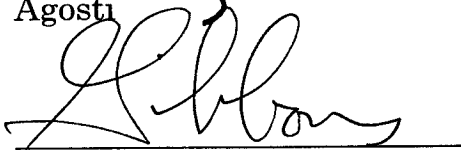
above, the State also improperly failed to notify Brinkley of the new grand jury proceeding date. The fact that the State was concerned with protecting Paige does not negate the procedural impropriety of the State's actions. Under such circumstances, we cannot conclude that the district court abused its discretion in dismissing the case with prejudice.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁵

 _____, C.J.
Shearing

 _____, J.
Agosti

 _____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Public Defender Philip J. Kohn
Clark County Clerk

²⁵The Honorable Nancy A. Becker, Justice, voluntarily recused herself from participation in the decision of this matter.