

Hightower v. State, 123 Nev. Adv. Op. 7 (2007)¹

CRIMINAL LAW – CRIMINAL PROCEDURE

Summary

Appellant Dennis Lydell Hightower appeals his conviction on the grounds that the district court erred when it denied his request to allow an incarcerated defense witness to appear at trial in civilian clothing. Hightower was convicted of one count each of gross misdemeanor conspiracy to commit larceny, gross misdemeanor unlawful taking of a motor vehicle, and felony conspiracy to commit robbery.

When the victim stopped his car to help an apparent stranded bicyclist, Hightower's codefendant, Derrick Farr, knocked the victim to the ground after repeatedly striking him in the face. While on the ground, Hightower took the victim's wallet and keys. Hightower, Farr, and a female entered the victim's vehicle and drove away. A Las Vegas Metropolitan Police Officer located the vehicle and conducted a felony traffic stop. The victim identified both Hightower and Farr as the perpetrators. The codefendants were arrested and subsequently charged with conspiracy, robbery, and grand larceny. The officer identified the female as Estelle Golightly.

At trial, Golightly served as a defense witness. However, at the time of the trial, she was incarcerated on a conviction for a gross misdemeanor and a probation violation. Before the defense began its case, counsel for Farr informed the district court that he had brought a change of clothing for Golightly to wear while testifying. However, the court refused to allow Golightly to change out of her prison attire. Hightower's defense counsel objected. Golightly testified in her jail clothing. She testified as to why she was incarcerated, and admitted to being a crack cocaine addict and a prostitute. Golightly testified that the victim was a john who allowed her to use his car in exchange for sex. While she was in possession of the borrowed vehicle, Hightower and Farr accompanied her to pick up some laundry and to get something to eat. Despite this testimony indicating she had permission to possess the vehicle, the jury convicted Hightower.

On appeal, the Nevada Supreme Court reexamined the rule established in *White v. State* that a district court may properly refuse a defendant's request for an incarcerated witness to appear in civilian clothing. The Court recognized that although *White* correctly states that the presumption of innocence only applies to the accused, the practice of requiring an incarcerated witness to appear at trial in prison attire may prejudice a defendant and affect his constitutional right to a fair trial. As a result, the Court modified *White* and held that in future cases, absent unusual circumstances, district courts should not compel incarcerated witnesses to appear at trial in such distinctive dress as it may taint the fact-finding process by the jury. Procedurally, the burden is on the defendant to timely request that his incarcerated witness be permitted to testify in civilian clothing and failure to do so is deemed a waiver of the right. Finally, the Court concluded that although the district court abused its discretion in denying Hightower's request, the error was harmless because it did not substantially affect the verdict. Therefore, the Court affirmed Hightower's conviction.

¹ By Shauna Welsh.

Issue and Disposition

Issue

Does a district court abuse its discretion when it compels an incarcerated defense witness to testify in prison attire, despite the defense's timely request to allow the witness to testify in civilian clothing?

Disposition

Yes. The district court abuses its discretion where, despite the defense's timely request to allow an incarcerated defense witness to testify in civilian clothing, the court compels the witness to testify in prison attire.

Commentary

State of the Law Before *Hightower*

Prior to *Hightower*, Nevada followed the rule in *White v. State*.² In *White*, the Court held that because the presumption of innocence only applies to the accused, a district court may properly refuse a defendant's request for an incarcerated witness to testify in civilian clothing.³ However, this approach represented the minority of jurisdictions, and Nevada almost stood alone in compelling incarcerated witnesses to appear at trial in prison clothing.⁴

Other Jurisdictions

The overwhelming majority of jurisdictions hold that it is improper to compel an incarcerated witness to testify in prison attire.⁵ Most courts recognize that requiring incarcerated defense witnesses to appear in prison clothing may cause unnecessary prejudice to the accused by undermining the witness's credibility.⁶ Further, jurors might assume guilt by association, prejudicing the accused even more.⁷ Additionally, the American Bar Association recommends that incarcerated defense witnesses not appear at trial in prison clothing, unless the defendant waives the right by failing to object.⁸

² *White v. State*, 105 Nev. 121, 123, 771 P.2d 152, 153 (1989).

³ *Id.*

⁴ *See State v. Marcelin*, 669 So. 2d 497 (La. Ct. App. 1996).

⁵ *See State v. Yates*, 381 A.2d 536 (Conn. 1977); *Mullins v. State*, 766 So. 2d 1136 (Fla. Dist. Ct. App. 2000); *State v. Artwell*, 832 A.2d 295 (N.J. 2003); *State v. Rodriguez*, 45 P.3d 541 (Wash. 2002); *State v. Allah Jamaal W.*, 543 S.E.2d 282 (W.Va. 2000); *see also United States v. Carter*, 522 F.2d 666, 677 (D.C. Cir. 1975) (condemn[ing] the practice of producing prisoners in court who are dressed in clothes typical of jails or penal institutions, when this circumstance may arguably cause injury to a defendant's case").

⁶ *Yates*, 381 A.2d at 537; *Artwell*, 832 A.2d at 303; *Rodriguez*, 45 P.3d at 544; *Jamaal*, 543 S.E.2d at 286.

⁷ *Artwell*, 832 A.2d at 303; *see also State v. Russell*, 895 A.2d 1163, 1172 (N.J. Super. Ct. App. Div. 2006).

⁸ *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, Standard 15-3.2(b) (3d ed. 1996).

Effect of *Hightower* on current law

In *Hightower*, the court held that, absent unusual circumstances, district courts should not compel incarcerated witnesses to appear at trial in prison attire. However, the Court made clear that the burden is on the defense to timely request that the witness be permitted to testify in civilian clothing. The defense's failure to make a timely request is deemed a waiver of the right. If the district court denies a defendant's request, it must set forth its findings on the record. On appeal, if the Court finds that the district court made an erroneous ruling, it may nonetheless deem the error harmless if it did not substantially affect the jury's verdict.⁹

In this case, the district court denied Hightower's request for Golightly to testify in civilian clothing without considering any possible prejudice to the defendant that might result. On appeal, the State argued that the district court did not err because the request was not made in a timely manner.¹⁰ The Court reasoned that although it might have also been inconvenient for prison personnel to monitor Golightly while she changed into the civilian clothes, mere convenience to prison employees is an insufficient ground to deny this type of request.¹¹ Therefore, the Court held that the district court's denial of Hightower's request to allow Golightly to testify in civilian clothing constituted error. However, because the State presented other evidence sufficient to establish Hightower's guilt beyond a reasonable doubt, the Court determined that the error was harmless and upheld Hightower's conviction.

Unanswered Questions

The Court expressed that a district court may correctly deny a request for a defense witness to change from prison to civilian attire. In the presence of "unusual circumstances," a district court may properly deny this request. However, the Court did not expressly state what constitutes "unusual circumstances," nor did it give the district courts any guidance regarding factors which might be considered in making such a determination. Further, the Court was not specific in terms of defining what it means to make a "timely" request. Specifically, the Court did not make clear where district courts should draw the line between those requests that are made in a timely manner and those which are not.

Conclusion

As a result of *Hightower*, district courts may no longer compel incarcerated defense witnesses to testify in the distinctive dress of a prisoner. This rule reinforces the policy that our justice system protects a defendant's constitutional right to a fair trial by preventing the jury from attaching an incarcerated witness' prisoner status to the accused. So long as defendants

⁹ The Court noted that the evidence of guilt presented by the State at trial was overwhelming. For example, the victim made an unequivocal identification of Hightower, and the officer apprehended Hightower inside the victim's vehicle shortly after the robbery. Further, the Court noted that Golightly's credibility was already minimal due to her testimony regarding her participation in illegal prostitution and drug use, and that she was currently serving time for a gross misdemeanor and a probation violation.

¹⁰ The Court noted that the timing of the request was not an issue here because Hightower's request was made before Golightly testified, and there was no evidence in the record suggesting that accommodating Hightower's request would have significantly delayed the trial.

¹¹ *Estelle v. Williams*, 425 U.S. 501, 505 (1976).

properly request the court's permission to allow incarcerated witnesses to testify in civilian clothing, absent unusual circumstances, they will be accommodated.

The change in Nevada's approach to these situations also furthers the longstanding presumption of innocence afforded to defendants in criminal trials. The Nevada Supreme Court, in modifying its holding in *White*, appropriately adopted the majority approach and no longer compels imprisoned defense witnesses to testify in prison clothing.