

CRIMINAL LAW

Summary

In November 2003 the Las Vegas Metropolitan Police Department executed a decoy operation targeting the crime of robbery. An officer was posed on a public street dressed as an intoxicated, off-duty casino dealer with a stack of twenty one-dollar bills visible in his left dress shirt pocket. The defendant approached the officer, made conversation and casually removed the dollar bills while placing his arm around the officer. When the officer acted as though he was turning his head to catch the defendant in the act, the defendant pushed the officer's head away with his forearm twice. The defendant was arrested and charged with robbery and conspiracy to commit robbery. He pled not guilty.

The State informed the court that if the defendant used an entrapment defense it intended to use a certified minute order from a prior California conviction as rebuttal to show predisposition. Defense counsel said he would pursue an entrapment defense and objected to the sufficiency of the minute order's ability to demonstrate that the defendant was the named individual. The court ruled that the State could use the minute order for rebuttal to an entrapment defense. Defense counsel informed the court that the defendant would testify and asked whether the State intended to use the minute order to impeach. The State said it would. Defense renewed its objection to the minute order based on identity. The court ruled that if the defendant testified, the State could use the minute order to impeach his testimony.

The State informed the court that it had evidence of the defendant's 1984 Washington conviction that it also wanted to use for rebuttal and impeachment. The defense objected. The court ruled that the Washington conviction was too remote in time. The Washington conviction remained relevant, however, because the fingerprints on the Washington conviction had the same FBI fingerprint identification number as those on the California certified minute order, thus it served to indicate that he was the individual named in the minute order.

The defendant did not testify and declined the court's invitation to request any jury instructions on entrapment. The defendant was found guilty of robbery and not guilty of conspiracy to commit robbery. The defendant appealed the trial court's ruling on the admissibility of the minute order. The Nevada Supreme Court adopted the view that a defendant preserves his right to appeal an in limine ruling based on improper impeachment, when he does not testify, so long as he makes an offer of proof as to what his testimony would have been absent the ruling. Additionally, they held that a certified minute may be used for rebuttal and not for impeachment but that its admission for impeachment here was harmless error.

¹ By Charles R. Cordova, Jr.

Issues and Disposition

Issues

- (1) Does Nevada follow the holding of *Luce v. U.S.*,² which states that a defendant waives his right to appeal based on improper impeachment when he fails to testify?
- (2) May the State use a certified minute order to show predisposition in rebutting an entrapment defense?
- (3) May the State use a certified minute order to impeach the testimony of the defendant?

Disposition

- (1) The Nevada Supreme Court held that Nevada does not follow the *Luce v. U.S.* rule and instead follows the holding of *Wickham v. State*.³ A defendant does not waive his right to appeal based on improper impeachment if he makes an offer of proof outlining his intended testimony and it is clear from the record that he would have testified, but for the in limine ruling of the trial court.
- (2) The State may use a certified minute order to show predisposition in rebutting an entrapment defense under NRS § 48.055(b) and according to the three part test enumerated in *Foster v. State*.⁴
- (3) The State may not use a certified minute order to impeach the testimony of a defendant under NRS § 50.095. The court determined that the statute instead requires a judgment of conviction. Here, however, since the certified minute order was admissible for rebuttal, the court determined that its admission for impeachment purposes was harmless error.

Commentary

State of the Law Before *Warren*

The court decided an issue similar to issue (1) above in *Pineda v. State*.⁵ In *Pineda* the court held that a defendant preserves his right to appeal even if *he* first introduces evidence of his prior convictions that was ruled admissible during pretrial motions over his objection.⁶ The court in the present case clarified that while similar to *Pineda*, the question here is distinct

² 469 U.S. 38 (1984).

³ *Id.*; 770 P.2d 757 (Alaska Ct. App. 1989).

⁴ 116 Nev. 1088, 13 P.3d 61 (2000).

⁵ 120 Nev. 204, 88 P.3d 827 (2004).

⁶ *Id.*

because it presents an additional issue. In *Pineda* the concern was that without the defendant's testimony the court would not be able to properly weigh the probative value against its prejudicial effect.⁷ In addition to that concern, the circumstances of this case raise the issue of the court's ability to conduct harmless error review, thus *Pineda* did not control.

Other Jurisdictions

Most states facing the issue have adopted the holding of *Luce v. U.S.*. However, a significant minority have declined. The Court in *Luce* held that a defendant must testify in order to preserve for appeal a claim of improper impeachment with a prior conviction.⁸ They determined that any harm that may result from a trial court's in limine ruling is purely speculative unless and until the defendant actually testifies.⁹ Nevada and the other jurisdictions rejecting the *Luce* rule have determined that there are other means to obtain adequate information such that an appellate court may make a determination of whether the probative value outweighs the prejudicial effect.

Effect of *Warren* on Current Law

Warren makes it clear when a defendant may decline to testify and yet preserve his right to appeal the admission of impeachment evidence. So long as the defendant makes an offer of proof as to what his testimony would have been in the absence of the in limine ruling, his appeal is preserved.

Unanswered Questions

None.

Conclusion

The Nevada Supreme Court adopted a more lenient rule of criminal appeals than the U.S. Supreme Court's rule in *Luce v. U.S.*¹⁰ They found that there would be an adequate record produced for appeal if the defendant makes an offer of proof and that this would better allow them to conduct harmless error review. The court clarified the admissibility of a certified minute order for purposes of rebuttal and impeachment. A certified minute order may properly be admitted to show predisposition in rebutting an entrapment defense under NRS § 48.055(b). A certified minute order may not be properly admitted to impeach the testimony of a defendant under NRS § 50.095.

⁷ 120 Nev. 204, 209, 88 P.3d 827, 831 (2004).

⁸ *Luce v. United States*, 469 U.S. 38, 43 (1984).

⁹ *Id.* at 41-2.

¹⁰ 469 U.S. 38 (1984).