

5-5-2014

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Recommended Citation

Caitlin Boland Aarab, Oral Argument Review, *The Cart Before the Horse: A Potentially Premature Writ of Supervisory Control*, 75 Mont. L. Rev. Online 10, https://scholarship.law.umt.edu/mlr_online/vol75/iss1/3.

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**THE CART BEFORE THE HORSE: A POTENTIALLY
PREMATURE WRIT OF SUPERVISORY CONTROL**

Caitlin Boland Aarab

No. OP 14-0096
Montana Supreme Court

*State of Montana, Petitioner v. Montana Ninth Judicial District Court,
Teton County, the Hon. Robert Olson, District Judge, Respondent*

Oral Argument: Monday, April 28, 2014, at 10:00 a.m. in the Strand
Union Building, Ballroom A on the campus of Montana State University,
Bozeman, Montana

I. JONATHAN M. KRAUSS FOR PETITIONER

Mr. Krauss began his argument by assuring the Court that this petition for a Writ of Supervisory Control over the Ninth Judicial District Court is not the State's way of forcing the defendant to testify, in contravention of the defendant's Fifth Amendment right. Rather, this Writ is about enforcing the rules of evidence that apply to all parties, including criminal defendants. Whatever evidence a defendant chooses to offer in his defense must be admissible.

This opening led to an exchange between Mr. Krauss and Justice Wheat. The point of admitting evidence, Justice Wheat noted, is to allow opposing counsel to test that evidence by cross examination. In this case, the defendant signed a *Miranda* waiver, voluntarily submitted to questioning by the County Attorney and the investigator, and even handed over a typed statement summarizing the defendant's version of events. Since that was so, Justice Wheat asked, didn't the State have the opportunity to cross examine the defendant on the statement he gave? Mr. Krauss responded in the "past exonerative tense"¹: "Well, questions were asked."² Mr. Krauss then pivoted to policy: the point of the rules of evidence is to admit only reliable evidence. The fact that an unsworn statement was given voluntarily does not make it reliable. The defendant's statement includes hearsay, double hearsay, triple hearsay, and victim character evidence; and the entire statement is offered for the truth of the matter asserted. The rules of evidence should not be ignored simply because the burden of proof in justifiable use of force cases now rests with the State and not the defendant.³

¹ John M. Broder, *Familiar Fallback for Officials: 'Mistakes Were Made'*, N.Y. Times (Mar. 14, 2007) (available at: <http://www.nytimes.com/2007/03/14/washington/14mistakes.html>).

² 01:18:09

³ Mont. Code Ann. § 46-16-131 (2013).

II. KENNETH R. OLSON FOR RESPONDENT

Mr. Olson began by assuring the Court that his position is far less radical than Petitioner made it out to be. Mr. Olson did not argue that criminal defendants should be allowed to rely on inadmissible evidence in justifiable use of force cases. Rather, Mr. Olson argued that the statement in question is actually admissible for two reasons: (1) the statement contains genuine indicia of trustworthiness, and (2) the statements are not offered for the truth of the matter asserted. First, the circumstances under which the statement was made support its trustworthiness: the interview was conducted by the County Attorney and the investigator, and they had the opportunity to take as long as they wanted and ask as many questions as they wanted; the County Attorney and the investigator praised the defendant for his honesty in his answers; and the 9-1-1 recording, which is admissible, corroborates the defendant's version of events. Second, the statement contains a recitation of all the "bad acts" the defendant knew the victim to have committed. The evidence of victim "bad acts" didn't need to be true in order for the defendant to have justifiably relied on them when assessing what level of force to use against the victim in self-defense. Thus, this evidence is not offered for the truth of the matter asserted.

In response to Mr. Olson's first argument, Judge Holly Brown, sitting by designation, distinguished the present case from prior case law: in Montana case law dealing with hearsay exceptions, "circumstantial guarantees of trustworthiness"⁴ are found in statements made in the heat of the moment. In contrast, the statement at issue here was made after the defendant had a motivation to lie. Judge Brown then read the text of Montana Code Annotated Section 46-16-131 to counsel and the Court and lingered on the phrase "when the defendant has offered evidence of justifiable use of force." Her point was to draw attention to the word "evidence" in the statutes that came out of House Bill 228. The statute may have shifted the burden of proof, but the requirement of admissible evidence has not changed.

In response to Mr. Olson's second argument, Justice Wheat asked the million-dollar question: why is this our problem? Justice Wheat asked Mr. Olson if evidence of the victim's violent behavior could possibly be introduced through another witness and not through the defendant's statement. Mr. Olson replied in the affirmative. Well then, Justice Wheat suggested, why doesn't this Court simply deny the Writ and send this case back for trial so that a full evidentiary record can be developed? After a considerable pause, Mr. Olson agreed that denying the Writ and proceeding to trial might render this Writ moot. Then

⁴ Mont. R. Evid. 803(24).

Justice Rice chimed in: “I think you hit it on the head earlier when you described the problem we have here without a record explaining what happened.”⁵ Buzzer. Time’s up.

III. PREDICTION

The Justices seemed persuaded by Petitioner’s argument that the defendant’s statement is not admissible and thus should not be admitted. But toward the end of oral argument, Justice Wheat’s question about the advisability of denying the Writ and allowing the case to proceed to trial gained traction. This author predicts that the Court will deny the Writ even though it is likely to side with Petitioners on the merits of the evidentiary issue should this issue come back on appeal following trial.

Lower Court: Teton County Cause No. DC 12-009; Honorable Robert Olson, District Court Judge of the Ninth Judicial District, Teton County.

Attorney for Petitioner: Jonathan M. Krauss, Assistant Attorney General, State of Montana.

On behalf of Respondent, Attorney for Defendant Martin Vincent Lau: Kenneth R. Olson, Olson Law Office, P.C., Great Falls, Montana.

⁵ 02:16:08