

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,)
)
) Appellant,)
)
) vs.)
)
) MARRITTE FUNCHES,)
)
) Respondent.)

No. 24006

MARRITTE FUNCHES,)
)
) Appellant,)
)
) vs.)
)
) THE STATE OF NEVADA,)
)
) Respondent.)

No. 24399

FILED

MAR 31 1994

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

ORDER OF REMAND

These are consolidated appeals from a district court order granting a new trial and a subsequent district court order vacating the order granting a new trial.

On June 5, 1992, appellant/respondent Marritte Funches ("Funches") was convicted of one count each of first-degree murder and being an ex-felon in possession of a firearm, in connection with the killing of a Reno cab driver. Funches was sentenced to two consecutive life terms in the Nevada State Prison without the possibility of parole, plus an additional six years to be served concurrently with the two life sentences.

On May 5, 1992, Funches filed in the district court a motion for new trial on the ground of newly discovered evidence; the district court denied the motion. On July 1,

1992, Funches filed his notice of appeal from the judgment of conviction (Docket No. 23638).

Funches filed a second motion for a new trial on October 14, 1992, again on the ground of newly discovered evidence. The district court heard evidence on this second motion and granted Funches a new trial by order dated November 23, 1992.

On December 8, 1992, the State filed a motion asking the district court to reconsider its order granting Funches a new trial. On December 23, 1992, the State filed a notice of appeal from the district court's order granting Funches a new trial (Docket No. 24006).

Thereafter, the district court conducted a hearing on the State's motion to reconsider, but withheld its decision pending this court's resolution of Funches' petition for a writ of mandamus or prohibition challenging the district court's jurisdiction to reconsider the order granting Funches a new trial (Docket No. 23985). On February 12, 1993, this court denied Funches' petition for a writ of mandamus or prohibition because Funches had an adequate remedy in the ordinary course of law.

The district court then conducted another hearing on the State's motion to reconsider and, on April 8, 1993, vacated its order granting Funches a new trial and reinstated the judgment of conviction. Funches filed a notice of appeal from the order vacating the order granting a new trial on May 4, 1993 (Docket No. 24399). This court ordered Docket Nos. 24399 and 24006 consolidated, and held in abeyance Funches' appeal from the district court's original judgment of conviction, Docket No. 23638.

These consolidated appeals, Docket Nos. 24399 and 24006, present a rather narrow legal question: whether the district court exceeded its jurisdiction by considering and granting the State's motion to reconsider the order granting Funches a new trial. Funches' primary argument on appeal is that the district court lost jurisdiction to reconsider its order granting Funches a new trial when the State filed its notice of appeal from that order.

The filing of a notice of appeal divests the district court of jurisdiction to take any action which will affect the finality of the judgment or order from which the appeal is taken. See Layton v. State, 89 Nev. 252, 510 P.2d 864 (1973); B. E. Witkin and Norman L. Epstein, California Criminal Law, § 3135, at 3134 (2d ed. 1989) (citations omitted) ("the trial court loses jurisdiction [during the pendency of the appeal] to do anything in connection with the cause which may affect the judgment"). The district court may, nevertheless, certify to this court that it would be inclined to grant a new trial motion, and this court will decide whether remand to the district court is appropriate. Layton v. State, 89 Nev. 252, 510 P.2d 864 (1973).

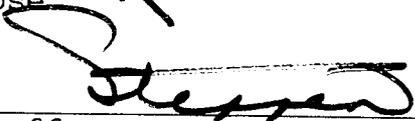
Because the State's notice of appeal stripped the district court of jurisdiction to rule on the motion to reconsider, we choose to treat the district court's order, vacating its order granting Funches a new trial, as a request that this court remand this matter to the district court so that the district court may reconsider its order granting Funches a new trial. We grant the district court's request.

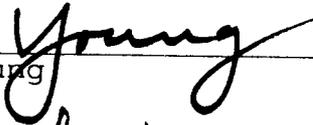
Accordingly, we vacate the order of the district court granting Funches a new trial and the order of the district court vacating that order. We remand this matter to

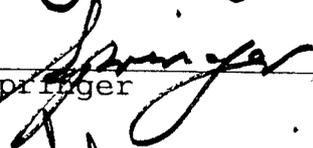
the district court for further proceedings consistent with this order.

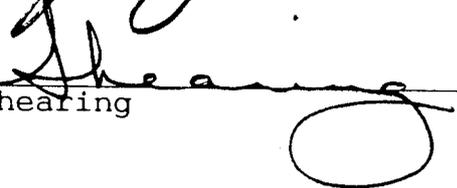
It is so ORDERED.


Rose _____, C.J.


Steffen _____, J.


Young _____, J.


Springer _____, J.


Shearing _____, J.

cc: Hon. Mills Lane, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Dorothy Nash Holmes, District Attorney
Michael R. Specchio, Public Defender
Judi Bailey, Clerk