

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY D. HIBEL,

Petitioner,

No. 38876

vs

THE SIXTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF,
HUMBOLDT, AND THE HONORABLE
RICHARD A. WAGNER

Respondent,

and
THE STATE OF NEVADA,
Real Party in Interest

FILED

FEB 01 2002

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

ANSWER TO PETITION FOR WRIT OF CERTIORARI

LEGAL ARGUMENT

A. THE DISTRICT COURT DID NOT PASS UPON THE
CONSTITUTIONALITY OR VALIDITY OF NRS 171.123.

Petitioner claims in the writ of certiorari that this court should entertain his writ because District Court Judge Richard Wagner ruled on the constitutionality of NRS 171.123 and therefore pursuant to NRS 34.020 this court has jurisdiction. A review of Judge Wagner's order reveals that he made no finding as to the constitutionality of NRS 171.123. Judge Wagner's order discusses the constitutionality of NRS 171.123 and provides some case law indicating that the United States Supreme Court has never really addressed the issue of

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02-02148

1 whether it is a violation of the Fifth Amendment to require an individual to identify them
2 self.
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4 Judge Wagner made his decision by applying the standard of whether there was
5 sufficient evidence presented to the justice of the peace for a finding of guilt. Judge Wagner
6 specifically stated: "it is the opinion of this court that even without determining the
7 constitutionality issue as to whether NRS 171.123 (2) is valid or invalid on its face, that
8 there was sufficient evidence under the totality of the circumstances of this case that the
9 justice court could and did correctly conclude that the Appellant resisted or delayed officer
10 Lee Dove..." (Petitioner's Exhibit p.3 lns 22-26, p.4 lns 1-2)
11

12 As the reviewing court, Judge Wagner chose not to determine the constitutionality of
13 NRS 171.123 but decided the appeal on another basis. That basis was whether there was
14 sufficient evidence presented to the justice of the peace to substantiate petitioner's
15 conviction. Judge Wagner states in his order that he reviewed the trial transcript and the
16 same videotape presented to the justice of the peace during the trial. (Petitioner's Exhibit L
17 p.4 lns 4-11) As a result, he held that **all the acts by petitioner** during his encounter with
18 the Deputy Dove constituted resisting an officer. (Petitioner's Exhibit L p.5 lns 13-26, p.6)
19 Since Judge Wagner never specifically ruled on the constitutionality of NRS 171.123 when
20 considering the merits of petitioner's appeal from the justice court this court does not have
21 jurisdiction to grant petitioner's writ of certiorari. *See* NRS 34.020 (3).
22

23 Furthermore, petitioner has failed to show how Judge Wagner exceeded his jurisdiction
24 pursuant to NRS 34.020 (2) by ruling there was sufficient evidence presented to the justice
25 of the peace to sustain petitioner's conviction. Petitioner properly appealed his conviction to
26 the district court pursuant to NRS 189.010. Therefore, Judge Wagner had jurisdiction over
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1 the parties. NRS 189.050 requires that all appeals to the district court from the justice court
2 be judged on the record. Judge Wagner's order makes it very clear that he considered
3 petitioner's appeal on the record and found there was sufficient evidence to sustain his
4 conviction.
5

6 A writ of certiorari can only be granted if petitioner demonstrates that the court exceeded
7 its jurisdiction **and** there is no plain, speedy and adequate remedy. Goicoechea v. Fourth
8 Judicial District Court, 96 Nev. 287, 607 P.2d 1140 (1980); *See Also* NRS 34.020 (2) In the
9 writ of certiorari presented to this court petitioner has failed to establish that Judge Wagner
10 exceeded his jurisdiction. Therefore, the authority of this court ceases and it cannot
11 determine if any errors were committed by the district court. State ex. rel. Hinckley v. Sixth
12 Judicial District Court, 53 Nev. 343, 1 P.2d 158 (1931) The state asks this court to deny
13 issuance of petitioner's writ of certiorari because petitioner has failed to meet the statutory
14 requirements set for in NRS 34.020 (2)(3).
15

16 **B. REQUIRING AN INDIVIDUAL TO IDENTIFY THEM SELF AS SET FORTH**
17 **IN NRS 171.123(3) DOES NOT RISE TO THE LEVEL OF A FOURTH OR FIFTH**
18 **AMENDMENT VIOLATION.**

19 Petitioner claims that his Fourth and Fifth Amendment rights were violated because
20 Deputy Dove arrested him for not providing identification. The state submits that
21 petitioner has not made it clear as to what aspect of the Fourth and/or Fifth Amendments
22 were violated and therefore it is difficult to respond to a particular argument.
23 Nevertheless, this appears to be a case of first impression in Nevada. The United States
24 Supreme Court has been given the opportunity to rule on the issue presented in this Writ
25 of Certiorari but has declined to do so. The state believes that based on the argument and
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1 legal analysis set forth below NRS 171.123(3) is not unconstitutional and Petitioner's
2 writ should not be issued.
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4 FOURTH AMENDMENT

5 The state submits that under the facts presented in this case petitioner's Fourth
6 Amendment rights were not violated because reasonable suspicion existed at the time he
7 was detained. In Brown v. Texas, 443 U.S. 47 (1979) the United States Supreme Court
8 discussed why it is important that an officer have reasonable suspicion of criminal
9 conduct prior to detaining an individual and asking to identify them self. Brown was
10 detained by an officer because of suspicious circumstances and asked to produce
11 identification. Brown refused so the officer arrested him pursuant to a Texas statute. The
12 Texas statute required a person who was "lawfully stopped" to provide a name and
13 address when requested by the officer. Failure to do so could result in a criminal charge.
14

15 The court found the officer violated Brown's Fourth Amendment rights because he
16 did not have reasonable suspicion to detain Brown. In fact, the record revealed that one of
17 the officers admitted during a hearing in the lower court that the only reason he stopped
18 Brown was to ascertain his identity. Id at 52 Since the officer did not have reasonable
19 suspicion to detain Brown his right to be free from arbitrary interference by law
20 enforcement had been violated and his conviction improper.
21

22 The court stopped short of deciding if a person had to provide identification when an
23 officer had reasonable suspicion to detain him. However, the court's opinion indicates
24 that a "balancing" test should be applied to decide if, under the circumstances of the case,
25 the public interest of having a suspect identify himself outweighs the right to be free from
26 arbitrary interference by law officers.
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1 As stated by petitioner NRS 171.123 is a codification of Terry v. Ohio, 392 U.S. 1
2 (1968) NRS 171.123 requires that an officer have reasonable suspicion prior to stopping
3 an individual and asking for identification. This prerequisite would equate to the
4 “lawfully stopped” requirement in the Texas statute. Reasonable suspicion is the great
5 leveler and maintains the proper balance referred to by the court. However, once an
6 officer has reasonable suspicion he should not be hindered in the pursuit of the
7 investigation. Part of that investigation is to discover the identity of the suspect. If we
8 place barriers to an officer’s ability to identify the individual he is confronting then the
9 investigation is stifled. Without a proper investigation those who are innocent might be
10 falsely accused. Those who were guilty might wholly escape prosecution and many
11 crimes would go unsolved. As a result, the security of all would be diminished. Haynes v.
12 Washington, 373 U.S. 503 (1963)

15 Petitioner concedes that Deputy Dove had reasonable suspicion to detain him and the
16 record on appeal is certainly in accord. (Petition for Writ of Certiorari p.8 lns 10-14)
17 Unlike the officer in Brown Deputy Dove complied with the requirements of NRS
18 171.123. The “balance between the public interest and the individual’s right to personal
19 security free from arbitrary interference by law officers” was maintained and petitioner
20 was not illegally detained. Pennsylvania v. Mimms, 434 U.S. 106,109 (1977)

22 The state submits that since Dove had reasonable suspicion to detain petitioner then
23 petitioner was obligated to identify himself. If Dove was not engaged in a lawful
24 detention then petitioner could withhold his identification and any subsequent arrest
25 would have been a violation of his Fourth Amendment rights. In Oliver v. Woods, 209
26 F.3d 1179 (2000) the Tenth Circuit Court of Appeals reached the same conclusion.
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1 Oliver, a criminal defense attorney, was taking his car to an auto repair shop. In the
2 process of driving his car into the shop he triggered a silent alarm. Law enforcement
3 officers installed the silent alarm to catch individuals who had been dumping illegal oil
4 near the auto shop. An officer approached Oliver and asked for his name and
5 identification. Oliver refused and quoted the Utah statute regarding when an officer can
6 ask for identification. The officer asked for identification again and told Oliver he was
7 not free to leave. Oliver ignored the officer and left in another vehicle that was there to
8 pick him up. The officer followed Oliver and upon receiving backup stopped Oliver's
9 car. Oliver was told to get out of his car but he refused. After a brief scuffle he was
10 arrested for failing to provide identification.
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13 The prosecutor reviewed the case and determined that no penalty was imposed for
14 violating this statute. The charge was amended to failing to display motor vehicle
15 registration. The justice of the peace dismissed the charge because he determined the
16 officers did not have reasonable suspicion. Oliver filed a 1983 action alleging the
17 officers violated his constitutional rights.
18

19 On appeal the Tenth Circuit noted that the Utah statute Oliver was arrested under
20 codified the requirements for an investigative or *Terry* detention. The court reviewed the
21 facts leading up to Oliver's arrest and determined that the officer did have reasonable
22 suspicion to detain him. Id at 1187-8 The court then addressed the issue of whether the
23 officer had probable cause to arrest Oliver when he refused to produce identification. The
24 court cited Adams v. Williams, 407 U.S. 143 (1972) and stated "when an officer is
25 conducting a lawful investigative detention based on reasonable suspicion of criminal
26 activity, the officer may ask for identification and an explanation of the suspect's
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1 presence in the area.” The court ruled that the officer gave Oliver a lawful order when he
2 told him to present identification and remain in the parking lot while he conducted an
3 investigation. **When Oliver refused to present identification he refused to perform an**
4 **act required by a lawful order that was necessary to effect the detention.** Id at 1189
5 **The Tenth Circuit concluded its opinion by holding that Oliver had no clearly**
6 **established constitutional right to violate Utah code 76-8-305 which makes it a**
7 **misdemeanor to interfere with an officer when he is seeking to effect a lawful**
8 **detention.** Id at 1190 *See United States v. Trimble*, 986 F.2d 394 (10th Cir. 1993)
9

10
11 In the case at bar, Deputy Dove was effectuating a detention based on reasonable
12 suspicion. NRS 199.280 prohibits an individual from delaying or obstructing an officer
13 while he is discharging any legal duty. Deputy Dove had reasonable suspicion to
14 investigate a reported crime and therefore was engaged in a legal duty. When petitioner
15 refused to produce identification during the course of the lawful detention he delayed and
16 obstructed Deputy Dove as he discharged his legal duty. As in Oliver, petitioner has no
17 clearly established constitutional right to violate NRS 199.280 Therefore, arresting
18 petitioner for failing to produce identification and other acts amounting to resisting a
19 public officer under NRS 199.280 does not make NRS 171.123(3) unconstitutional under
20 the Fourth Amendment.
21

22 Petitioner’s right of privacy under the Fourth Amendment was also not violated.
23 The state could not find any case law from the United States Supreme Court or any other
24 jurisdiction that permits an individual to refuse to identify them self because they have a
25 privacy right under the Fourth Amendment. In fact, the court has upheld roadblocks that
26 require a driver to produce identification through license and registration. When deciding
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1 whether a privacy right exists under these circumstances the United States Supreme Court
2 has applied a “balancing” test to determine if the governmental interest outweighed the
3 individual’s right to privacy. The court has held that as long as there were limits placed
4 on the officer’s discretion the public interest in reducing crime outweighed the minimal
5 intrusion caused by asking for identification. Delaware v. Prouse, 440 U.S. 648 (1979);
6 *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); *See Also* United States v.
7 Duncan, 629 A.2d 1(D.C. App. (1993)

8
9 The state asks this court to apply a balancing test when determining if NRS 171.123
10 (3) is unconstitutional. The only question that NRS 171.123(3) compels an individual to
11 answer is “who are you?” When balancing the need for a law enforcement officer to
12 investigate a crime against an individual’s right to privacy this one question constitutes a
13 minimal intrusion. Furthermore, when considering the possibility that a truly innocent
14 person could be falsely arrested or a guilty person permitted to leave, requiring
15 identification during a *Terry* stop is reasonable.
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18 The state understands that this court can broaden the right of privacy under the Fourth
19 Amendment to allow an individual to refuse to identify himself but the more important
20 question is should this court do it. Permitting individuals to refuse to identify themselves
21 once an officer has reasonable suspicion to detain and investigate carves out a much
22 broader privacy right than the constitution envisions. It tips the scale and forces an
23 officer to make more difficult decisions because he no longer has the ability to gather
24 needed information. If this court adopted petitioner’s argument an officer could not run a
25 “wants” check on a detained person to see if he is a wanted felon. While detaining an
26 individual that matched the description of a suspect the officer would be unable to verify
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1 that he is detaining the right person. These circumstances illustrate why it is reasonable to
2 compel an individual to identify them self once they are lawfully detained.
3

4 Arresting a person and charging them with violating NRS 199.280 for refusing to
5 identify himself is also reasonable because it maintains the integrity and purpose of our
6 criminal justice system. If a person can be compelled to identify himself but incur no
7 consequence for refusing then NRS 171.123(3) becomes a hollow statute without
8 meaning or purpose.
9

10 FIFTH AMENDMENT

11 The United States Supreme Court has held that the privilege against self-
12 incrimination protects an accused only from being compelled to testify against himself or
13 otherwise provide the state with evidence of a testimonial or communicative nature.
14 Schmerber v. California, 384 U.S. 757 (1966) To be testimonial the communication must
15 explicitly or implicitly relate a factual assertion or disclose information. Doe v. United
16 States, 487 U.S. 201 (1988) A suspect is not required to disclose any knowledge he might
17 have or speak to his guilt. United States v. Wade, 388 U.S. 221 (1967) When petitioner
18 was asked to provide identification he was not being compelled to give any factual
19 assertion relating to the battery that Deputy Dove was investigating. This question did not
20 compel him to "speak to his guilt". Petitioner was not forced to choose between
21 truthfully or falsely revealing his thoughts. As a result, compelling petitioner to identify
22 himself did not constitute a violation of the Fifth Amendment right against self-
23 incrimination.
24
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26 As this court is aware, when a person is placed into custody they must be given a
27 Miranda warning prior to being questioned by law enforcement. Miranda v. Arizona, 384
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1 U.S. 436 (1966) There is no clearer indication that a person has been placed into custody
2 than during the booking process. Yet the United States Supreme Court has held that
3 certain questions can be asked of a person during this process and not be in violation of
4 their right to remain silent. In Pennsylvania v. Muniz, 496 U.S. 582 (1990) the court ruled
5 that requiring a person in custody to give his name and address were "routine booking
6 questions" that are necessary to complete the booking process. Muniz illustrates the
7 court's view of how minimal and inconsequential producing identification is when
8 compared to being compelled to give information that can jeopardize a suspect's case. If
9 the United States Supreme Court can find that producing identification after being placed
10 in custody is an exception to the Fifth Amendment, producing identification while being
11 detained but not in custody should also be a recognized exception.
12

13
14 **C. PETITIONER HAS FAILED TO CITE ANY COMPELLING CASE LAW TO**
15 **PERMIT THIS COURT TO FIND NRS 171.123(3) UNCONSTITUTIONAL.**

16 Petitioner has cited language from Terry v. Ohio, 392 U.S. 1 (1968), Michigan v.
17 Defillippo, 443 U.S. 31 (1979), Davis v. Mississippi, 394 U.S. 721 (1969) and Berkemer
18 v. McCarty, 468 U.S. 420 (1984) in support of his proposition that he cannot be
19 compelled to identify himself during a lawful detention. The state believes that if this
20 argument is a correct interpretation of the court's intent, the court would have reaffirmed
21 that position in Kolender v. Lawson, 461 U.S. 352 (1983) when the issue was before
22 them. The state suggests that a different interpretation can be ascribed to these opinions.
23

24 There are various aspects to an investigation. The initial detention is typically used to
25 gather general information from a suspect such as name, address etc. Once this
26 information is obtained the officer can begin asking more substantive, specific questions
27 relating to the particular crime he is investigating. Upon review of the cases cited by
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1 petitioner it is clear the United States Supreme Court is referring to the part of the
2 investigation where the detaining officer is inquiring about specific information relating
3 to the crime being investigated.
4

5 In DeFillippo Justice Blackmun states "...while the police have the right to request
6 citizens to answer voluntarily questions concerning unsolved crimes they have no right to
7 compel them to answer." Id at 44 Compelling an individual to identify himself is not a
8 question concerning an unsolved crime. The answer is not an admission or a confession
9 and provides no details relating to the crime. It is a general, informational type question
10 that helps the officer to determine who he is confronting. The protections under the
11 Fourth and Fifth Amendments apply once the officer begins to ask the suspect specific
12 questions about the crime being investigated. At that point the suspect cannot be
13 compelled to answer because the danger of self-incrimination becomes more apparent.
14

15 The state believes the United States Supreme Court's primary concern in these cases
16 was to protect an individual from providing information that ultimately could be used
17 against them at time of trial. The language in NRS 171.123(3) is consistent with this
18 position and provides the same protections.
19

20 CONCLUSION

21 The state submits that this court should not issue petitioner's writ of certiorari because
22 petitioner has failed to meet his jurisdictional burden under NRS 34.020. Petitioner has also
23 failed to provide any compelling argument that NRS 171.123(3) violates the Fourth and/or Fifth
24 Amendments. Petitioner has admitted that he was lawfully detained. Furthermore, he has not
25 shown how the right of privacy protects him from being compelled to give identification to an
26 officer. The state believes that the government's interest in obtaining this information outweighs
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1 the individual's right of privacy because it promotes efficient law enforcement and reduces the
2 possibility that an innocent person will be arrested and a guilty person go free.

3
4 Finally, the act of producing identification should not be characterized as compelling
5 testimony. This act does not cause the individual to give a factual assertion of an unsolved
6 crime. It involves revealing general information that is a necessary part of law enforcement. The
7 state contends that NRS 171.123(3) is constitutional and establishes a reasonable balance
8 between the interest of law enforcement and the protections afforded to individuals who are
9 detained for investigative purposes. Petitioner's writ of certiorari lacks constitutional merit and
10 should not be issued by this court.
11

12
13 Dated This 31 Day of January 2002

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15 
16 Conrad Hafen
17 Chief Deputy District Attorney
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 31st day of January, 2002, I deposited for mailing at Winnemucca, Nevada, a true copy of the **ANSWER TO PETITION FOR WRIT OF CERTIORARI** to:

Supreme Court Clerk's Office
Supreme Court Building
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

Public Defender
511 East Robinson Street
Carson City, Nevada 89701
Attn: Gary Logan

Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

Paige Brown

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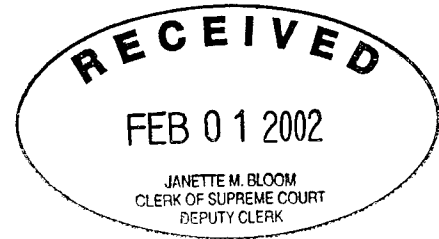
HUMBOLDT COUNTY DISTRICT ATTORNEY

DAVID ALLISON
DISTRICT ATTORNEY



POST OFFICE BOX 909
WINNEMUCCA, NEVADA 89446

January 31, 2002



Nevada Supreme Court Clerk
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

RE: HIIBEL, LARRY v. SIXTH JUDICIAL DISTRICT COURT

Dear Court Clerk:

Enclosed please find original and two copies of Answer to Petition for Writ of Certiorari regarding the above-entitled matter. Please file-stamp and return file-stamped copy to our office in the enclosed, self-addressed stamped envelope.

Thank you and if you have any questions, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in cursive script that reads "Paige Brown".

Paige Brown
Legal Secretary

:pb
encl.