Transcription of Oral Arguments for RABY v STATE

NEVADA SUPREME COURT

Case #8184 Dated 12/11/1975

Judge: PAUL S. GOLDMAN

Public Defender: MR. BILL MAUPIN

Appellant: ALECK EUGENE RABY

Attorney General: ROBERT LIST

District Attorney: GEORGE E. HOLT

Deputy/District Attorney: RIMANTES A. RUKSTELE

NRS 193.165 "USE OF A DEADLY WEAPON"

*Public Defender, Mr. Maupin starts at minute 15:15 on audio and ends at 26:40. Page 4-6 of transcription.

*District Attorney, Mr. Rukstele starts at minute 42:45 on audio and ends at 53:59 Page 9-11 of transcription.

*Public Defender, Mr. Maupin's rebuttal starts at minute 54:10 on audio and ends at 56:40 Page 11-12 of transcription.

*Judge Goldman speaks throughout minutes.

PLEASE START LISTENING TO AUDIO AT 15:15 AND FOLLOW ALONG WITH THE TRANSCRIPTION AT THE HIGHLIGHTED PORTIONS

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The Supreme Court of the State of Nevada is now in session.

Judge: Raby v State #8184. Mr. Maupin, you may proceed.

Mr. MAUPIN: Thank you, your honor. If it pleases the court, the case at bar involves a conviction of the appellant for five counts of robbery and five counts of using a deadly weapon in the commission, of a robbery, of the robberies that were alleged counts 1 through 5 in information. Briefly by way of history of this case on April the 18th 1974 the appellant pled not guilty on all ten counts, counts 1 through 5 being robbery, counts 6 through 10 being use of a deadly weapon during the Commission of a crime to with the robberies referred to is counts 1 through 5. The trial of this matter began on December. 9, 1974 with jury selection. Evidence was taken starting on December the 10th 1974 and the trial was taken to a conclusion on December the 12th 1974. Again, the jury rendering guilty verdicts on all ten counts. Prior to the trial on November the 26th, 1974 the council for the appellant filed a motion to suppress, uh in court and out of court identifications based upon a confrontation that occurred approximately a week after the alleged robberies, that is a policeman apprehended the appellant brought him back to the location of the robberies which was the Cherry Patch bar in Las Vegas and exhibited him to two of the alleged victims that were at the bar at that time. The motion to suppress dealt with the effect that, that particular two-man, one man show up had upon the inquiry of identifications at trial. On December 6th, 1974 **** the Friday before the trial December 9th started on Monday the points and authorities were filed, now the motion to suppress was not filed more than 15 days before the trial and compliance with 174 NRS 174.125 which has become known and common parlance in our district as the 15-day rule. This was done pursuant to an agreement between the deputy District Attorney that was handling this case and defense counsel that the deputy District Attorney would not be asserting the 15-day rule and in fact would agree to waive the 15-day rule and have an evidentiary hearing on this motion to suppress prior to the trial. On the morning of trial part of jury selection, the trial court noted that this motion had been filed and as will become more apparent later in the argument, noted that no points and authorities had been filed, this evidently was a mistake. Any event, the trial court refused to hear this issue notwithstanding its constitutional ramifications or that jury selection proceed and the trial was then commenced on the 10th. There are five alleged victims of this robbery or of these robberies; Earl James Graham, James Ray Splawn, Susan Espiritu, Ronald Roy Jans, and David Victor Union. Briefly, the testimony adduced at the trial indicated the following; that Mr. Graham's testimony indicated that on February the 7th about 5:00 AM he went into the Cherry Patch Bar, and he had been there about an hour and 20 minutes, when it's 6:20, he and four other persons in the bar were robbed at gunpoint and forced to disrobe. He described his assailant as being 6 feet tall, 170 pounds, 28 years of age with brown hair. He attended a line up on February the 14th, that is about seven days after the alleged robberies and this was one day after the alleged, the show up at the bar with the two other victims, he was not at the bar at the time of this this show-up. James Ray Splawn was also one of the victims, he had indicated that

he was at the Cherry Patch Bar that night as a, as an employee of a custodial service that was cleaning up in the bar. He said he was, as with Mr. Graham, said he was robbed at gunpoint, forced to disrobe. He said his assailant wore glasses, had no mustache, the appellant at trial, he noted in terms of his testimony that the appellant did not have glasses on, he wore a mustache and he appeared thinner than the assailant. He also testified that he could not be sure that the appellant was actually the assailant, because the appellant was much smaller than, a much smaller man than the assailant. He did not attend the line-up; he was not present at the show up. During the trial and during Mr. Spawns testimony the appellant was asked to stand up and Mr. Spawn gave the following testimony "considering that the man is smaller, that the man had on his glasses, and without the mustache, I would say that it was him". Susan Espiritu and Ronald Roy Jans both testified to the robbery, they both said they were present in the bar when the police officers brought the appellant over. Those were the two, those were the two alleged victims that were in the bar the day before the lineup. This is where the defendant was at this show up, again the defendant below was singly brought to the bar by police officers. **JUDGE:** Wasn't that at his request? Didn't he insist on being taken there? (Both attorney & judge talking at the same time) he says, I want to go over there, I want to go over there and, and see these people and clear this thing up. **MR. MAUPIN:** Well, your honor, the record is, is somewhat unclear about that, in terms of the testimony from the police officers, the police officers indicated they saw him driving down the street in an automobile that matched the description, given by the victims. He advised the appellant at that time that they were going to go back to the bar. It was after that statement by the police officers, as the testimony goes, that he advised him, that he had the right to an attorney and that he did not have to go over there and that was taken from the context of the... **JUDGE:** and after the warning and after the advice that he didn't have to go over there he still insisted on going, isn't that what the record shows? **Mr. MAUPIN:** that's well it's I don't know whether you can say he insisted on going. I would say that he cooperated with that, the issue as to the subjectivity of this show up uh I think was in terms of whether or not the identification should have been suppressed is one of, when you have to take all these all this testimony together and see whether this issue did arise. Now allegedly he has agreed to go over and wave his rights to an attorney at that time. I still don't think that, that gets around the issue of whether or not this particular show-up was unduly suggestive and unduly tainted, subsequent identifications at the line-up, your honor will note that the testimony of Ronald Roy Jans, as to the description at trial indicates that the assailant was 6ft tall, 170 pounds, 28 years of age, this is word for word identical to the testimony of Mr. Graham, now Mr. Graham's testimony is good, in terms of the identification, he gives exactly the same description, very specifically. Mr. Jans was at the show-up the very next day Mr. Graham was at a, was at the lineup and I think that in terms of an evidentiary hearing uh there might have been, there would have been an opportunity to further delve into this point to see whether or not there was a taint on this identification, as to whether or not this identification was in fact proper. **JUDGE:** Well, hindsight's really great all the time, we'd like to use it ourselves sometimes, but what is wrong with what happened in the procedure as it was done, going to the bar, the procedure that the officers used, a one plains clothes man went into the bar and asked if there was anyone there who had been there the night of the robbery and he found out there were two people there, then two other people came into the bar and sat down. One of them was the defended or the appellant here and one another one plain clothed man. What, what was suggestive about that? I mean sure you can go back from here into any case and pick it apart and, and nitpick the thing, but tell me what was really wrong with this uh procedure, that the officers followed after he at least indicated your...he had indicated that he wanted to go back and clear things up. **MR.MAUPIN:** You see that's just the, what you're saying is

just the point, we can't, it's hard for us to come back and, and discuss this case in terms of, all we're talking about is hindsight, we weren't there, the problem is... normally when we come up here and argue on motions to suppress, the motion was heard, and we can take a look at the evidence and how it was adduced at the evidentiary hearing, and then we have, and then we can, and then when in the event that the motion is that is that the conviction would be affirmed in these instances where that does happen, you take a look back and say well the judge, the trial judge had an opportunity to take a look at the demeanor of the witnesses, now the purpose of this motion, was stated at uh page 238 of the uh record on appeal and council brought this up at the trial and we would have shown to the court that the defendant was improperly brought to the Cherry Patch Bar for an identification and the matter that was both unnecessary and suggestive, and we would have also tried to show that at the hearing that perhaps the taint of this showing extended beyond the two victims that were present at the time in might have extended to the other three victims who weren't present at the bar at the time the defendant was brought in. **JUDGE:** Don't we know what happened by reason of the testimony at the trial? **MR. MAUPIN**: Well, I... **JUDGE:** I would assume it would have been the same on the motion to suppress. **MR. MAUPIN:** I don't know if we can assume that, because in a motion to suppress outside the presence of the jury... **JUDGE**: Do you think it would be different? **MR. MAUPIN**: Well, the problem is we don't know that, because he never got an opportunity to have the hearing. **JUDGE**: They had an opportunity to testify in court. **MR. MAUPIN**: that's right, but still, at an evident... **JUDGE**: They won't listen to the motion to suppress, because of the 15-day rule. I don't know if you knew about the agreement that had been made, but in any event, all of the evidence came in during the trial, it was suppressible at that time. **MR. MAUPIN**: Yes, it was your honor, but I would submit that in terms of the motion itself, constitutional ramifications, that a hearing should have been had, because the, when you, when you're cross examining in a jury trial, your approach is going to be a little bit different than a motion to suppress. You don't have the jury there listening to your testimony and I submit that, that a different mode of cross examination would be used at the hearing and the problem is, is that there are certain issues that would have been developed as to whether or not there was a, an improper or an improper identification at the preliminary hearing, and at the trial they could have with a short evidentiary hearing before hand, with a different approach across examination there would have been at least an opportunity to air this issue. What I'm saying is that the merits of this in terms of the demeanor of the witnesses at the evidentiary hearing before the trial was never had, now, the 15-day rule, which is an administrative rule for the operation of the court system that is for, to speed cases through, and make it more efficient. If that, that should not be a bar to the airing of constitutional issues, it's a, if there is not a waiver of those issues and I don't think there was a waiver here, in terms of the council's activities in this case, the motion was filed, the judge mistakenly thought that it was not filed, but the record of the of the appeal here and the representations made before the court which I've cited in my brief. I indicate that in fact those points, and authorities were filed, and the District Attorney had received a copy of those points and authorities and was ready to proceed prior to the trial with an evidentiary hearing. I grant you that as we look at the testimony in the trial, it is not as strong as it should be in terms of a motion to suppress, but again the approach taken at trial has got to be different than the approach that you take cross examining in their emotion to suppress. It's a practical consideration, but the problem is here, we have nothing to go on other than the evidence at the trial. I don't think that's enough. We don't have the litigation of these issues pursuant to the motion to suppress. I'm uh, and (STARTS AT MINUTE 15:15 ON AUDIO) the other issue that I think is very important in this case, is the issue of sentencing. The defendant was convicted 10 times in this case. Ten counts, counts 1 through 5 for

robberies of the individuals I've mentioned, counts 6 through 10 he was convicted of something that isn't a crime. There are, there is a judgment of conviction on those counts in the information. Now I am not unmindful at this point of the decision in Woofter v O'Donnell, uh the District Attorney was kind enough to supply me with his copy of the memorandum decision and it is not, I have not had a chance to read it until yesterday. Now as I understand from reading this case, uh, it is finally the rule of law in the State of Nevada that NRS, I want to make sure that I am citing the right statute 193.165 does not state a new and separate offense. The purpose of this is to enhance penalty. For your honor, your honors, to the verdicts in this case on counts 6 through 10, we the jury in the above entitled cause find the defendant Aleck Eugene Raby, guilty of use of a deadly weapon in Commission of a crime, counts and then in each particular verdict the particular count is set forth, these verdicts were rendered pursuant to the accounts and the information is that the, the appellant did willfully, unlawfully, and feloniously, use a deadly weapon to with a firearm during the Commission of the crime of robbery of each victim's name at the Cherry Patch Bar 2327 South Eastern Ave, Las Vegas, Clark County, Nevada. Now this information is set forth in terms of a crime, now pursuant to your ruling in Woofter v O'Donnell he was convicted of something that is not a crime under the law of the State of Nevada, and when it comes in and it shows up on his record, it's going to show that he was convicted 10 times and the court was without jurisdiction, in my view, to send these, this form of verdict to the jury and rendered a judgment of conviction on those forms of verdict. **JUDGE**: So, if we say in our decision that indeed they are not separate crimes we point that out in our decision here in this appeal so that it will reflective of record and he can establish that uh he hasn't been indeed properly convicted of these crimes, uh, you would concede would you not that he has been properly sentenced? **MR. MAUPIN**: Well. **JUDGE:** he's received, he's received the proper amount of time, the judges sentence correctly assesses the penalties does it not? **MR. MAUPIN**: Well, assuming the constitutional, constitutionality of the statute which you have held is constitutional. He has been given, he has been sentenced properly, except for the fact that his record does show this. Now I don't think that and of course I've seen a lot of rap sheets and if this is going to show up, I think unless there is some sort of remand and special instructions given uh that he was convicted the 5 times on these extra charges now uh the problem is, is this case went to a jury. **JUDGE**: Well, what do you want us to do to make sure that his rap sheet doesn't uh prejudice him? **MR.MAUPIN**: I want you to dismiss all 5 of those, and the reason that you should dismiss them is because he went to a jury on this, this was, jeopardy had attached at the time of jury selection and he was tried, they've submitted verdicts on this, and they improperly prosecuted him under this statute... and it shows, it and...without any question in my mind anyway, the uh, the fact remains that, that's what his record would show, and even if you were to put a uh a caveat in this particular opinion that you wrote, uh when that rap sheet came out of a computer, over in California someplace, it would show that in fact he had been convicted 10 times instead of just five and further...uh **JUDGE**: It's not gonna happen unless he gets arrested and charged again, is it? **MR. MAUPIN**: Well, that's a danger that everyone in the world faces. I mean uh, there's nothing to stop any of us from being arrested at some time in our life, and if he, when he eventually is released from prison. **JUDGE**: Do you think it, do you think it's our functions as long as he's properly uh sentenced to uh uh be concerned with straightening out the FBI's uh rap sheets? **MR. MAUPIN**: Well, I think it has, I think we have to be concerned with practical, practical problems. Your uh your opinion can, can, can state what you want it to state, but as a practical problem your going to see this come up on someone's rap sheet later on and he's going, uh for example they, they pull his rap sheet and there he is with several felonies and they're going to the, the, the problems of an habitual criminal type situation arise and he would be charged. Now ultimately it could

be straightened, maybe it could be straightened out, maybe it wouldn't be. I mean I've seen it it's quite possible and sometimes even probable in some other jurisdiction that a judge wouldn't think to call over here or read the appellate opinion of his case, of this of this particular appellants case and the fact that he could even be charged, additionally, under under in some future time under an habitual criminal habitual criminal situation indicates to me that his, his right to due process are being violated and the fact remains is that this went to a jury, and went to a jury in this form, and I think jeopardy attached and he was convicted without jurisdiction. Now the alternative in this case and I happen to be involved in a trial of had had this particular issue in it where they had plead it in one count and they came back with a special finding, not a spec, not another adjudication of guilt as to the robbery count, but a special finding and assuming that the, the statute is constitutional that is the method by which this statute should be applied, not by prosecuting him on another count... for each robbery where the weapon was used. I also submit that the uh that the application of the statute against him in this manner would violate his rights to double jeopardy. Now as I understand the opinion in Woofter v O'Donnell it does not address itself to the question of whether or not a conviction on the, on a robbery in the corresponding use of a deadly weapon in that robbery would be violative of double jeopardy, it it addresses itself to the constitutionality of the statute per say, but not to this particular application. In this situation, again, he was convicted twice for each robbery and the Nevada Constitution, and the United States Constitution provides that a person shall not be subject for the same offense to be twice put in jeopardy of life and limb and I think that in this situation, that's exactly what happened. (Judge & Attorney- talking over each other) **JUDGE**: It seems to me that he got something more than he really may be entitled to because in this situation the jury had to find beyond a reasonable doubt one, that he was guilty robbery and two, that he was guilty of use of a deadly weapon in the posture of this at the trial of this case, but I'm not too certain that if you find the, if the jury finds the uh the defendant guilty of robbery beyond a reasonable doubt that they have to reach that (stutter) same uh plateau and finding the use of the deadly weapon, so at least in this case, he got the benefit of that of having them to go to uh the full extent not only of finding him guilty of robbery of beyond a reasonable doubt, but guilty of using a deadly weapon in connection with his robbery beyond the reasonable doubt so... **MR.MAUPIN**: that's, that's, that's an interesting proposition, however, I would respectfully submit to the court that, and that doesn't bear to the issue of his, of the process of prosecution in this matter, that is, again, it doesn't bear to issue to whether or not he was convicted twice of the same act of robbery. Now in the situation where you don't have two separate counts, and where it's plead in one count, for example, and a special finding is made, he's not convicted twice, he's only convicted once. And if the statute, again, statute being constitutional and it's only an enhancement of penalty, then what is happened is, is he's had the enhancement of penalty attached to, to the one conviction, that would be constitutional, but the fact that he was tried and convicted twice for each robbery and that's the way the, that's the way each of those that each of the counts in the information read, they bear they, they talk in terms of felony language unlawfully, willfully, and feloniously, use a deadly weapon in the robberies OF these victims and as such, again, he was convicted twice whether the, the I, I, I don't think that the burden of proof on, on each of these counts bears to the issue of whether or not he was prosecuted twice for each offence. There being, if there are no other questions your honor, I'll preserve the rest of my time for rebuttal. **JUDGE**: Thank you Mr. Maupin. (ENDS AT MINUTE 26:40 ON AUDIO)

JUDGE: Mr. Rukstele, do I pronounce that correctly? **MR. RUKSTELE**: Uh, Well that's close. **JUDGE**: Well, how should it be? **MR. RUKSTELE**: It's Rukstele. **JUDGE**: Rukstele. OK. **MR. RUKSTELE**: Thank you very much your honor. Good morning, uh for the record my name is Rimantes A. Rukstele and I'm appearing

on behalf of Mr. George Holt and the Clark County District Attorney's Office. May it please the court, it's the state's position that in this matter of State v Raby, as far as the first issue is concerned, the defendant bears a heavy burden, and I submit that it is incumbent upon the defendant to show one of two things, first of all an abuse of discretion on part of the trial judge or prejudice to the defendant and it's our position that the record in this matter, shows neither one of those elements. As far as the abuse of discretion is concerned, uh the statue that being 174.125 the 15-day rule, I submit is quite clear.

It's a procedural matter, but it's a statue that is necessary for the, for the proper flow of paperwork and cases in the Eighth Judicial District Court. Uh, that statute was not met. Now the thing that I'd like to point out to this court is that I'm trying to speculate why the judge did what he did why the trial judge will not allow this motion and I think there are several things happening in this case which perhaps would give us an insight into Judge Goldman's decision not to grant this motion. First of all, there was a long delay here between the date**** the defendant was ordered to stand trial when he was bound over from justice court and the trial date. He was bound over in March; the trial date was in December. During that interim there were numerous adjournments my record indicates 5 defense requests for adjournments, which were all granted. On December 5th, the defendant again requested another adjournment. This time what he believed to be a constitutional issue on the identification. I think the trial court rejected that and I think the record reflects that the court was rather upset with the long delay in this case the fact that this man was in custody all this time, perhaps that's one of the reasons why it was not granted. At any rate, the defendant admits that the statute 174.125 was not met. Uh, he was not timely in his motion, granted that the state did stipulate the such continuance but I don't believe that defense counsel and deputy District Attorney whatever their stipulation might be that stipulation I submit, is not binding under the court, especially in the interpretation of this statute. Now obviously we believe this is a discretionary matter, uh, the trial court could have granted it, could not, in this case did not grant this request. I don't believe there is any abuse of discretion on part of the trial judge, as far as the... **JUDGE**: What about Mr. Maupin's argument that that uh although there's these same question and they seem same questions uh constitutional questions about suppression came up at the trial that he would have a wider range of cross examination and a better opportunity to put on his case for suppression at a motion hearing than he would at trial. **MR. RUKSTELE**: I've been, for me to strategic, from a trial tactics point of view, I think his position has some merit to it. I will, you're asking me your honor, to put myself in the defense attorneys' position and I'm asking myself, would I have tried this case any differently, had this motion been granted? Uh... **JUDGE**: You mean heard. **MR. RUKSTELE:** Had this motion been heard... that's correct your honor. Uh, I can only speculate your honor, we can only speculate in whether or not the motion would have been granted. Were the motion granted, obviously, the trial strategies and what would have been presented by the state and by the defendant may have been different. If the motion were denied, not the hearing in the motion, after the motion were heard and were that motion denied then I can see, I cannot see, how it would affect the trial. I can only guess, I really, that's not a very good answer your honor, but I think we're only, we can only speculate. Looking back and I can only speculate, but I think the council's position I think has some merit to it that, but again it would of course depend on how the trial court would have ruled on that motion. As to the prejudice *** again it's our position there but prejudice has not been shown and if I may briefly go over the testimony and facts as were elicited. There were five victims to this robbery and these five victims all testified to being robbed. That Mr. Raby pointed a handgun at him, that monies were given to him, that they were forced to disrobe, etc. Let me call these victims, victims 1 through 5 and if I may run through the facts. I, I believe I can indicate to this court that there was absolutely no

prejudice whatever in this case. Victims #1 and #2 were present on this, for this, on the scene confrontation. This happened approximately a week or so after the, this crime occurred. What transpired here is that the police officers had a general description of the suspect, and they had a description of the car were, the getaway car used during this crime. A week after this crime, they saw this car, they saw a man fit the description driving this car. A stop was made, there was a discussion with the defendant, he was taken back to this scene. I think the record reflects, and council's brief reflects, that immediately when this defendant entered that bar room, victims 1 and 2 said "that's him". I think one of the witnesses said, "it took me 2 seconds to realize that that was the man". Victim 3 and 4, those two parties, were at the line-up. This was a corporal line-up, after this gentleman was arrested. He was arrested, taken to jail, a line-up was held. These 2 victims identify this man in the line-up. They were not present for the on-the-scene confrontation. Victim #5, I believe was Mr. Splawn, Mr. Splawn was not present for the on-the-scene confrontation, and he was, he did not come down and view this gentleman at the line-up. In court, he identified the man with this caveat, and he stated, and I'm reading from page 309 of the transcript, "considering that the man is smaller, if the man had on his glasses, and without his mustache, I would say that it was him". Now the testimony indicated that during this interim from the robbery to the trial date, Mr. Raby grew a mustache and at the trial, he wore glasses and if memory serves me right, during the perpetration of this robbery, he neither wore glasses and didn't have a mustache, so... if we look at this gentleman Mr. Splawn's testimony, and that's the only person who showed some hesitancy in identifying this man. He said; if the man, if you take his glasses off and take his mustache off, that's him. **JUDGE**: Except, except uh, he's not the right size. **MR. RUKSTELE**: Except he's smaller, and if I may add your honor, one, the arresting officer who arrested this man and who testified at trial, indicated that it appeared to him that the defendant had lost some weight, that he looks a little thinner now. There is one other piece of evidence which I think negates any inference or any possibility of any prejudice to this defendant and that evidence is this, the testimony indicated that Mr. Raby sat in this bar for quite some time. He sat at the bar, and he had a bottle of Budweiser, and he drank a bottle of Budweiser, and all the witnesses recall this gentleman being there, and having a beer and when the officers arrived, they were taken to the bar and there sat a bottle of Budweiser, and that bottle was recovered and a lass* a very nice set of fingerprints were recovered from this bottle of Budweiser. I submit that there can be no doubt that this is the gentleman who was in the bar. I think the fingerprints only reflect the fact that this is the right person. If I may comment on one other issue here, and that is the on-the-scene confrontation. Uh this confrontation, may it please the court, took place one week after the incident. Uh, we district attorneys we read the same cases and we try to do what is right, and the police officers, I'm sure, try to do what is right. Uh, Stovall, Simmons, (names of officers?) I think speak negatively against this sort of procedure, an on-the-scene confrontation a week after the crime, but I wonder, and I ask myself, and I'm sure this court will, will consider what else could the officer of done. Were all concerned with, with protecting the defendant's rights, and district attorneys and police officers have that concern as well. Nobody wants to arrest the wrong man. Now what else could this officer have done? He stops the car that fits the description and there drives a man who fits the description of the perpetrator. Well, he could have released him, and say well I have a general description that could fit a thousand young black males in the city of Las Vegas. He could have released him. Had he done that, I don't think he's doing a very good job. He could have taken him into custody and taken him down to jail, booked him, mugged him, and had a line-up, however, what are the dangers of that, what if this man were innocent? What if this were not the man who perpetrated the robbery? He's gone through the humiliation of being arrested, booked, mugged, thrown in jail. And that leaves

the third possibility and that is the on-the-scene confrontation. It's dangerous if an officer called me and asked me should I do this? I would have to tell him "No", because I think the U.S. Supreme Court and other cases indicate that you shouldn't do this sort of thing, not a week after the incident occurred. However, I wonder what are the alternatives? What could he have done? Uh, it would disturb me to know that an innocent man were taken to jail, spent several days in jail and it was the wrong person. Uh, what happened here, carries a great possibility of prejudice to every defendant, but quite frankly, I don't know how we can get around it. Uh, it's a problem that district attorneys encounter throughout the United States. What do you do when you have a man a week later, and perhaps you lacked enough probable cause to arrest that person, because you only have a general description of him? Uh, wouldn't it be a lot easier to take him to the scene? Uh, again, I don't encourage that sort of activity, but in this instance here, I don't think there was any prejudice. **JUDGE**: Did or didn't he at least indicate that he wanted to go down there and clear things up? **MR. RUKSTELE:** That's correct your honor. Uh, Uh My memory of the record reflects that the officer made some attempt to warn this man of his constitutional rights. The transcript says, "I gave him his rights", I told him he had a right to an attorney, that he didn't have to go. Apparently, Mr. Raby waived his rights in some matter, I guess he waived his rights by telling the officer that he wanted to go. Whether or not that's a proper waiver, that issue is not before this court. However, I might add that The United States Supreme Court takes a softer view on waiver these days especially since the decision of Schneckloth v Bustamonte. That was a waiver of a search, where the officer searched the trunk of a car, and in that case, the U S Supreme Court says "let's look at the whole incident, let's see if there was any force used. Whether there was any coercion. If there wasn't perhaps there was a waiver of rights". That urged trial courts to look at the whole, at all of the surrounding facts and circumstances. The interesting thing that The U S Supreme Court noted is that you do not have to advise the defendant of the entire gavet of his rights, of his Miranda rights, etc. I think we have a very similar situation here it's not the search of a trunk of a car, but it's the seizure or view of a person, I think the same standards could be applied for a fact situation here.

(MR.RUKSTELE-MINUTE 42:45 ON AUDIO) If I may further address myself to the next issue that the brother counsel spoke of and that is the issue on the NRS 193.196, excuse me, 193.165 the Use of Deadly Weapon statue. I must confess to you gentlemen that the Clark County district attorney's office has not been very consistent in their pleadings on this matter. I think this court should expect and should demand consistency from our office. We have not been consistent. There have been instances where we have pled this count or this charge "the use of the deadly weapon" in one count, there have been other instances where we have plead it in two counts. There are positions I submit to support either theory. Perhaps, uh hopefully this honorable court's decision in Woofter would straighten this out once and for all. Perhaps this case here, this case at the bar can straighten that issue out once and for all. However... **JUDGE**: Have you contacted the Washoe County District Attorney's office to see how they charged it? Do you have any communication with your fellow district attorneys? **MR. RUKSTELLE**: I'm sure there is such communication your honor. **JUDGE**: I've seen some of their pleadings, and they, when they had one of these situations, where there had been a robbery with a firearm, set up in regular pleadings though state of Nevada, County of Washoe District Attorney being informed that so and so committed the crime of robbery in such and such a manner by the use of a firearm and they set forth both the statutes, the robbery statute and the enhanced punishment statute, so he's on notice that he's subject to punishment under both of those statutes, just one count and then when he is uh tried and it goes to the jury. The jury is given two verdicts. Only one of which they can return, one they can find the defendant guilty of robbery or one guilty robbery by the use of a firearm. **MR. RUKSTELE**: If I, may I

inquire. **JUDGE**: That's something that you have to get into in your own operation of your office, but uh. **MR. RUKSTELE**: Well, your honor, we want to do what's right. This is one possibility, this this much, however, is clear to our office. Number 1, it's our position that we have to plead, what we intend to prove, and if we intend to prove that a deadly weapon was used, then I submit we have to plead that. **JUDGE**: Well can't you plead that in one count? **MR. RUKSTELE**: Well, I believe we can plead that in one count. **JUDGE:** Can't you sight the two statutes that have been bound over so the defendants put on adequate notice and due process has been had, like they do in Washoe County? **MR. RUKSTELE**: That can be done. **JUDGE:** Can't you then try him on that count? Can't you instruct the jury that you may return, find the defendant guilty of robbery, given (give him) that verdict, the jury, that verdict or another verdict guilty the robbery with the use of a firearm. **MR. RUKSTELE:** Does the court suggest that two instructions be given to the jury? **JUDGE:** Well, I understand that process is followed, I'm not suggesting anything. Just uh I understand that is followed as strict news, weather as a reasonable way to handle it, but I'm not speaking for the court. **MR. RUKSTELE**: I see, well your honor, here is the danger that I perceive and it again it's a possibility, I don't know. First of all, this court we're faced with problems that not all of the trial judges in the Eighth Judicial District Court, they're not consistent with what they expect and what they demand there are some judges in the Eighth judicial District Court who believe that it should be two counts and there are other judges who believe that it should be one count. **JUDGE**: We had hopes that we had hopes that, that we'd at least resolve that now. **MR.RUKSTELE**: I'd hoped, I would like to think so your honor, yes. However, I'm sure you know this case came up quite some time ago. When this case was tried, that problem was still in Las Vegas. The only problem that I can see that pleading this in one count is that it perhaps would confuse the jury and when I say confuse the jury, the jury may find itself in a situation where it says; well, I believe that this man perpetrated a robbery, however, I do not believe that the weapon he used was a deadly weapon, therefore I'm gonna vote for not guilty. **JUDGE**: Well, uh Justice Mowbray suggests that under the Washoe County practice they would have, they would have an alternative verdict to use that didn't incorporate reference to a deadly weapon and that the wanted simply to find him guilty of robbery, but robbery without the use of a deadly weapon, they would use that verdict form. **MR. RUKSTELE**: I see, however, your honor, my point is, however it's pled its gotta go to the jury. It's still...Whether or not... **JUDGE**: Well now that's news to me. Uh, uh If you, if you have uh a case that involves a lesser included offense, you give them, do you give the jury verdicts that enable them to bring in a less, a finding of guilty on a lesser included offense. **MR. RUKSTELE**: That's. **JUDGE**: Don't you? **MR. RUKSTELE**: Yes, sir. **JUDGE**: So, if you, if you uh plead uh robbery in the normal form, and then go on uh with an allegation that it was done with a deadly weapon, can't you, uh can't you give them a verdict for the uh principal offense and a verdict that would encompass the enhanced offense, as Justice Mowbray suggests? I mean, uh in fact, it seems to me that uh under our holding in Woofter v O'Donnell where we say that uh it's to be pled in one count that, that would be about the only way you could do it, idnt it? Give them two verdict forms? **MR. RUKSTELE**: I agree, your honor. **JUDGE**: Idn't, now you suggest a special finding, but actually isn't that just a form of special verdict, another verdict form? **MR.**

RUKSTELE: It is another verdict form, however the, that specific question, I believe whether or not a deadly weapon was used, should be pled, and the jury has to decide that. **JUDGE**: I don't think, I don't think there's anyone here uh that's in disagreement with that, I think that everybody agrees that uh due process requires that the, the enhancement aspect of the uh crime, if you're going to rely on it to be pled so that the defendant will have due process uh notice of, of the fact that your seeking an enhanced penalty and uh I think everybody is in agreement that uh you gotta submit the issue to the jury by some kind of uh form. **MR.RUKSTELE**: Very well your honor, and I guess my point in this discussion is this, we tried to submit it to the jury, we did it by separate count, the, the end result is the same uh I guess what this issue deals with... **JUDGE**: Can you suggest a simple way that the uh the defendant's claim that his rap sheet may one day prejudice him, can be obviated? **MR. RUKSTELE**: Well, I don't believe that counts 6 through 10 that conviction of these counts would ever appear on a rap sheet because they're not conviction for criminal offenses. It is impossible, we can't, it is impossible to charge a person one count for use of a deadly weapon in the commission of a crime, uh I don't believe you can charge that count, charge a defendant with that offense without having a substantive offense... robbery, burglary, rape, etc. attached to it. I don't think that can be done. Ergo... its NOT a crime, its merely, as we all know uh an enhancement penalty, it's not in the penal section, its in the preliminary provision section. Quite simply, it is NOT a crime. Therefore, it should not appear on the rap sheet. **JUDGE:** It probably will. It's a judgement of conviction. **MR. RUKSTELE**: It's a...Your honor, it's a judgment of... **JUDGE**: One of the things that appear on the rap sheet that (chuckling)... **MR. RUKSTELE**: the that's right. **JUDGE**: is convictions. **MR. RUKSTELE**: A lot of things appear on rap sheets, that shouldn't appear. Perhaps this may be one of them uh **JUDGE**: Well, we can't solve the biologic, when you get back uh to your office, why don't you get a copy of his rap sheet and send it to us. **MR. RUKSTELE**: Oh, I'd be delighted to. **JUDGE**: Alright. **MR. RUKSTELE:** (inaudible) Your honor, may it please the court, I have nothing more to, to say regarding these issues. If there are any questions that this court may have. Thank you very much.(MR.RUKSTELE ENDS AT 53:59) **JUDGE:** Thank you Mr. Rukstele. Mr. Maupin. Send council a copy of that, if you would. **MR. RUKSTELE**: Yes sir. (MR.MAUPIN'S REBUTTAL STARTS AT 54:10) **Mr. Maupin**: Thank you your honor. I can actually take issue with the some of the basic assertions councils' made about the deadly weapon statute. In the first place, the pleading of this, of this, of this particular statute in one count would not confuse the jury, and if it did, it would be the fault of the attorneys involved. This is a matter that the attorneys have to resolve in terms of their instructions and the forms of verdict that they submit to the jury. Now I've been involved in a couple of these trials myself and I can tell you from hard experience, that they weren't confused. It's pled in one count, and in one instance a special verdict was used, the jury was instructed on the on the doctrine of reasonable doubt, on the elements of the charge. They were to, they were to find if they felt the evidence was sufficient, that the defendant was guilty of robbery, and if they so found, then they were to make another finding, that finding, being whether or not there was sufficient proof to believe that a deadly weapon was used in the Commission of the crime. It's not a confusing situation at all. It should be pled in that form. The problem is, is that it should

not be pled in the form that it sounds in a felony, and that's what it, that's what this particular situation involves. It was pled as a felony, and therefore his record, when you search his record, down in the County Courthouse, it will show that he has been convicted of not 5 robberies, but he has been convicted twice for each of those 5 robberies, therefore 10 convictions. The state argues in its brief, that the forms of verdict did nothing more than allow the jury to so find, that they believe the evidence showed such a fact referring to the existence of a deadly weapon. That is NOT what these verdicts did, these verdicts found him guilty of what appears on the record, in terms of the verdict, the information, and the judgment of conviction, shows that he (stuttered) committed five other felonies. These are not crimes. They also show that he's been convicted twice for each offense. (Minute 56:38 on audio). I am also gratified by the solicitude that council shows toward individuals accused with crime when he speaks about the motion to suppress, he was, he said that it was, he would "think it was very unfortunate if an innocent man was brought to jail and arrested...What else could the police do in this situation". Well, there's one thing they could have done, they could have taken him down to the jail, held a lineup, incarcerated him, and at that time, had a full corporeal lineup with all the victims present. But they didn't do that, and I submit to you that the part, that it's a much worse situation that an innocent man is brought through an unduly suggestive procedure, and then convicted when he could have been detained for a relatively short period of time, during which they had a line up, which would either exonerate or relief or, or would implicate him. Terms of subjectivity in this case, council has in essence argued the motion to suppress here before this court, I don't think that is necessarily proper in this tribunal, because this issue was never heard before the trial court. And one issue that he, that he gulled on was that Mr. Spawn was the one man who didn't have a confrontation, he didn't see a lineup, he didn't, he wasn't present at the two man, at the one man show up. He was the only one who was equivocal in his identification, the other persons were dead sure, and that to me is a clue, that there is a, there is an issue that should have been resolved on the motion to suppress, because there is a possibility once that, once the type of cross examination that would be undertaken at the motion to suppress was had, there is a possibility that it could have been shown to be unduly, suggestive, and to have improperly tainted the in court (?) identification. What I'm saying is that the 15-day rule can be used to prevent the airing of constitutional issues, issues that are not, that cannot be prevented from being heard by this court, and the trial court should not be able to, to utilize the 15-day rule to refuse to hear this issue. He speculates on why the judge did not uh hear this motion, oh, I think the record is quite clear on that, he felt there was a waiver, there's no waiver, he felt that there was no points and authorities in the file, but in fact, there were. And he felt that it was not filed in compliance within NRS 174.125 which again, I suggest to this court should that be used, to be able, too far for the airing of constitutional issues of trial. Thank you. **JUDGE**: Thank you, Mr. Maupin. The case will be, will stand submitted upon the delivery of the copy of the rap sheet as previously mentioned. Uh, the court will be in recess until 25 minutes of the hour.