

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID FUGATE,

SUPREME COURT No. 69925

Appellant,

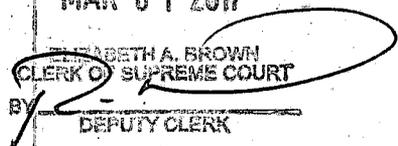
vs.

THE STATE OF NEVADA,

Respondent.

FILED

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BY  DEPUTY CLERK

APPEAL FROM JUDGMENT OF THE HONORABLE ELLIOTT SATTLER

SECOND JUDICIAL DISTRICT COURT

APPELLANT'S SUPPLEMENTAL BRIEF

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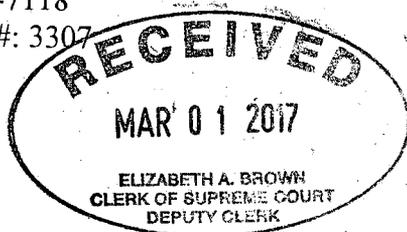
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17-07092

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STATEMENT OF FACTS

Matthew David Fugate, Appellant herein, was charged by way of an Indictment dated January 28, 2015, with three counts of Violation of Lifetime Supervision by Sex Offender, felony violations of NRS 213.1243, for conduct which occurred on or about October 21, 2012 and April 9, 2014.

The State filed an Information Amending Indictment on April 6, 2015, which reduced the charges to:

Count I: Violation of Lifetime Supervision by Sex Offender, NRS 213.1243, a felony, occurring on October 21, 2012, for the following conduct: "the defendant did have contact with a person less than 18 years of age, to wit: a male juvenile, in a secluded environment without another adult who has never been convicted of an offense present." 1AA 124-125.

Count II: Violation of Lifetime Supervision by Sex Offender, NRS 213.1243, a felony, occurring on April 9, 2014, for the following conduct: "the defendant did possess an electronic device capable of accessing the internet and/or did access the internet through an electronic device or by any other means without approval by the parole and probation officer assigned to the defendant." 1AA 125.

The case proceeded to jury trial. The jury convicted Mr. Fugate of Count I, having contact with a minor in a secluded area without another adult who has never been convicted of an offense present. 2AA 303-304.

At the trial, the State called witness David Smith, a Nevada Parole Board

Commissioner who testified that the Board set conditions for lifetime supervision by way of Exhibit 1 and that Mr. Fugate could not have contact with a person under age 18 unless another adult who had not been convicted of an offense under NRS 179D.410 was present. David Smith advised the jury that the Board sets the conditions and that the offender has to agree to the conditions and sign the supervision agreement. According to Mr. Smith, the Board was required to set conditions of lifetime supervision. 2AA 379-388.

The jury was instructed by way of jury instruction number 4 that the crime committed was as follows:

Count I. Violation of Lifetime Supervision by Sex Offender, a violation of NRS 213.1243, a felony by... That the said defendant on the 21st day of October A.D., 2012,... did willfully and unlawfully having been previously convicted of a sexual offense, to wit: Attempted Lewdness with a Child Under the Age of Fourteen, did violate a condition imposed upon him pursuant to a program of Lifetime Supervision imposed as a consequence of his conviction, to wit: the defendant did have contact with a person less than 18 years of age, to wit: a male juvenile, in a secluded environment without another adult who has never been convicted of an offense present. 2AA 278.

Mr. Fugate was on lifetime supervision from a felony conviction which entered against him on November 13, 2003, attempted lewdness with a child under

fourteen. Mr. Fugate was not on parole. The jury was provided a copy of the prior judgment of conviction, which document advised the jury that Mr. Fugate was sentenced to 36-120 months in prison. 3AA 737-738. Mr. Fugate served his sentence. Upon conclusion of the sentence, Mr. Fugate was placed on lifetime supervision in 2009.

The Board of Parole Commissioners action on this case included the addition of terms to the standard conditions of lifetime supervision which included that Mr. Fugate: 1) not possess any electronic device capable of accessing the internet unless approved by his supervision officer and 2) that he not be within 500 feet of a public or private school, a school bus stop, a center or facility that provides day care, a video arcade, an amusement park, a playground, a park, an athletic field or facility for youth sports or a motion picture theater. 3AA 725, 727 (Exhibit 2 at trial).

Mr. Fugate executed a lifetime supervision agreement on November 18, 2009. 3AA 729. This agreement was provided to the jury as Exhibit 3. 3AA 730. The terms of this agreement included terms found in NRS 213.1255, a statute

directed at parole conditions for sex offenders. Special condition number 18 was added by the Board and required that Mr. Fugate not have contact with a person less than 18 years of age unless another adult who has never been convicted of an offense listed in NRS 179D.410 was present. NRS 179D.410 was repealed in 2007. NRS Chapter 179D was a chapter of law dedicated to registration of sex offenders.

On September 15, 2010, Mr. Fugate executed a lifetime supervision agreement which imposed an additional term by way of Special Condition number 18 and required that Mr. Fugate not have contact with a person less than 18 years of age unless another adult who has never been convicted of an offense listed in NRS 179D.410 was present. 3AA 731-732. This agreement was provided to the jury as Exhibit 4.

On April 9, 2014, Mr. Fugate executed a lifetime supervision agreement which imposed the same special condition number 18, but also imposed an additional condition at paragraph 24 which stated: "B. Prohibit the subject from being alone with a child unless an adult who has never been convicted of a sexual

offense is present . 3AA 734-735. The special condition found at 24B deleted the language “secluded environment”.

The charging document required the State to prove only that Mr. Fugate could not be “in a secluded environment without another adult who has never been convicted of *an offense* present.” 1AA 124-125.

During deliberations, the jury returned with Jury Question #2, “With regards to Instruction No. 19, element 3, are we able to consider all parts of evidence, Document Exhibit No. 3, specifically items No. 18 and Item No. 24 sub (b), are we allowed to consider both?” 3AA 615-616. In response to this question, the jury was advised: “In response to the jury question, please refer to Jury Instruction NO. 7”. 6AA 618.

Jury instruction number 19, element 3 stated:

“The Defendant did willfully have contact with a person under the age of 18 in a secluded environment without another adult who was not a sex offender present.” 2AA 294.

The answer referred the jury to jury instruction number 7, which was an instruction on the general evaluation of evidence. 2AA 282.

The conditions imposed by the Board for not being with a minor in a secluded environment and not having an internet accessible electronic device are not found in NRS 213.1243. There was no criminal allegation for violation of conduct against Mr. Fugate which was found in the statutory conditions contained in NRS 213.1243. There was insufficient evidence to sustain a conviction for violation of NRS 213.1243.

Mr. Fugate was sentenced to the maximum possible punishment by the District Court, 28-72 months in prison. 3AA 718-719. This Supplemental Brief is filed pursuant to this Court's Order of February 16, 2017 and is limited to the application of *McNeill v. State*, 132 Nev. Adv. Op 54, 375 P.3d 1022 (2016).

1. THE ADDITIONAL CONDITIONS APPLIED TO APPELLANT'S LIFETIME SUPERVISION CLAUS VIOLATED NRS 213.1243 & THE SEPARATION OF POWERS DOCTRINE, Nev. Const. art. 3, § 1.

Standard of Review:

The interpretation of a statute is a question of law that this Court reviews de novo. **Mendoza-Lobos v. State**, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009).

Issues relating to the constitutionality of a statute are reviewed de novo. *State v.*

Hughes, 127 Nev. ___, ___, 261 P.3d 1067, 1069 (2011).

Argument:

NRS 213.1243, does not grant the Parole Board authority to impose additional conditions upon lifetime supervision other than those specifically directed in the lifetime supervision statutory scheme. *McNeill v. State*, supra. Mr. Fugate did not violate a condition found at NRS 213.1243(3-5). The jury convicted Mr. Fugate for having contact with a person less than 18 years of age, to wit: a male juvenile, in a secluded environment without another adult who has never been convicted of an offense present.” 1AA 124-125, 2AA 303-304.

This Court has had the opportunity to distinguish the condition of lifetime supervision from that of an offender granted parole. In *Coleman v. State*, 130 Nev. 22, decided March 27, 2014, this Court held:

“The special sentence of lifetime supervision “commences after any period of probation or any term of imprisonment and any period of release on parole.” NRS 176.0931(2); see also NRS 213.1243(1). Under the plain language of the statute, lifetime supervision begins only after the person has been discharged from any further obligations of probation or has expired his prison term while incarcerated or on parole. Therefore, unlike a probationer or parolee, a person on lifetime supervision is not subject to a suspended or unexpired sentence of imprisonment set forth in the judgment of conviction

that may be enforced upon a violation of the conditions of lifetime supervision. 3 Instead, when a person on lifetime supervision violates a condition of that supervision, the violation is a new, separate and distinct offense, NRS 213.1243(8), and will result in the person being under a sentence of imprisonment only if he is charged with, convicted of, and sentenced for that offense. 4 In that event, the person is under a sentence of imprisonment based on the new judgment of conviction, not the lifetime supervision. A person on lifetime supervision therefore is not in the same position as a probationer or parolee.”

The State presented insufficient evidence that Mr. Fugate violated any provision of NRS 213.1243 (3-5) and the charging document did not allege a violation of the lifetime supervision statute. The charging document alleged a violation of the parole conditions found in NRS 213.1255. The condition of not being in a secluded area with a minor child without adult supervision by an adult who has not been convicted of a sexual offense is found at 213.1255 (5)(b) and that statutory section also deleted the term, secluded area, from its provisions. The clear language of the section demonstrates that it was not directed at lifetime supervision as the section states: “prohibit the *parolee* from being alone with a child unless another adult who has never been convicted of a sexual offense is present.”

Under the separation of powers doctrine of the Nevada Constitution, each of the three branches of government is vested with authority to exercise its own functions, and no branch may exercise the functions of another unless expressly permitted to do so by the Nevada Constitution. *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 241-42 (1967) (discussing Nev. Const. art. 3, § 1). This doctrine exists for one very important reason—“to prevent one branch of government from encroaching on the powers of another branch.” *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009).

The legislature has not imposed NRS 213.1255 upon lifetime supervision participants. The legislature imposed NRS 213.1255 upon parolees. This Court has noted that the status as parolee is separate and distinct from the status of a lifetime supervision participant. The Legislature is the only governmental branch who can define what constitutes a crime. The charge against Mr. Fugate is a new felony crime, not a violation of parole. Hence, the charge must be levied by the Legislature, not the Board.

The application of NRS 213.1255 parole provisions upon Mr. Fugate was

unlawful. The criminal violation alleged in Count I was not found in NRS 213.1243, thus Mr. Fugate was convicted for a crime which could not have occurred. The Board imposed conditions were unlawful. This judgment of conviction must be vacated.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR VIOLATION OF NRS 213.1243.

Standard of Review:

In determining the sufficiency of the evidence below, the Court considers “whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt.” *Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). The critical question is “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Argument:

There was no evidence presented to this jury that Mr. Fugate violated any term found in NRS 213.1243. Mr. Fugate's residence was proper and approved. NRS 213.1243(3). Mr. Fugate was employed. Mr. Fugate was not within 500 feet of a prohibited area as found in NRS 213.1243(4). Mr. Fugate paid his costs.

This jury could not have convicted Mr. Fugate for a violation of requirements found at law in NRS 213.1243, as there was no violation of that nature alleged against Mr. Fugate. The two charges against him were 1) he had contact with a minor without appropriate adult supervision and 2) his telephone had access to the internet. The jury acquitted on the telephone charge. The conviction for Count I must be set aside as there was no evidence submitted to this jury that Mr. Fugate actually violated NRS 213.1243.

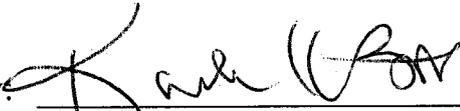
CONCLUSION

This conviction must be reversed and this charge dismissed. Mr. Fugate did not violate the conditions of lifetime supervision found at NRS 213.1243 and he cannot stand convicted of a separate felony for his alleged contact with a minor in

a secluded area without another adult who has never suffered a conviction for a sexual offense being present. Mr. Fugate did not commit a crime.

Mr. Fugate submits that the other remaining issues found in the Fast Track Statement on file demonstrate cumulative errors which warrant reversal of the conviction.

Respectfully submitted this 2nd day of March, 2017.

By: 

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CERTIFICATE OF COMPLIANCE WITH BY COUNSEL

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S SUPPLEMENTAL BRIEF" and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the word and line counts found in 32(a)(7)(A)(ii).

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. The document was prepared in Word Perfect. There are 8 typed pages, 2307 words in this brief and 223 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

Dated this 2nd day of March, 2017.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

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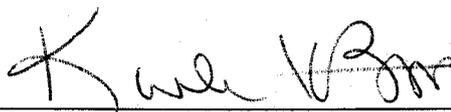
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DATED this 2nd day of March, 2017.



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