IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 59957

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. Statement of the Issue

Did the district court err by informing Dunckley he was eligible for probation when he pleaded guilty to a violation of NRS 201.230 where, even though NRS 201.230 did not provide for probation, NRS 176A.110(3)(j) specifically provided probation was available for a violation of NRS 201.230?

II. Summary of the Argument

This is an appeal from the district court's order denying Dunckley's motion to withdraw his guilty plea. Dunckley contends he did not enter a knowing and intelligent guilty plea because his counsel, the district court, and the guilty plea memorandum told him that probation was available as a consequence of his plea when it was not.

Dunckley pleaded guilty to lewdness with a child under the age of 14 years and attempted sexual assault. He was informed probation was available. On August 11, 2008, the district court declined to put Dunckley on probation at the sentencing hearing. On March 3, 2010, Dunckley moved the district court to withdraw his guilty plea, because when he pleaded guilty, he believed

probation was available, when it was not.

The lewd act to which Dunckley pleaded guilty occurred between August 1998 and August 2000. In 1995, probation was available for a violation of NRS 201.230. In 1997, the Legislature removed the possibility of probation from that statute. But in the same legislative session and in the same senate bill, the Legislature amended NRS 176, and added a new section, which became codified as NRS 176A.110. Under NRS 176A.110(3)(j), probation became available for a violation of NRS 201.230. Although the Legislature removed the possibility of probation from NRS 201.230 in 1997, the statute did not explicitly prohibit placing an offender on probation. Because NRS 176A.110(3)(j) supplements and complements NRS 201.230, the statutes must be read together. Accordingly, probation was available to one who violated NRS 201.230 between 1998 and 2000; and the district court correctly denied Dunckley's motion to withdraw his guilty plea.

On direct appeal from his judgment of conviction, Dunckley argued the district court mistakenly believed that probation was not available. This Court held that the district court was aware that probation was a sentencing option for Dunckley. Thus, this Court implicitly held probation was lawfully available in this case. Dunckley's argument is therefore barred by the law of the case.

III. Argument

A. The District Court Properly Denied Dunckley's Motion to Withdraw his Guilty Plea Because Probation was Available for a Violation of NRS 201.230.

1. Standard of Review

"When reviewing a district court's denial of a motion to withdraw a guilty plea, this court presumes that the district court properly assessed the plea's validity and . . . will not reverse the lower court's determination absent

abuse of discretion." *Crawford v. State*, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001).

The Court reviews "questions of statutory construction, including the meaning and scope of a statute," de novo. *Nevadans for Prop. Rights v. Sec'y of State*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006).

2. Discussion

A district court may grant a post-conviction motion to withdraw a guilty plea in order to correct a manifest injustice. NRS 176.165. "[C]onsideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice.'" *Hart v. State*, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000).

"[I]neligibility for probation is a direct consequence arising from a guilty plea . . . [and] a defendant must be aware that an offense is nonprobational prior to entry of his plea." *Little v. Warden*, 117 Nev. 845, 849-50, 34 P.3d 540, 543 (2001)(footnote omitted). Here, Dunckley sought relief from his guilty plea more than 18 months after he pleaded guilty (Appellant's Appendix, Volume 1, 32-33, 187-201). Although laches was never raised as a defense in the district court, it is nevertheless a valid reason to deny Dunckley's motion. *Hart*, 116 Nev. at 564, 1 P.3d at 972.

Dunckley argues that in 1997 the Nevada Legislature amended NRS 201.230 by changing it from a category B felony to a category A felony, and, as set forth in NRS 193.130(2)(a), a category A felony does not provide for probation as part of a sentence. NRS 193.130(2)(a). NRS 193.130(2)(a) sets forth the sentences for various grades of felonies, unless the sentences are "otherwise provided by specific statute." As noted below, NRS 201.230 provided for probation between 1998 and 2000 under NRS 176A.110(3)(j) as

it then existed. Section 7, of chapter 176, Statutes of Nevada 1997, at page 2504-05.

Furthermore, NRS 193.130(2) does not attempt to outline all possible sentencing schemes a district court is authorized to use for the various classes of felonies. The statute only provides the available sentences but not for the execution of those sentences. For example, a court can impose probation as part of a sentence for a category D felony, even though probation is not specifically authorized for such a felony in NRS 193.130(2)(d). Accordingly, NRS 193.130(2)(a) does not bar the imposition of probation for a violation of NRS 201.230.

Dunckley also argues probation was not available for a lewdness offense committed between 1998 and 2000. In 1995, probation was available for a violation of NRS 201.230. Section 89 of chapter 443, Statutes of Nevada 1995, at page 1200-1201. In 1997, the Nevada Legislature amended NRS 201.230 three times. Initially, the Legislature amended NRS 201.230 in SB 328, which retained the possibility of probation. Section 19 of chapter 641, Statutes of Nevada 1997, at page 3190. In the same session, the Legislature amended the statute again in AB 280, without effect to the possibility of probation. Section 5, of chapter 455, Statutes of Nevada 1997, at page 1722. Again in the same legislative session, the Legislature then removed the possibility of probation in SB 5. Section 4 of chapter 524, Statutes of Nevada 1997, at page 2502-2503. But in SB 5, the Legislature also amended NRS 176, and added a new section, which became codified as NRS 176A.110. Section 7 of chapter 524, Statutes of Nevada 1997, at page 2504-2505. Under NRS 176A.110(3)(j), the Legislature added probation as a possible sentencing condition for a violation of NRS 201.230.

Although the Legislature removed the possibility of probation from NRS 201.230 in 1997, the statute did not explicitly prohibit placing an offender on probation. The statute provided that a conviction resulted in a sentence of 10 years to life with the possibility of parole after 10 years. Section 5 of chapter 455, Statutes of Nevada 1997, at page 1722. In the same bill and the same legislative session that the Legislature removed the possibility of probation from NRS 201.230, the Legislature also included the possibility of probation for a violation of NRS 201.230 in NRS 176A.110. Thus, NRS 201.230 and NRS 176A.110 do not conflict with or contradict one another. They supplement and complement one another. Accordingly, the district court correctly denied Dunckley's motion to withdraw his guilty plea. *See e.g., Sanders v. State*, 119 Nev. 135, 140, 67 P.3d 323, 327 (2003)(statutes are interpreted based on their plain meaning and to reflect legislative intent); *Fierle v. Perez*, 125 Nev. ___, ___, 219 P.3d 906, 915–16 (2009) (statutes should be interpreted in a manner to avoid conflict with other related statutes).[1]

Finally, on direct appeal, Dunckley argued the district court abused its sentencing discretion when it did not place him on probation because the district court did not believe probation was lawfully available. *Dunckley v. State*, No. 52383 (Order of Affirmance, May 8, 2009). The Court rejected that argument, holding "not only was the district court aware that probation was

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[1]If there were a conflict between NRS 176A.110 and NRS 201.230, the rule of lenity would suggest that the district court had the authority to grant Dunckley probation. *See State v. Lucero*, 249 P.3d 1226, 1230 (2011)("The 'rule of lenity [is a rule of construction that] demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor,' and it 'applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose[]'")(citations omitted).

a sentencing option for Dunckley, but that it properly exercised its discretion by imposing prison terms for the offenses." *Id.* at 3. Accordingly, this Court has previously determined that probation was a sentencing option. Dunckley's argument is therefore barred by the law of the case. *See Hall v. State*, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975).

IV. Conclusion

For the foregoing reasons, the State respectfully requests the Court to affirm the district court order denying Dunckley's motion to withdraw his guilty plea.

DATED: August 24, 2012.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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.

DATED: August 24, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 24, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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