IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBURT HICKMAN, JR.
A/K/A William Hicks,

Petitioner,

vs

THE STATE OF NEVADA,

Respondent.

CASE NO: 64776

MOTION TO STRIKE PORTIONS OF APPELLANT'S REPLY BRIEF OR FOR LEAVE OF COURT TO FILE SUPPLEMENTAL PLEADINGS

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, CHRIS BURTON, and files this Motion to Strike Portions of Appellant's Reply Brief or for Leave of Court to File Supplemental Pleadings. This motion is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 23rd day of March, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Chris Burton*
CHRIS BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney

ARGUMENT

Appellant's Reply Brief alleges for the first time before this Court that his adjudication as a small habitual criminal was improper because two of the prior convictions proffered by the State at sentencing arose out of the same event. See Appellant's Reply Brief ("ARB"), 3/20/15, p. 2. This argument should be struck due to Appellant's failure to raise it in his Opening Brief or Respondent should be given an opportunity to address this contention.

Nevada Rules of Appellate Procedure (NRAP) Rule 28 directs that a reply brief "is limited to answering any new matter set forth in the opposing brief[.]" As such, "[i]ssues not raised in an appellant's opening brief are deemed waived." Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. Adv. Rep. 14, 252 P.3d 668, 672, n.3 (2011) (citing Bongiovi v. Sullivan, 122 Nev. 556, 570, n.5, 138 P.3d 433, 444, n.5 (2006)). Similarly, an "issue, raised for the first time in appellant's reply brief, will not be considered on appeal." Phillips v. Mercer, 94 Nev. 279, 283, 579 P.2d 174, 176-77 (1978); accord, State v. Glusman, 98 Nev. 412, 428, 651 P.2d 639, 649 (1982).

Appellant's Opening Brief did not raise the argument that his habitual adjudication was flawed because two of the prior convictions relied upon by the sentencing Court arose out of the same event. Instead, Appellant argued only that his habitual adjudication was improper because the Court abused its discretion,

was unaware such adjudication was discretionary, and sentencing counsel was ineffective. See Appellant's Opening Brief ("AOB"), 1/21/15, pp. 17-19. As such, this new argument should be struck or Respondent should be given an opportunity to address it.

If Respondent is given an opportunity to address Appellant's claim that two of his prior convictions should have constituted one prior felony conviction for habitual adjudication purposes because they arose out of the same event, the argument would be substantially as follows. To support his position, Appellant cites NRS 207.010, Halbower v. State, 96 Nev. 210, 606 P.2d 536 (1980), and Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). However, all three of these authorities support the State's position that Appellant's convictions for Battery Domestic Violence, Third Offense, and Stop Required on Signal of Police Officer constitute two separate prior conviction for adjudication purposes. "Where two or more grow out of the same act, transaction or occurrence, ***and are prosecuted in the same Indictment or Information***, those several convictions may be utilized only as a single "prior conviction" for purposes of applying the habitual criminal statute." Rezin, 95 Nev. at 462, 596 P.2d at 227 (emphasis added); see also, Halbower, 96 Nev. at 211-12, 606 P.2d at 537. Here, all three of Appellant's prior felony convictions proffered by the State at sentencing arose out of ***separate*** Indictments or Informations. See, 2 AA 311-12. As Appellant's prior convictions

arose out of separate Informations or Indictments, it was entirely appropriate for the sentencing court to count them as three separate felony convictions, even assuming Appellant's claim that two arose out of the same transaction true (an assertion the State does not concede but declines to address in the interest of judicial economy).[1]

The State also feels it necessary to address Appellant's significantly misleading discussion of Tanksley v. State, 113 Nev. 997, 946 P.2d 148 (1997). See ARB, 3/20/15, pp. 4-5. In his reply brief, Appellant contends the Tanksley Court, which was substantially relied upon by the State in its Answering Brief, found it improper for a sentencing court to consider a sixteen-year old felony conviction for criminal mischief in adjudicating the defendant a habitual criminal. In fact, Appellant even quotes "the Tanksley Court" as "not[ing]" "the criminal mischief charge was for breaking a toilet and some glass and occurred sixteen years prior to the arson; this was a stale, trivial, non-violent crime." ARB, 3/20/15, p. 4. However, the quotation relied upon by Appellant was the ***dissenting*** opinion and certainly not the holding of "the Tanksley Court" as implicitly claimed by

[1] The State also notes that, even assuming Appellant's argument persuasive (an assertion the State does not concede), his adjudication as a small habitual criminal was still appropriate as he had been at least twice previously convicted of a felony. See NRS 207.010(1)(a)

Appellant. See Tanksley, 113 Nev. at 1007, 946 P.2d at 154 (Rose, J., dissenting). Appellant wholly fails to note the weight of authority.[2]

CONCLUSION

WHEREFORE, the State respectfully requests that this Court strike the new argument from Appellant's Reply Brief or permit supplemental briefing by Respondent to address Appellant's new arguments.

Dated this 23rd day of March, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Chris Burton*
CHRIS BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

[2] Nevada Rules of Professional Conduct prohibit a lawyer from knowingly making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Rule 3.3. The State makes no comment on whether Appellant's counsel "knowingly" made a false representation to this Court. However, Appellant counsel's discussion of Tanksley certainly gives the distinct and false impression that the Tanksley Court held the exact opposite of its true conclusion. At a minimum, the State asks this Court to advise counsel to be more forthright and clear in future pleadings before this Court. If this Court feels more severe action is warranted, the State asks the matter to be referred to the State Bar.

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 23, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

KRISTINA WILDEVELD, ESQ.
Counsel for Appellant

CHRIS BURTON
Deputy District Attorney

BY */s/ j.garcia*
Employee, District Attorney's Office

CFB//jg