

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

NATASHA JACKSON,

Respondent.

Electronically Filed
Apr 17 2015 09:15 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 67071

APPELLANT'S REPLY BRIEF

**Appeal From Order Granting in Part Jackson's Pretrial Petition for Writ of
Habeas Corpus
Eighth Judicial District Court, Clark County**

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
200 Lewis Ave, Las Vegas, Nevada
89101
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

DAN SILVERSTEIN
Deputy Public Defender
Nevada Bar #007518
CHRISTY CRAIG
Deputy Public Defender
Nevada Bar #006262
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	3
I. THIS COURT HAS CONSISTENTLY CONSTRUED “POSSESSION” TO INCLUDE CONSTRUCTIVE POSSESSION..	3
II. THE DISTRICT COURT ERRED IN DISMISSING TWO COUNTS OF BURGLARY WHEN IT ALSO FOUND THAT THE STATE PROVIDED SLIGHT OR MARGINAL EVIDENCE TO SUPPORT EACH COUNT	8
CONCLUSION	8
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Page Number:

Cases

Anderson v. State,

95 Nev. 625, 629, 600 P.2d 241, 243 (1979) 5, 6, 7

Brooks v. State,

124 Nev. 203, 208–10, 180 P.3d 657, 660–62 (2008)7

Carr v. Sheriff,

95 Nev. 688, 689–90, 601 P.2d 422, 423 (1979)5

Funderburk v. State,

125 Nev. 260, 263–64, 212 P.3d 337, 339–40 (2009)5

Jones v. State,

111 Nev. 848, 851–53, 899 P.2d 544, 545–46 (1995)7

Sheriff v. Burcham,

124 Nev. 1247, 1257, 198 P.3d 326, 332 (2008)8

Statutes

NRS 193.165 3, 5, 6, 7

NRS 205.0604, 5

NRS 205.060(4) 4, 5, 6

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

NATASHA JACKSON,

Respondent.

CASE NO: 67071

APPELLANT'S OPENING BRIEF

**Appeal From Order Granting in Part Jackson's Pretrial Petition for Writ of
Habeas Corpus
Eighth Judicial District Court, Clark County**

ARGUMENT

**THIS COURT HAS CONSISTENTLY CONSTRUED "POSSESSION" TO
INCLUDE CONSTRUCTIVE POSSESSION**

In her Answering Brief, Jackson argues that the term "possession" does not include constructive possession. She bases her argument on a case holding that "use" of a weapon does not include constructive possession of it under NRS 193.165. Her argument, however, ignores the fact that this Court has consistently construed "possession" as inclusive of actual or constructive possession, and that she was charged with possessing the weapon during the burglary, rather than using it. Moreover, when this Court retreated from its construction of "use" as including constructive possession, it did so because of the distinction between using and

possessing a weapon, but this Court did not change its well-settled construction of “possession.”

On August 8, 2014, the State charged Respondent Natasha Galenn Jackson by way of Indictment with, among other things, two counts of Burglary While in Possession of a Firearm. 1 Record on Appeal (ROA) 1–4. These charges stemmed from the night of July 29, 2014, on which Jackson and her boyfriend Cody Winters forced a Freeway Service Patrolman at gunpoint to drive them from their car to a nearby residential neighborhood. Id. at 58–76. Jackson and Winters proceeded to invade the home of the Ramos family, wherein they fought with Mr. Ramos and Mrs. Ramos. Id. at 40–44. While Jackson stabbed Mrs. Ramos with a screwdriver, Winters struggled with Mr. Ramos for the gun, which discharged and killed Mr. Ramos. Id. After Jackson and Winters fled the house, they took refuge in an adjacent abandoned home. Id. at 88–89. Pretending to be a hostage, Jackson lured police officers closer to the building, and as soon as she was out of the line of fire, directed Winters to shoot at the officers. Id. at 97–100. Winters engaged the officers in a firefight, and was eventually killed.

Jackson was charged, among other things, with burglary while in possession of a firearm, under NRS 205.060(4). This crime punishes an individual who commits burglary, and who has or gains possession of a firearm at any time during the

commission of the crime. NRS 205.060(4). Importantly, the burglary charges did not allege “use” of a deadly weapon, nor was Jackson alleged to have violated NRS 193.165 in those counts.

Whereas NRS 205.060(4) punishes having or gaining possession of a deadly weapon during the commission of a burglary, or prior to leaving the building, NRS 193.165 punishes “use” of a deadly weapon while committing a crime. Compare NRS 205.060(4), with NRS 193.165. Indeed this Court has held that one cannot “use” a deadly weapon in committing a burglary. Carr v. Sheriff, 95 Nev. 688, 689–90, 601 P.2d 422, 423 (1979). Section 4 was added to NRS 205.060 specifically in order to address this fact, and punishes possessing the weapon, rather than using it. Funderburk v. State, 125 Nev. 260, 263–64, 212 P.3d 337, 339–40 (2009). Accordingly, the issue presented to this Court is, at heart, whether this Court’s change in construing “use” because it is distinct from “possession,” also resulted in changing the construction of “possession” as used in NRS 205.060(4).

In Anderson v. State, this Court faced the question of whether an unarmed codefendant could be punished for the use of a firearm by a codefendant. 95 Nev. 625, 629, 600 P.2d 241, 243 (1979). This Court concluded that the intent of the legislature was to punish, and thereby deter, individuals who commit crimes with firearm-wielding codefendants. Id. at 630, 600 P.2d at 244. The Anderson Court

noted that an unarmed codefendant may still benefit from the deadly potential of the firearm, even when she does not hold the weapon herself. Id. Accordingly, this Court held that NRS 193.165, which punishes the use of a weapon during the commission of offenses, can reach to unarmed codefendants. Id. at 630–31, 600 P.2d at 244.

Importantly, the Anderson Court held that its decision was consistent with previous interpretations of the term “possession.” Id. Those previous interpretations consistently held that the term “possession” was not limited to actual possession, but extended to constructive possession. Id. Specifically, this Court held, “possession necessary to justify statutory enhancement may be actual or constructive; it may be exclusive or joint.” Id. Jackson is correct that this holding was made in the interpretation of NRS 193.165, rather than NRS 205.060(4), however she ignores the fact that this Court specifically interpreted “possession” to include constructive possession. Id.; Respondent’s Answering Brief (RAB) at 10–11.

Jackson is also correct that there is a critical distinction between “use” and “possession.” RAB at 9–10. Her error comes in her application of that distinction to this Court’s precedent. As noted above, Anderson specifically held that “possession” encompasses constructive possession. 95 Nev. at 630–31, 600 P.2d at 244. Further, that Court applied the construction of “possession” to the “use” requirement of NRS 193.165. Id. Thus, when Anderson was decided, both “possession” and “use”

encompassed constructive possession. Id.; see Jones v. State, 111 Nev. 848, 851–53, 899 P.2d 544, 545–46 (1995).

In Brooks v. State, this Court noted the distinction between “use” and “possession.” 124 Nev. 203, 208–10, 180 P.3d 657, 660–62 (2008). The Brooks Court recognized the incongruity of applying its construction of “possession” to a statute punishing “use.” Id. at 209–10, 180 P.3d at 661. Specifically, the Brooks Court held, “*Anderson’s* reliance on constructive possession was not warranted by the statutory language.” Id. (italics in original). As such, this Court altered the Anderson test in so far as it allowed constructive possession, without more, to subject a defendant to punishment under NRS 193.165. Id.

What is critical to this case is what the Brooks Court did *not* do. Importantly, the Brooks Court did not make any attempt to change the way in which “possession” is construed. Id. Rather, the Court held that applying the construction of “possession” to “use” was inappropriate. Id. Therefore, following Brooks, “possession” is still construed as it was under Anderson—including constructive possession—whereas “use” no longer is. Id.; Anderson, 95 Nev. at 630–31, 600 P.2d at 244. Nowhere in her Answering Brief does Jackson provide any authority indicating that this Court has construed “possession” differently.

At argument on the Petition, Jackson argued that “possession” constituted only actual possession, to the exclusion of constructive possession. Supplemental Record on Appeal (SROA) at 2–3, 15 (“And the [Nevada Supreme] Court has said that you can have use without possession but they’ve never said that you can have possession without ever touching the weapon and that’s what happened in this case.”). In granting Jackson’s Petition and dismissing Counts 1 and 8, the District Court adopted this erroneous construction. *Id.* at 16. As demonstrated above, this Court construes “possession” to include constructive possession. It was error for the District Court to restrict that interpretation. Given that the decision to dismiss Counts 1 and 8 were based upon this erroneous interpretation, dismissal was substantial error warranting reversal. *Sheriff v. Burcham*, 124 Nev. 1247, 1257, 198 P.3d 326, 332 (2008).

II

THE DISTRICT COURT ERRED IN DISMISSING TWO COUNTS OF BURGLARY WHEN IT ALSO FOUND THAT THE STATE PROVIDED SLIGHT OR MARGINAL EVIDENCE TO SUPPORT EACH COUNT

With respect to this claim, the State submits upon the arguments raised in its Opening Brief.

CONCLUSION

Based upon the foregoing, the State respectfully requests the Order of the District Court dismissing Counts 1 and 8 be REVERSED, and the Counts reinstated.

Alternatively, the State respectfully requests that the case be remanded with an order for the District Court to strike Counts 1 and 8 only to the extent that they allege possession of a firearm.

Dated this 17th day of April, 2015.

Respectfully submitted,

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

BY */s/ Ryan J. MacDonald*

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

- 1. I hereby certify** that this brief complies with the formatting requirements of NAAP 32(a)(4), the typeface requirements of NAAP 32(a)(5) and the type style requirements of NAAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
- 2. I further certify** that this brief complies with the page or type-volume limitations of NAAP 32(a)(7) because, excluding the parts of the brief exempted by NAAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains 1,283 words and is 9 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 NAAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference 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 this 17th day of April, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
District Attorney
Nevada Bar #001565

BY /s/ Ryan J. MacDonald

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 17, 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

DAN SILVERSTEIN
CHRISTY CRAIG
Deputy Public Defenders

RYAN J. MACDONALD
Deputy District Attorney

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

RJM/Steven Rose/jg