IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN SCOTT ANDREWS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 71214

Appeal from a Judgment of Conviction in CR16-0323
The Second Judicial District Court of the State of Nevada
Honorable Janet J. Berry, District Judge

APPELLANT'S OPENING BRIEF

JEREMY T. BOSLER
Washoe County Public Defender
Nevada State Bar No. 4925
JOHN REESE PETTY
Chief Deputy Public Defender
Nevada State Bar No. 10
350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4827

Attorneys for Appellant

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on August 5, 2016, and a Corrected Judgment of Conviction on August 11, 2016. 1JA 87-88, 89-90.[1] Appellant, Ryan Scott Andrews (Mr. Andrews), filed a notice of appeal on September 2, 2016. JA 81-92. This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based on jury verdicts involving category B felonies. Additionally, the Nevada Supreme Court should retain and decide this appeal because it presents an issue of first impression. NRAP 17(a)(10).

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[1] "JA" in this Opening Brief stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). Volume numbers appear immediately before "JA."

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

> Whether the district court erred in allowing Mr. Andrews to be charged with possession of 14 or more but less than 28 grams of a controlled substance based on an aggregation of two different types of controlled substances?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. In an amended Information the State charged Mr. Andrews with two counts of trafficking in a controlled substance, violations of NRS 453.3385, category B felonies, and one count of unlawful sale of a controlled substance at or near a public park, a violation of NRS 453.321 and NRS 453.3345, a category B felony. 1JA 1-4 (Amended Information). In both of the trafficking counts the State alleged a trafficking quantity of a controlled substance based on a "mixture" of controlled substances—methamphetamine and heroin. *Id.* Prior to trial Mr. Andrews moved to strike these counts on the basis that it was improper to combine separate controlled substances for the purpose of aggregating them to a trafficking amount. 1JA 5-8 (Motion to Strike Counts I and II). The State opposed the motion, 1JA 9-15 (Opposition to Motion to Strike Counts I and II), and after hearing argument (1JA 16-49 (Transcripts of

Proceedings: Oral Arguments)), the district court denied the motion concluding,

> [i]t is incumbent upon the Court to focus on the packaging of the controlled substances in this case, the lethality of the substances, the schedules, and the amounts of the substances to decide this motion. The Court finds the statute and the law contemplate that when a seller of illegal drugs sells heroin and methamphetamine, which are both schedule I products, both sold together, and located together, the total weight of said Schedule I narcotics appropriately forms the basis for the changes [*sic*] before this Court.

1JA 53 (Order).[2]

Based on an agreement of counsel, 1JA 62 (Transcript of Proceedings: Arraignment), following the district court's order the State filed a Second Amended Information charging only one trafficking count along with the count of unlawful sale of a controlled substance at or near a public park. 1JA 55-58 (Second Amended Information). But this trafficking count retained the "mixture" combination of methamphetamine and heroin. *Id.* at 56 (charging "14 grams or more but less than 28 grams of a Schedule I controlled substance or a mixture

[2] Aside from citing the trafficking statute, neither the motion, nor the opposition, nor the district court's order cited to any other controlling authority from within or without the State of Nevada.

which contains a Schedule I controlled substance, to wit: methamphetamine and heroin[.]").

The jury convicted Mr. Andrews of both counts. 1JA 68-69 (Verdicts). The district court sentenced Mr. Andrews on the trafficking count to a term of 36 to 96 months in the Nevada Department of Corrections and credited him for 193 days in predisposition custody. The district court sentenced Mr. Andrews on the unlawful sale count to a concurrent term of 12 to 30 months (with a consecutive like term for the park enhancement). The district court also imposed fines, fees, an administrative assessment, and attorney fees. 1JA 87-88 (Judgment of Conviction); 1JA 89-90 (Corrected Judgment of Conviction). Mr. Andrews timely noticed his appeal. 1JA 91-92 (Notice of Appeal).

V. STATEMENT OF THE FACTS

Nicholas Daughtery (Nick) became a confidential informant for the Street Enforcement Team (SET), a local law enforcement collaborative.[3] 2JA 119, 127-28. Mr. Andrews was his target. 2JA 196. Nick had known Mr. Andrews for a couple years, lived a few doors down from him in the same apartment complex for a while, and used drugs

[3] SET targets street-level narcotics, prostitution, and underage alcohol offenses. 2JA 167.

with him. 2JA 121-27, 140-41. On June 19, 2015, Nick—after being wired by SET officers, provided buy money by them,[4] and transported to a location near Mr. Andrews's apartment on I Street in Sparks,[5] 2JA 122, 127-31, 172-77; 3JA 248-50—met with Mr. Andrews in his apartment. 2JA 131-32. There, under the ruse that he was buying drugs for a coworker, Nick bought heroin and crystal meth from Mr. Andrews. 2JA 132, 146. The drugs were taken from a drawer in the kitchen. Mr. Andrews put each substance in a separate plastic sandwich bag. 2JA 133. Nick was in the apartment for about 25 minutes and then he left. 2JA 137. Outside he met with SET officers who took possession of the drugs he had purchased from Mr. Andrews, and debriefed him. 2JA 137-38; 3JA 254-55. Nick told them that there were more drugs in the apartment. 2JA 138, 149; 3JA 256.

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[4] Including an extra $180.00 to settle a debt that Nick owed Mr. Andrews after he could not deliver a working Van that he had promised and for which Mr. Andrews had paid $500.00. 2JA 129, 141-42; 3JA 327. At trial Mr. Andrews testified that on June 19th Nick came to the apartment and paid him back. 3JA 331. He acknowledged that they used drugs, but testified that he did not give Nick drugs in exchange for money. 3JA 336-37, 342.

[5] Mr. Andrews's apartment was located within the 1,000-foot zone of Ardmore Park. 2JA 160-66. See also 1JA 73 (Transcript of Proceedings: Sentencing) (arguing against park enhancement because "many residences throughout the city are somewhere near a park. [But the buy] occurred inside an apartment, not at a park.").

Mr. Andrews walked out of his apartment with his dog about five minutes after Nick left. 2JA 178, 206. Reno Police Detective Scott Rasmussen, the lead detective, instructed other detectives to take him into custody. 2JA 171, 178; 3JA 314-16 (noting that the prerecorded buy money provided to Nick was found in Mr. Andrews's right front pocket). Based on the information provided by Nick, Detective Rasmussen applied for a search warrant to search Mr. Andrews's apartment for more drugs. 2JA 179. Pursuant to the warrant detectives found drugs in a drawer of the island portion of the kitchen. 2JA 181. A smaller baggie containing methamphetamine was found underneath a jewelry container in the bedroom. 2JA 182, 187. The drugs recovered from Nick and from the apartment were identified as heroin and methamphetamine. 3JA 240-41.[6]

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[6] See Exhibit 28 admitted on June 14, 2016. 1JA 65-67. This Exhibit pertained to 5 items seized by SET officers of varying weights each less than 14 grams. 1JA 66-67. Items 1 and 3 contained heroin; items 2, 4, and 5 contained methamphetamine. 1JA 68. If we add the weights of the same controlled substances together, and differentiate between them, we find the separate weight of heroin to be 9.445 grams, and methamphetamine to be 9.532 grams—both individually under the 14 grams threshold amount required by NRS 453.3385(1)(b).

VI. SUMMARY OF ARGUMENT

This is a case of first impression. The question presented is whether the district court erred in allowing Mr. Andrews to be charged and tried for a level 2 trafficking offense based on an aggregation of two different types of controlled substances—heroin and methamphetamine—albeit both schedule I controlled substances. Combined the amount exceeds 14 grams; separated into a heroin amount and a methamphetamine amount both individual amounts are less than 14 grams. Other jurisdictions that have confronted this issue have found it proper to aggregate the same type of controlled substances found at different locations so long as they are in the same spatial and temporal time frame, but have also concluded "different controlled substances cannot be aggregated for the purpose of determining the amount of a controlled substance to support a trafficking charge." But that is what happened here. Here 9.445 grams of heroin was combined with 9.532 grams of methamphetamine to get above the 14 gram threshold charging level. And the district court erred when it denied Mr. Andrews's motion to strike on this basis.

Accordingly, this Court must reverse the conviction on Count I and remand.

VII. ARGUMENT

The district court erred in allowing Mr. Andrews to be charged with possession of 14 or more but less than 28 grams of a controlled substance based on an aggregation of two different types of controlled substances.

Standard of Review and Discussion

A district court's pretrial order denying a motion to strike counts is reviewed for abuse of discretion. "An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' *Black's Law Dictionary* 119 (9th ed. 2009) (defining 'arbitrary'), or 'contrary to the evidence or established rules of law,' *id.* at 239 (defining 'capricious')." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

NRS 453.3385(1) makes it a felony for a person to "knowingly or intentionally sell[], deliver[], or bring[] into this State ... any controlled substance which is listed in schedule I, except marijuana, or any mixture which contains any controlled substance[.]" A person who violates the statute is subject to different penalties depending on the amount or weight of the controlled substance. *Id.* In calculating

amounts, the term "mixture" used in the statute means the aggregate weight of an entire mixture rather than just the weight of the controlled substance that is contained in the mixture. *Sheriff, Humboldt Cnty. v. Lang*, 104 Nev. 539, 542-43, 763 P.2d 56, 58-59 (1988) (observing that controlled substances "are typically sold in a diluted state" and society may impose "more severe penalties for the possession of large amounts of a diluted controlled substance than for smaller amounts of a pure controlled substance."). Here the facts do not present a case of dilution, rather the facts involved two separate controlled substances, albeit both schedule I drugs, that the State combined to create an aggregate weight in order to support the trafficking charge. Under these facts the issue is whether the district court erred in allowing Mr. Andrews to be charged and tried for possession of 14 or more but less than 28 grams of a controlled substance based on an aggregation of two different types of controlled substances?

In this question of first impression, Mr. Andrews does not contend that it would be improper to combine the *same* type of drug found at different locations but within a related spatial and temporal time for the purpose of aggregating weights. The error is in combining *different*

types of drugs to reach an aggregate weight for a trafficking charge. For example, in *Townsend v. State*, 823 So.2d 717 (Ala. Crim. App. 2001), Townsend, while fleeing on foot from the police, discarded a bag containing 22.4 grams of cocaine. A same day search of his bedroom after his arrest produced 17.91 grams of cocaine, which the prosecution was allowed to aggregate to meet the 28-gram requirement for trafficking (each individual amount being less than 28-grams). 823 S.2d at 719. In response to Townsend's argument that he should have been convicted of only two possession counts, *Id.*, the criminal appellate court disagreed; stating:

> [t]he cocaine found in Townsend's bedroom and the cocaine he dropped while fleeing were properly treated as a single unit of possession *because* the circumstances involved his possession of cocaine at the same time, i.e., the two quantities were within Townsend's dominion and control at the same time.

823 So.2d at 724 (italics added).

Approximately, ten years later the criminal appellate court was confronted with a related argument. In *Wells v. State*, 93 So.3d 155 (Ala. Crim. App. 2011), Jennifer Wells was convicted of two counts of possession (by her guilty plea) while reserving her right to challenge on

appeal a four-count indictment for possession of methamphetamine, morphine, diazepam, and dihydrocodeine (hydrocodone) all stemming from the same incident. She argued that she "could not be convicted of multiple offenses based on possession of several types of controlled substances at one point in time." 93 So.3d at 156. The criminal appellate court disagreed and noted that it and "[a] number of jurisdictions have ... concluded that the possession of different types of controlled substances should result in separate convictions and sentences." 93 So.3d at 162 (citing *Cunningham v. State*, 567 A.2d 126 (Md. 1989) (collecting cases)). The court added that this also meant "different controlled substances *cannot be aggregated for the purpose of determining the amount of a controlled substance to support a trafficking charge.*" 93 So.3d at 164 (italics added) (citations omitted).

The court's conclusion applies here. A case on point—*People v. Jones*, 2011 WL 44495 (decided on January 6, 2011, (Mich. App.)) (unpublished)—is both instructive and persuasive. Jeffery Jones was convicted of possession of 50 or more but less than 450 grams of a controlled substance (methadone and oxycodone), and possession with intent to deliver marijuana. *Id.* at *1. As relevant here, a search of

Jones's home recovered two separate quantities of oxycodone weighing 15.59 grams and 15.89 grams respectively, for a total of 31.49 grams, and a quantity of methadone weighing 39.44 grams. "The total for all three quantities was 70.83 grams." *Id.* On appeal Jones argued that "the quantities of oxycodone and methadone were improperly aggregated." *Id.* The appellate court agreed noting that even though "[b]oth oxycodone and methadone are controlled substances that are included in schedule 2," the "controlled substances at issue were not the same controlled substance." *Id.* The court found error because the prosecutor should have filed "separate charges based on the distinction of the two substances," and because "[t]he jury necessarily concluded that [Jones] possessed at least 50 grams of the combined substances[.]" *Id.* at *2-*3.

And that is what happened here. A total of 9.445 grams of heroin was combined with a total of 9.532 grams of methamphetamine to get above the 14 gram threshold charging level of the statute. The district court below nonetheless allowed the combination to stand finding that the statute and (some unidentified body of) law "contemplate[d] that when a seller of illegal drugs sells heroin and methamphetamine, which

are both schedule I products, both sold [and located] together" the statute is violated. This Court should disagree. And for the reasons set out above, find that the district court erred in allowing Mr. Andrews to be charged and tried as charged.

VII. CONCLUSION

This Court must reverse the conviction on Count I, trafficking in a controlled substance and remand.

DATED this 6th day of February 2017.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: JOHN REESE PETTY
Chief Deputy, Nevada Bar No. 10
jpetty@washoecounty.us

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 Century Schoolbook in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 2,699 words. NRAP 32(a)(7)(A)(i), (ii).

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 a reference to the page of the transcript or appendix where the matter relied upon 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 6th day of February 2017.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of February 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Washoe County District Attorney's Office

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Ryan Scott Andrews (#1080725
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, Nevada 89070-0208

John Reese Petty
Washoe County Public Defender's Office