

IN THE SUPREME COURT OF THE STATE OF NEVADA

IAN ANDRE HAGER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 72613

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PETITION FOR EN BANC RECONSIDERATION

JOHN L. ARRASCADA
Washoe County Public Defender

JOHN REESE PETTY
Chief Deputy Public Defender
350 South Center Street, 5th floor
Reno, Nevada 89501

ATTORNEYS FOR APPELLANT

CHRISTOPHER J. HICKS
Washoe County District Attorney

JENNIFER P. NOBLE
Chief Appellate Deputy
One South Sierra Street
Reno, Nevada 89501

ATTORNEYS FOR RESPONDENT

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PETITION FOR EN BANC RECONSIDERATION

Comes now, Respondent, by and through counsel, to respectfully request that this Court grant en banc reconsideration in the above-entitled matter. This request is premised on NRAP 40A and the accompanying points and authorities.

A jury convicted Ian Andre Hager (“Hager”) of six felonies, each involving possession of a firearm by a prohibited person. Counts I through III recited that Hager possessed an assault rifle (Count I) and handguns (Count II) and three other firearms (Count III). Those first three counts alleged that he was prohibited from possessing those guns by virtue of having been adjudicated mentally ill. The second set of crimes listed the same guns but listed the nature of the prohibition as Hager being a user of

controlled substances or being addicted to controlled substances. On August 29, 2019, after briefing and supplemental briefing, the Court vacated and remanded the judgment of conviction. The State sought rehearing, which was denied on September 20, 2019. The State now seeks en banc reconsideration of the panel decision. NRAP 40A.

I. Legal Standard

“En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.” NRAP 40A (a).

II. Facts

In its Opinion, *Hager v. State*, ___ P.3d___, 135 Nev. Op. 34, 2-5 (2019), the Court recognized the following facts. In February 2013, Hager was arrested for outstanding warrants during a traffic stop in Humboldt County. During the arrest, the police found two firearms. The Humboldt County district attorney charged Hager with illegally carrying a concealed weapon. Pursuant to negotiations, Hager pleaded guilty to carrying a concealed weapon. His criminal case was suspended, and Hager was

referred by the Sixth Judicial District Court to the mental health specialty court program that the Second Judicial District Court established under NRS 176A.250 through NRS 176A.265.

A licensed mental health professional diagnosed Hager with post-traumatic stress disorder (PTSD). Hager was accepted into Washoe County's mental health court diversion program. As part of the intake process, a presentence investigator interviewed Hager, and Hager admitted that he had been addicted to methamphetamine between the ages of 12 and 19, Hager also maintained that, with the exception of a one-time use of methamphetamine in January 2013, he no longer used drugs.

In May 2014, Hager successfully completed the Second Judicial District Court program and was discharged. Humboldt County dismissed its criminal case against him. After his discharge and dismissal, the matter was sealed, and Hager filled out paperwork asking the State to return his confiscated firearms, which the State did in August 2015.

In 2015, police responded to additional disturbances at Hager's residence, and confiscated his firearms. After Hager completed the necessary paperwork and background check, the police again returned Hager's firearms to him, this time in January 2016.

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A month later, in February 2016, Hager contacted a detective to discuss the investigation of his brother's 2012 death. Hager believed his brother had been murdered, but police had concluded that the death resulted from an accidental methamphetamine overdose. Hager asked the detective to reopen the investigation. After police declined to reopen the investigation, Hager was infuriated. Hager sent the detective a link to a video showing Hager expressing anger toward the police investigation of his brother's death, and snorting a white substance from a baggy to illustrate how much methamphetamine a person can consume without overdosing. The video depicted Hager with firearms beside him.

After reviewing this post, along with other social media posts, police took Hager into custody for illegal possession of firearms. During a search of Hager's home, police found firearms, a glass pipe, and empty baggies commonly used to hold drugs. Police did not find controlled substances or trace evidence of them. Hager admitted during his interview with police that he possessed the firearms in his home and that the substance he snorted in the Facebook video was methamphetamine. At trial, however, Hager testified the substance was salt.

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III. The Court's Order Vacating and Remanding

After ordering supplemental briefing, this Court issued a published opinion considering two questions:

First, is a defendant who is assigned to and successfully completes a mental health specialty court diversion program under NRS 176A.250 through NRS 176A.265 (2013) thereby “adjudicated as mentally ill,” making it illegal for him to possess a firearm under NRS 202.360(2)(a)? Second, was it harmless error to instruct the jury in a way that theoretically allowed Hager to be convicted of illegal possession of a firearm by an “unlawful user” of a controlled substance under NRS 202.360(1)(d) based on a single current use of the substance?

Hager v. State, ___ P.3d___, 135 Nev. Op. 34 (2019).

With respect to the first question, the Court concluded that Hager's assignment to mental health court in 2013 “did not constitute a sufficient adjudication of mental illness for NRS 202.360 (2)(a) to apply.” *Hager, supra*, at 9. On the second question, regarding the jury instruction concerning Hager's “unlawful user” status, the Court found that Jury Instruction 16 “failed to capture the concept of regular use, proximate in time to the illegal firearm possession charged.” *Id.* at 19.

IV. Argument

A. The Proceeding Involves Two Substantial Precedential, Constitutional, and Public Policy Issues.

The opinion issued by the Court regards two matters of first impression that concern the right bear arms under the Second Amendment,

and as well as important public policy concerns: 1) whether acceptance into, and completion of, a district court mental health court program constitutes an adjudication of mental illness sufficient to preclude possession of a firearm; and 2) what the State must show to establish that a defendant is a drug user or addict so as to preclude possession of a firearm.

This Court has previously recognized that NRS 202.360 reflects the legislature’s rational judgment that “certain classes of persons should be disabled from dealing in or possessing firearms of potential dangerousness.” *Pohlabel v. State*, 128 Nev. 1,8, 268 P.3d 1264 (2012) (quoting *Lewis v. United States*, 445 U.S. 55, 64–65, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980)). In an era of unprecedented gun violence, the Court’s decision concerns interpretation of laws designed to protect the public from persons whose possession firearm is, due to mental illness or drug use, particularly threatening to public safety.

1. A Judicial Determination That a Defendant Suffers From A Mental Illness Pursuant to NRS 176A.250 Satisfies NRS 202.360(2)(a).

Hager was assigned to a treatment program for mental illness under NRS 176A.250. In order for that statute to be satisfied, a district court must determine that the defendant “suffers from a mental illness.” NRS 176A.260. Yet in concluding that Hager’s assignment to mental health

court “does not constitute a sufficient adjudication of mental illness for NRS 202.360(2)(a) to apply,” the panel did not rely upon that statute. Instead, it erroneously relied on NRS 176.255(2)(b), a different statute in a different chapter, containing more ambivalent language. NRS 176.255(2)(b) provides that mental health court eligibility in justice court cases exists where the defendant “‘*appears to suffer from mental illness or to be intellectually disabled.*’ NRS 176.255(2)(b) (emphasis added).” But that statute contemplates the circumstances under which a justice court may transfer original jurisdiction over a case to a district court—not a district court’s finding that a defendant is eligible for a district court mental health specialty court:

1. *A justice court or a municipal court may, upon approval of the district court, transfer original jurisdiction to the district court of a case involving an eligible defendant.*
2. As used in this section, “eligible defendant” means a person who:
 - (a) Has not tendered a plea of guilty, guilty but mentally ill or nolo contendere to, or been found guilty or guilty but mentally ill of, an offense that is a misdemeanor;
 - (b) Appears to suffer from mental illness or to be intellectually disabled; and
 - (c) Would benefit from assignment to a program established pursuant to NRS 176A.250.

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In Hager’s case, he was not transferred to specialty court by a justice court to a district court. Instead, Hager was transferred by the Sixth Judicial District Court to the Second Judicial District Court’s specialty court program. 3 JA 490. It was the Second Judicial District Court that determined that Hager met the criterion outlined in NRS 176A.260, after he presented a qualifying diagnosis of post-traumatic stress disorder. In deciding Hager’s eligibility, the district court did so pursuant to NRS 176A.260, not NRS 176.255(2)(b). Admission pursuant to NRS 176A.260 does not contain the inconclusive “appears to suffer” language; instead, it requires a clear finding of mental illness:

176A.260. Conditions and limitations on assignment of defendant to program; effect of violation of terms and conditions; discharge of defendant upon fulfillment of terms and conditions; effect of discharge

1. Except as otherwise provided in subsection 2, *if a defendant who suffers from mental illness* or is intellectually disabled tenders a plea of guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, any offense for which the suspension of sentence or the granting of probation is not prohibited by statute, the court may:

- (a) Without entering a judgment of conviction and with the consent of the defendant, suspend further proceedings and place the defendant on probation upon terms and conditions that must include attendance and successful completion of a program established pursuant to NRS 176A.250; or
- (b) Enter a judgment of conviction and place the defendant on probation upon terms and conditions that must include

attendance and successful completion of a program established pursuant to NRS 176A.250.

NRS 176A.260. (Emphasis Added).

To be admitted to mental health court pursuant to NRS 176A.260, the district court must first conclude, without equivocation, that a defendant suffers from mental illness. Here, Hager was admitted to mental health court under that statute, meaning that the district court unequivocally found he suffered from mental illness. This Court should grant en banc reconsideration as to whether or not admittance to specialty court under this unequivocal statute satisfies the adjudication of mental illness required by NRS 202.360(2)(a).

2. The Opinion Appears to Establish New Precedent Concerning Harmless Error Review.

Though the opinion indicated it was reviewing the effect of a jury instruction under the current harmless error standard, its analysis suggests a heightened standard of review. NRS 178.598 provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” *Cortinas v. State*, 124 Nev. 1013,1015, 195 P.3d 315 (2009) (“harmless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability”). Although the opinion cites the *Cortinas* harmless-error standard, the analysis is more indicative of the absolute certainty approach contemplated by *Bolden v.*

State, 121 Nev. 908, 124 P.3d 191 (2005)—i.e., an erroneous jury instruction will only be considered harmless if “ ‘it is absolutely certain’ that the jury relied upon the legally correct theory to convict the defendant.” *Bolden*, 121 Nev. 908, 924 (quoting *Keating v. Hood*, 191 f.3d 1053 (9th Cir. 2003)).

Hager’s substantial rights were not affected by any error contained in jury instruction 16. The opinion itself recognized that the jury was presented with substantial evidence that Hager was addicted to methamphetamine from 1997-2004, relapsed in 2013, and sent law enforcement a video depicting himself ingesting methamphetamine with firearms in the background. It also concluded that the State’s evidence “was enough to show that Hager either maintained his prior addiction to methamphetamine or was using the drug regularly, proximate to, or contemporaneous with his firearm possession between December 2015 and April 2016.” 135 Nev. Adv. Op. 34 at 17.

During his closing argument, the prosecutor expressly discussed instruction 16, telling the jury that to be found guilty, Hager’s use and/or possession of the controlled substance had to be contemporaneous with his possession of the firearms:

A user of any controlled substance is a person who uses any controlled substance. And a user can quit using and if a user quits using, he can possess firearms. But while a user of any controlled substance, he is

prohibited from possessing firearms. *And as I told you before, in order to prove the Defendant guilty, it's not just that he was a user and then at some point, at any time in the future he possessed. He must have been a user at the time of possession of the firearms, or he must have been an addict at the time of the possession.*

5 JA 936-937 (Emphasis Added).

In its harmless error analysis, the opinion does not appear to consider the effect of the prosecutor's explanation of the instruction, despite the fact that it is consistent with the opinion's interpretation of the statute. Despite the compelling nature of the State's evidence establishing that Hager was both a habitual user and addict who possessed a firearm contemporaneous to his habitual use and addiction, and the prosecutor's explanation of the instruction, the opinion reasoned that "...the jury equally could have convicted Hager based on the video that depicted him snorting meth in the presence of firearms in 2016—a single use that qualified Hager as an "unlawful user" due to the objected-to error in instruction 16." *Hager* at 19. This analysis appears to suggest that harmless error review implicates the absolute certainty test standard in *Bolden*, from which this Court receded in *Cortinas, supra*. Reconsideration is warranted.

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V. Conclusion

Based on the foregoing, the State respectfully asserts that en banc reconsideration is appropriate.

DATED: October 4, 2019.

**CHRISTOPHER J. HICKS
DISTRICT ATTORNEY**

**By: JENNIFER P. NOBLE
Chief Appellate Deputy**

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this petition complies with the type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the petitions exempted by NRAP 32(a)(7)(c), it does not exceed 4,667 words (the petition contains 2,192 words).

3. Finally, I hereby certify that I have read this appellate petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition 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

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the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 4, 2019.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: JENNIFER P. NOBLE
Chief Appellate Deputy
Nevada State Bar No. 9446
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 4, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

/s/ Margaret Ford
MARGARET FORD