

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LAMAR CHAMBERS,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 73446

ANSWER TO PETITION FOR REVIEW

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, JOHN NIMAN, and submits this Answer to Petition for Review in obedience to this Court's order filed February 21, 2020, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 6th day of March, 2020.

Respectfully submitted,

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

BY */s/ John T. Niman*

JOHN T. NIMAN
Deputy District Attorney
Nevada Bar # 014408
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ARGUMENT

“Supreme Court review is not a matter of right but of judicial discretion.” NRAP 40B(a). Pursuant to that rule, the Supreme Court considers certain factors when determining whether to review a Court of Appeals decision, including, “(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance.” NRAP 40B(a). Appellants bear the burden of “succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court.” NRAP 40B(d).

Appellant raises three claims in support of Supreme Court review. First, Appellant argues that the Court of Appeals (“COA”) decision conflicts with Nevada statutes and legislative intent. Petition for Review (“Petition”) at 4. Second, Appellant claims that the COA decision conflicts with prior Nevada Supreme Court decisions. Id. at 10. Finally, Appellant argues that his argument regarding jurisdiction is an issue of first impression. Id. at 17.

I. APPELLANT RAISES SEVERAL ISSUES FOR THE FIRST TIME IN HIS PETITION

As a preliminary issue, Appellant raises new issues in his Petition for review. He argues that the filing requirements for the notice of intent to seek punishment as a habitual criminal implicate a district court’s jurisdiction to sentence under the

habitual criminal statute. Petition for Review (“Petition”) at 3. However, Appellant did not raise his arguments thus before the Court of Appeals. See, Appellant’s Opening Brief (“AOB”) at 38-39 (averring the alleged violations of NRS 207.016 implicated Appellant’s “right to Due Process.”). While the AOB mentions “jurisdiction,” it does so passively as part of Appellant’s main argument that *the State did not comply with statutory requirements*, not that the district court lacked jurisdiction. See generally, *id.* at 36-47. This distinction is further galvanized by Appellant’s argument against habitual criminalization at sentencing, wherein Appellant argued that the district court should “not apply any type of habitual status based on the State’s failure to comply with the statute.” Appellant’s Appendix, Volume 4 (“4AA”) at 318 (emphasis added). The COA considered, and rejected, Appellant’s argument as thus stated. Appellant cannot now re-characterize his arguments simply because his first attempt was unsuccessful.

Appellant also argues that the COA overlooked Appellant’s legal citations. Petition at 3. However, Appellant fails to assert, much less provide authority to support, the notion that the COA specifically address every case cited by any party in their pleadings. Furthermore, a close review of Appellant’s citations demonstrates that it was not necessary for the COA to address them each in turn. Other than the criminal habitual statute, and related statutes, Appellant cited first to Crutcher v. Eighth Judicial Dist. Court, 111 Nev. 1286, 903 P.2d 823 (1995). AOB at 43.

However, Crutcher clearly does not apply, because the issue in that case was whether the State was required to present judgments of conviction to support its request for habitual criminalization when that request came *four years* after the defendant began serving his sentence. 111 Nev. at 1288, 903 P.2d at 825. Appellant then cited to multiple cases to assert the unobjectionable point that “shall” is mandatory. AOB at 44-45. Next, Appellant quotes, then string cites, a number of cases without analysis or argument. Id. at 46. Because Appellant did not present cogent argument, even to demonstrate the alleged relevance of his cited-to cases, the COA was entitled to ignore them. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”).

Because a Petition for Review is not the correct forum for Appellant to raise new claims, or to introduce a new theory tenuously based on his previous claims, and because these claims do not address Appellant’s burden when seeking Supreme Court review, the State respectfully requests this Court deny Appellant’s Petition in its entirety.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED APPELLANT’S SENTENCE

A. Appellant introduces contradictory arguments in support of Supreme Court review

Appellant's major points in support of Supreme Court review directly contradict one another. In the first instance, Appellant argues that the COA misapplied and/or contradicted prior Nevada Supreme Court decisions. Petition at 10. Appellant follows that argument by submitting that his concern presents an issue of first impression for this Court. Id. at 17. The State respectfully submits that Appellant cannot have it both ways; indeed, to allow Appellant to do so would present a paradoxical situation for the State in its attempt to address each of Appellant's arguments. Responding fully to each conflicting argument would likely necessitate the State's contradicting itself, just as Appellant has done in his Petition.

Because Appellant has presented contradictory claims to assert Supreme Court review is warranted, the State respectfully submits Appellant has failed to meet his burden, and his Petition should be denied in its entirety.

B. Appellant fails to submit any authority to support his position that the habitual criminal statutes are jurisdictional

Appellant boldly claims that the habitual criminal statutes are jurisdictional, but fails to specifically provide authority to support his assertion. See generally, Petition at 4-17. Without specific authority, the State submits that Appellant cannot demonstrate that the COA ruled in error.

Appellant cites primarily to two cases, Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008), and Crutcher, 111 Nev. 1286, 903 P.2d 823, when arguing that the habitual criminal statutes are jurisdictional. However, a careful review of those cases

belies Appellant's reliance, as those cases are easily distinguishable from the case at hand.

In both Grey and Crutcher, the Nevada Supreme Court treated whether a district court could sentence a defendant as a habitual criminal when the State had failed entirely to file a habitual criminal allegation. 124 Nev. at 123, 178 P.3d at 163; 111 Nev. at 1289, 903 P.2d at 825. Such is not the case here. Rather than merely faxing a notice of habitual criminality to Appellant's counsel (which was the case in Grey), or relying on a stipulation to prior felony convictions without an allegation of habitual criminality (as in Crutcher), here, the State clearly filed a Notice of Intent to Seek Punishment as a Habitual Criminal with the district court. 2AA at 170-72. Therefore, the only issue that Appellant could have under Grey is whether that case applies to an arguably untimely notice of habitual criminality. However, Appellant is clear that he is not seeking review of the issue of the timeliness of the State's notice. See Petition at 4 ("Chambers does not take issue with the timeliness aspect of this ruling in the instant Petition.").

Because Appellant fails to cite to any relevant legal authority for the proposition that an arguably untimely notice of habitual criminal treatment raises a

jurisdictional issue,¹ Appellant has failed to meet his burden under Maresca and his Petition should be denied.

C. NRS 207.016 is not jurisdictional

The 2007 version of NRS 207.016 stated, “A count pursuant to NRS 207.010, 207.012 or 207.014 may be separately filed after conviction of the primary offense...” Therefore, the applicable version of that statute clearly provided for a separate filing of habitual criminality. While the 2009 versions of NRS 207.010 and 207.012 both include language that appears to distinguish between an information and an indictment, neither of those statutes implicates the district court’s jurisdiction. In fact, the strict reading of the 2009 versions of NRS 207.010 and 207.012 that Appellant suggests would render the “separate filing” language of the 2007 version of NRS 207.016 meaningless, a result that the Legislature could not have intended.

Once again, then, the only potential issue that could arise would be the timeliness of the State’s notice. Beyond Appellant’s express waiver of this issue in the instant Petition, the COA clearly accepted the district court’s finding of good cause. Order of Affirmance at 14. The State filed its habitual criminal notice on February 21, 2017, and the district court accepted the State’s filing. In the context of

¹ The Grey Court specifically limited its jurisdictional finding to a situation in which the State failed to file a notice of habitual criminality. 124 Nev. at 123, 178 P.3d at 163. As such is not the case here, the State submits that ruling should not apply in the instant case.

late rebuttal witness notices, the Nevada Supreme Court has applied an abuse of discretion standard to district courts' findings of good cause to excuse a prosecutor's failure to comply with notice timeliness requirements. Butler, 120 Nev. , 892, 102 P.3d, 80 (). In Butler, the Court found that the district court did not abuse its discretion by allowing the State to file a late notice. Id. Specifically, the Butler Court found that the State had "previously given Butler at least some verbal notice" of its intent to call certain rebuttal witnesses. Id. In the instant case, Appellant had more than mere verbal notice of the State's intent to seek habitual criminal treatment.

Along with its habitual criminal notice the State included an affidavit from the trial deputy. 2AA at 199 - 3AA at 205. The affidavit noted that over two years prior to trial, on October 23, 2014, the State extended Appellant a plea offer. Id. At the time, the State conveyed to Appellant's attorney that the State reserved its right to argue for habitual criminal treatment. Id. Nine (9) months prior to the start of trial, the State conveyed to trial counsel that it intended to seek habitual treatment under NRS 207.012. Id. These two communications with trial counsel placed both trial counsel and Appellant on notice that the State would seek habitual criminal treatment. During sentencing, the district court accepted the State's representations, and noted that throughout the settlement discussions it seemed that the State intended to pursue habitual treatment. 4AA 320. In its Affirmance, the COA did not take issue with the district court's conclusions, instead concurring "that the State provided

adequate notice pursuant to the 2007 version of NRS 207.016(2).” Order of Affirmance at 14; see also Order of Affirmance at 15 (“the district court properly exercised its discretion when it adjudicated [Appellant] as a habitual offender.”).

Because NRS 207.016 is not jurisdictional, and because Appellant does not argue that the timeliness issue warrants review, Appellant’s Petition should be denied.

D. The record does not support Appellant’s assertion that the district court erroneously believed it was “mandated” to sentence Appellant as a habitual criminal

Appellant makes multiple references to the district court’s alleged erroneous belief that it was “mandated” to sentence Appellant as a habitual criminal. See, e.g., Petition at 15 n.3. A review of the record, specifically the sentencing transcript, does not support that the district court was under any such impression.

Instead, the district court’s comments during the sentencing proceedings seem to indicate that the district court was exercising its discretion and sentencing Appellant accordingly. In fact, the district court made an explicit reference to its discretion. 3AA at 326 (“Looking at the felony convictions that have been presented by the District Attorney’s office for use in this Court’s *discretion* in determining whether to treat the Defendant as a large habitual...” (Emphasis added).).

Therefore, to the extent Appellant seeks to rely on such comments to support his Petition, the comments are belied by the record and Appellant's Petition should be denied.

E. The State's error, if any, was harmless

As discussed *supra*, the State's late filing of the notice of habitual criminality did not implicate the district court's jurisdiction at sentencing. Appellant affirmatively waived any claim regarding the timeliness of the State's notice. Any remaining error, if there is such, is harmless and does not entitle Appellant to relief.

Both the district court and the COA concluded that Appellant received sufficient notice of the State's intent to seek treatment as a habitual criminal. 3AA at 320; Order of Affirmance at 14. Appellant does not argue how inclusion of the notice within the Information, or how the State's earlier filing of its notice, would have positively affected the outcome of Appellant's case. Appellant had sufficient time to prepare and to address the cases presented by the State. Appellant's arguments simply failed before the district court and the COA.

Because Appellant had plenty of notice, and cannot specifically allege how the notice in this case prejudiced his case or his sentence, Appellant's Petition should be denied.

CONCLUSION

In sum, Appellant failed to demonstrate that the instant case meets any of the

enumerated reasons for Supreme Court review; therefore, based upon the foregoing and the record before this Court, the State respectfully submits that Appellant's Petition for Review should be denied.

Dated this 6th day of March, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

- 1. I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
- 2. I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 2,075 words.

Dated this 6th day of March, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 6, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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