

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

S.C. Case No. 77018

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APPELLANT'S REPLY BRIEF

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons and entities as
3 described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These
4 representations are made so that the justices of this Court may evaluate any potential
5 conflicts warranting disqualification or recusal.

6 1. Attorney of Record for Appellant: Brian Rutledge

7 2. Publicly held Companies Associated: a. N/A

8 3. Law Firm(s) Appearing in the Court(s) Below:

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10 Kenneth Long, Esq.

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13 DATED this 22th day of April, 2019.

14 /s/ /Brian Rutledge/

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Argument

A. Respondent's claim that Appellant mischaracterized his 29, 27, and 21 year old prior convictions is belied by the record

The State tries to claim that the convictions that were 29, 27, and 21 years old are somehow "not old" because Mr. Cash spent a long time in prison and parole - however the very PSI cited by the State shows no disciplinary history for Mr. Cash in prison, and "no violations" on parole - parole that he successfully completed and was discharged from. PSI at 3-4. Thus the PSI also shows that the *last crime committed* by Mr. Cash was indeed *twenty-one (21) years* before the instant offense. PSI at 4. It is certainly not uncommon for criminals to commit infractions in prison or parole violations, yet Mr. Cash's record was completely clean after the 1996 offense. PSI 4-5. The fact that Mr. Cash was never observed breaking the law in that 21-year period even though he was closely watched by law enforcement in prison and while on parole during a large portion of it certainly does not support the State's claim that Mr. Cash is a habitual criminal that must be locked away forever, or their claim that the convictions are somehow not all over 20 years old. The State also cannot rebut the obvious fact that the instant offense (a stabbing that occurred while he believed he was defending his daughter) has no factual connection with the robbery crimes he committed in his youth, making the judge's finding that Mr. Cash must be given Life Without an obvious abuse of discretion.

**B. The abuse of discretion in sentencing Mr. Cash as a habitual criminal cannot
be considered "harmless error"**

The State claims that Judge Smith's abuse of discretion in finding Mr. Cash a Habitual Criminal and sentencing him to Life Without is somehow "harmless error" because the State wanted him sentenced under a different habitual statute, NRS 207.012, even though they failed to prove to Judge Smith that Mr. Cash qualified under that statute and even though Judge Smith specifically ruled that he did NOT find that Mr. Cash qualified under the mandatory provisions of NRS 207.012. AA1377-1389. Unlike the other habitual criminal statutes which allow the use of any felony conviction, NRS 207.012 is very limited, listing only 39 specific statutes that qualify for this enhancement, and the State has the burden of proving the convictions qualify. Having failed to prove to Judge Smith that Mr. Cash had the requisite priors for NRS 207.012, the State then takes the novel position that it can prove up the convictions in this appeal - and once again fails to do so. The State claims that Mr. Cash was convicted twice of "Robbery with Use of a Firearm" in California, and cites to the PSI at page 4 to support the claim (Answering Brief page 18, lines 5-9). Looking at page 4 of the PSI shows something very different - it shows that although the initial charges in both cases included at least one count of "Robbery", it also shows that he pled down both cases to the lesser charge of "Robbery-Second Degree" - a lesser offense that does not exist in Nevada law, and is not one of the 39 statutes listed in NRS 207.012. PSI at 4, NRS 207.012. The

State never made a showing to Judge Smith that a California conviction to the lesser charge of "Second Degree Robbery" qualifies as one of the 39 crimes listed in NRS 207.016 (it obviously is not in the statute as Nevada does not even have a "Second Degree" robbery), and his refusal to consider NRS 207.012 was proper given this showing was not made by the State at the sentencing hearing. The State cannot rescue the Judge Smith's improper habitual adjudication which was clearly an abuse of discretion by claiming it was "harmless error" under a theory that Judge Smith should have instead have applied NRS 207.012 when even Judge Smith recognized the State had utterly failed to prove the two qualifying priors required to impose the NRS 207.012 enhancement. This court it should overturn the sentence and send the case back to a new District Court Judge for re-sentencing.

DATED this 22th day of April, 2019.

Respectfully Submitted by:

/s/ /Brian Rutledge/

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CERTIFICATE OF COMPLIANCE

1
2
3 1. I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style
5 requirements of NRAP 32(a)(6) because this brief has been prepared in a
6 proportionally spaced typeface using Microsoft Word in 14 point Times New
7 Roman type style.
8

9
10 2. I further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 32(a)(7)(A) as it contains 742 words in 3 pages as computed
12 under NRAP 32(a)(7)(C).
13

14 3. Finally, I hereby certify that I have read this appellate brief, and to the best
15 of my knowledge, information, and belief, it is not frivolous or interposed for any
16 improper purpose. I further certify that this brief complies with all applicable
17 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
18 every assertion in the brief regarding matters in the record to be supported by a
19 reference to the page and volume number, if any, of the transcript or appendix where
20 the matter relied on is to be found. I understand that I may be subject to sanctions in
21 the event that the accompanying brief is not in conformity with the requirements of
22 the Nevada Rules of Appellate Procedure.
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1 DATED this 22nd day of April, 2019.

2
3
4 /s/ /Brian Rutledge/

5 Brian Rutledge, Esq.

6 Nevada State Bar No. 4739
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9 **CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that on this 22nd day of April, 2019, the foregoing
11 **APPELLANT’S REPLY BRIEF** was served upon the appropriate parties hereto via the
12 Supreme Court’s notification system in accordance to the Master Service List as follows:
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19 DATED this 22nd day of April, 2019.
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