

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION OF EDWARD
TARROBAGO FINLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Dec 07 2018 11:51 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 76715

RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition to Seal Records
Eighth Judicial District Court, Clark County**

JOHN HENRY WRIGHT, ESQ.
Nevada Bar #006182
CHRISTOPHER B. PHILLIPS, ESQ.
Nevada Bar #014600
The Wright Law Group, P.C.
2340 Paseo Del Prado, Suite D-305
Las Vegas, Nevada 89102
(702) 405-0001

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

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ROUTING STATEMENT.....	1
STATEMENT OF THE ISSUE(S).....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED DISCRETION TO CONSIDER THE MERITS OF APPELLANT’S PETITION TO SEAL RECORDS.....	4
II. THE ORDER IN WHICH A DISTRICT COURT CONSIDERS A PERSON’S CRIMINAL HISTORY DOES NOT RENDER NRS 179.2595 MEANINGLESS.....	6
CONCLUSION	8
CERTIFICATE OF COMPLIANCE.....	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Page Number:

Statutes

NRS 179.245	3, 4, 6, 7
NRS 179.245(1)(a)	4
NRS 179.245(1)(b)	4
NRS 179.245(5)	6, 7, 8
NRS 179.2595	i, 6, 7, 8
NRS 179.285(1)(a)	7, 8
NRS 200.408	4
NRS 200.408(2)(b)	5

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION OF EDWARD
TARROBAGO FINLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 76715

RESPONDENT'S ANSWERING BRIEF

**Appeal from Order Denying Petition to Seal Records
Eighth Judicial District Court, Clark County**

ROUTING STATEMENT

This matter is not clearly addressed in NRAP 17(a), but appears to be a matter of first impression. Accordingly, it is presumptively retained by this Court.

STATEMENT OF THE ISSUE(S)

1. Whether the district court erred in holding that it lacked discretion to consider the merits of Appellant's Petition to Seal Records.

STATEMENT OF THE CASE

On May 28, 2003, Edward Finley (Appellant) was arrested for Battery Constituting Domestic Violence. I AA 18. He pleaded guilty on August 20, 2003. I AA 22.

He was arrested again for Battery Constituting Domestic Violence on July 25, 2004, and once more he pleaded guilty on September 17, 2004. I AA 5, 17. He received credit for time served. Id.

On August 30, 2004, Appellant was arrested again for Kidnapping and Battery Constituting Domestic Violence. He ultimately pleaded guilty to second degree kidnapping (Category B Felony), assault with a deadly weapon (Category B Felony), and battery constituting domestic violence (M). I AA 29. He was sentenced to time in the Nevada Department of Corrections, but this sentence was suspended and he instead was put on probation for an indefinite period of time not to exceed four years. I AA 29-30. The district court filed its Judgment of Conviction on December 13, 2004. Id.

Appellant's 2003 case was closed on December 27, 2004. I AA 22. In 2005, Appellant was arrested for violating parole in his December 2004 conviction. Despite this, he was honorably discharged from probation. I AA 78 n.1.

Appellant filed a Petition to Seal Records on March 21, 2018. I AA 1. The City of Henderson filed a Notice of Motion and Motion to Oppose Petitioner's Request to Seal Records on June 13, 2018. I AA 19. Appellant filed its Opposition to Motion to Oppose Petitioner's Request to Seal Records on June 26, 2018. I AA 31.

The State filed its Opposition to Petition to Seal Records on July 2, 2018. I AA 43. Appellant replied to the State's opposition on July 9, 2018. I AA 46. On July 19, 2018, the district court held a hearing on this issue. I AA 54. It denied the petition in an order filed later the same day. I AA 64.

Appellant filed a Notice of Appeal on August 13, 2018. I AA 73.

STATEMENT OF THE FACTS

Appellant and his girlfriend Brittney Leavitt had been dating for three-and-a-half years when, on August 29, 2004, they got into an argument on the phone after she attempted to end the relationship. I AA 25. Appellant drove to her house, and they went on a drive, where the argument continued. I AA 25. As they drove near Centennial Parkway, Appellant had pulled out a knife and poked his girlfriend in the thigh while telling her that he was going to kill her by cutting her throat. I AA 26. Appellant was discharged from probation for these crimes in December 2007. I AA 70.

SUMMARY OF THE ARGUMENT

When considering Appellant's Petition to Seal Records, the district court applied an incorrect and outdated version of NRS 179.245. Because of this error, it came to the erroneous conclusion that it lacked discretion to consider the merits of the petition. This Court should remand the case to the district court to allow it to consider the merits of the petition in the first instance.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED DISCRETION TO CONSIDER THE MERITS OF APPELLANT’S PETITION TO SEAL RECORDS.

As an initial matter, the State agrees with Appellant that the district court erred in applying the 2015 version of NRS 179.245 instead of the 2017 version which was the law when Appellant petitioned to seal his records. AOB at 16. The differences between the two statutes are consequential, as under the 2015 version of NRS 179.245, the district court lacked discretion to consider the petition until December 2022, whereas under the 2017 version of the statute, the district court had discretionary power to seal his two 2004 felonies,¹ from which he was discharged from probation in December 2007, starting in December 2017. NRS 179.245(1)(a), as it read when Appellant filed his petition, states that “a person may petition the court in which the person was convicted for the sealing of all records relating to a conviction of . . . a crime of violence pursuant to NRS 200.408 . . . after 10 years from the date of release from actual custody or discharge from parole or probation.”²

¹ The State will only address the 2004 felonies as it understands that the City of Henderson is filing a brief to address the sealing of the other crimes in Appellant’s record.

² Appellant argues that because the 2004 convictions were for class B felonies, NRS 179.245(1)(b) applies, and he therefore became eligible in December 2012. AOB at 16. If on remand it appears that Appellant has not been convicted or charged with a crime for which the charges are still pending, this discrepancy is inconsequential as Appellant would have been eligible to have the district court consider his petition on the merits regardless of whether this Court consider the felonies crimes of violence under NRS 179.245(1)(a) or as mere class B felonies under NRS 179.245(1)(b).

Appellant's 2004 convictions were crimes of violence under NRS 200.408(2)(b), which defines a crime of violence as "[a]ny felony for which there is a substantial risk that force or violence may be used against the person or property of another in the commission of the felony." On December 14, 2004, the district court filed its Judgment of Conviction for two felony counts and one misdemeanor. I AA 29. The felonies to which Appellant pleaded guilty were second degree kidnapping and assault with a deadly weapon. Id. Both of these felonies present a substantial risk of force or violence, especially when considered together with the facts for which Appellant was arrested. After an argument and while driving down Centennial Parkway, Appellant had pulled out a knife and poked his girlfriend in the thigh while telling her that he was going to kill her by cutting her throat. I AA 26. Appellant was discharged from probation for these crimes in December 2007. I AA 70. Thus, assuming that Appellant went without being charged with a crime that is still pending or convicted of a crime, he became eligible to seal his records in December 2017 after 10 years had passed. He filed his petition on March 21, 2018, several months thereafter. AOB at 2. Accordingly, the district court had discretion to seal his petition for his 2004 felonies. Because the district court never considered

the merits of the petition for these felonies, it committed reversible error, and the case should be remanded.³

II. THE ORDER IN WHICH A DISTRICT COURT CONSIDERS A PERSON'S CRIMINAL HISTORY DOES NOT RENDER NRS 179.2595 MEANINGLESS.

Appellant argues that the district court's reading of NRS 179.245 leads to an absurd result. AOB at 7. Although the State ultimately agrees that this case should be remanded, it has severe reservations about Appellant's underlying argument. Appellant argues that the way that the district court applied NRS 179.245 would render NRS 179.2595 meaningless. AOB at 8. To further his argument, he alleges that the district court's application of 179.245 would have different results depending on whether the district court "started its review with the most recent arrest . . . and worked backwards in reverse chronological order" or started with the first conviction and worked its way forward chronologically. AOB at 11. This is incorrect.

NRS 179.245(5) provides that a district court only has discretion to seal records if a petition has not have been "charged with any offense for which the charges are pending or convicted of any offense, except for minor moving or standing traffic violations" in the statutory time period provided by NRS 179.245.

³ Because of procedural errors in the petition, the State never responded to its merits. It reserves the right to address the merits of the Petition once the procedural inadequacies have been remedied, and it may yet oppose the Petition.

This suggests that there are some circumstances under which the legislature intended to prevent those who regularly commit crimes, especially within a short period of time, from being eligible to seal their records.

Although NRS 179.245 only allows a petitioner to seal the record of a single crime at a time, NRS 179.2595 expands its reach and allows a petitioner to file a comprehensive petition asking the district court to seal multiple records even if the charges were tried in multiple courts. This statute facilitates judicial efficiency, and it saves the district court from having to expend valuable—and limited—resources on the briefing and consideration of multiple petitions.

Each individual crime, however, must still be eligible for sealing, and NRS 179.2595 should not be read to overcome the provisions of NRS 179.245(5). Crimes committed in the “period prescribed in subsection 1” render the previously committed crimes ineligible for sealing, regardless of the order in which the district court considers them. NRS 179.245(5).

Appellant spends considerable time arguing a hypothetical about how he could have started backwards and filed petitions piecemeal from the most recent conviction to the first conviction he committed. AOB at 9-10. Because NRS 179.285(1)(a) says that a proceeding that has been sealed “are deemed never to have occurred,” Appellant argues that he could have his entire record sealed by erasing any record of the most recent convictions. Id.

This Court should decline to read NRS 179.285 as broadly as Appellant argues. Although once a record is sealed, “the person to whom the order pertains may properly answer accordingly to any inquiry,” the crimes nevertheless occurred. NRS 179.285(1)(a). The legislature in NRS 179.245(5) made clear that some crimes are ineligible to be sealed if a person commits a subsequent crime in the statutory period, regardless of the order that they are considered and regardless of whether Appellant files multiple petitions under NRS 179.245 or a single consolidated petition under NRS 179.2595. District courts have the responsibility of considering the entirety of a person’s criminal history in considering the merits of a Petition to seal records, and NRS 179.285(1)(a) should not be read to eliminate a conviction so completely that it cannot be used for purposes of judicial review of a person’s record in accordance with NRS 179.245(5).

The district court on remand should not be required to ignore Appellant’s subsequent crimes if a review of the record reveals that they fell within the statutory period.

CONCLUSION

Because the district court applied the wrong law when considering Appellant’s Petition to Seal Records, this Court should remand the case.

///

///

Dated this 7th day of December, 2018.

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
Office of the Clark County District Attorney
Regional Justice Center
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 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 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 NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 1,718 words and 8 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 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 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 7th day of December, 2018.

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
Office of the Clark County District Attorney
Regional Justice Center
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 7th day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

JOHN HENRY WRIGHT, ESQ.
CHRISTOPHER B. PHILLIPS, ESQ.
Counsel for Appellant

JOHN T. NIMAN
Deputy District Attorney

/s/ J. Garcia

Employee, Clark County
District Attorney's Office

JTN/Joshua Prince/jg