

In The Supreme Court Of The State Of Nevada

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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Roy Daniels Moraga
Appellant,

Supreme Court No. 80897

Nv. Dist. Co. No. 89C092174

v.

Warden Perry Russell
State Of Nevada

Respondant,

Appeal From Eighth Judicial District Court

Appellant's Opening Brief

Roy Daniel Moraga #31584

PO Box 7000

Roy D. Moraga #31584

Pro Se / Pro Per

JUL 31 2020 SON City, NV 89702

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20-28269

Topical Index of contents

State of Case/Statement of Case

Statement of Facts

Legal Authority and Arguments

I. District Court Improperly Dismissed Extraordinary Writ/Writ of
Certiorari

II. Curative Action Appropriate For This Instant Case

Table Of Authorities

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Appellant,

Supreme Ct. No. 80897
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Eighth Judicial District Court

v.

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Statement Of Case - History

Roy D. Moraga was charged and arraigned on two counts of Burglary and two counts of sexual assault that allegedly occurred between December 4th and December 5th of 1989, in violation of NRS 205.060, 200.364, and 200.366.

Moraga entered a plea of not guilty on all charges on the 11th day of January 1990 and was taken to trial on March 12, 1990. The record appears to denote that on June 4th, 1990, the District Attorney filed notice of intent to amend the information in order to seek to have the defendant adjudicated as a Habitual Criminal.

The District Court issued an order that allowed the entry into the record, the amended information which allowed the state to seek the Habitual Offender enhancement, on June 13th, 1990. On the very date that the District Court accepted the amended information concerning the habitual offender enhancement, it held a hearing and it sentenced the Defendant to a sentence of Life without the possibility

of parole pursuant to NRS 207.010 (B), when the District Court had allegedly determined that the Defendant had previously been convicted of committing a felony criminal offense on at least three prior occasions.

After identifying errors about the trial and the sentencing phase, the Defendant filed a Notice of appeal on June 27th, 1990. On August 27th, 1991 the Nevada Supreme Court reviewed the record and remanded the case back to the Eighth Judicial District Court for resentencing on the original underlying charges.

A newly appointed District Court Judge Jack Lehman was presiding and committed constitutional error and violated Moraga's fifth and fourteenth Amendment protections by sentencing him for the underlying charges and then adjudicating him as a habitual criminal. On August 27th, 1991 District Court Judge Jack Lehman sentenced Moraga to 10 years for Count I Burglary, consecutive to 10 years for Count II Burglary. Moraga was sentenced to 5 yrs to life for Count III to run consecutive to Counts I and Count II. At this point the District Court adjudicated Moraga as a habitual offender and sentenced him to a fourth term of life without the possibility of parole, this fourth term to run consecutive to Counts I, II, and III.

The District Court sentenced the Defendant for the underlying crimes to a total of 25 years to life in prison. Then it gave him Life in prison, without the opportunity to ever be free again, to begin when the first three were served. A final exclamation point that is meant to last until the last breath. An act of judgement that went beyond the jurisdiction of the enacted statute.

Since filing his Direct Appeal, the Defendant has filed four (4) petitions

For writ of Habeas Corpus (post-conviction), One (1) motion to modify sentence, One (1) motion to correct an illegal sentence, One (1) petition for Genetic marker Analysis of Evidence and this instant extraordinary writ.

Statement Of Facts

Defendant filed this petition for extraordinary writ and or certiorari on 2/11/20. There were no evidentiary hearings held to review the issues that were raised by the Defendant.

Appellant-Defendant was convicted for his charged offenses and was then sentenced for each of three underlying offenses. Sentences to be served were handed down on August 27, 1991 and were applied in accordance with the relevant sentence statutes. NRS 205.060, 200.364, 200.366

On August 27, 1991, the District Court, in response to the District Attorney's motion and Notice to seek adjudication for Habitual Criminal Enhancement, pursuant NRS 207.010(b), sentenced the Appellant to a sentence of Life without the possibility of parole.

The Habitual Offender term to be served consecutive to the three underlying offense sentences, not instead of them.

The record shows that the State provided evidence of two prior felony convictions that were directly certified as to the Appellant. The third conviction was not certified as to any other person or to the appellant, but it was identified as belonging to an individual other than the Appellant. (Same name but different social security Number)

The statute for NRS 207.010(B) that was in effect at the time the offenses were committed did not allow a term or sentence for Habitual Offender adjudication to be served in addition to the sentences received for the underlying offense(s), but directed the District Court to hand down the Habitual Offender sentence to be served (instantly) instead of the sentences for the underlying offenses.

Whenever Habitual Offender Adjudication is reviewed, the District Court must determine its applicability and verify the states motion with the required prior felony convictions, which were three (3) in this instant. This is the required fourteenth amendment level of required due process. This was not done with this case.

Petition for Extraordinary writ and or writ of Certiorari filed in the Eighth Judicial District Court on February 11th 2020, to expound the errors made in the penalty phase that violated the Appellant's fifth and fourteenth amendment constitutional protections against double jeopardy.

The Eighth Judicial District Court denied the Petition for Extraordinary writ on March 4, 2020. The Appellant filed a timely notice of appeal and now presents this timely filed opening Brief for the Appeal.

Argument with Legal Authority

In this instant case there appears to be two plain errors of a constitutional magnitude within the issues raised with the extraordinary writ and or writ of Certiorari. The Appellant challenged the District Court's adjudication and finding that the Appellant was a Habitual Criminal, then applying the enhancement sentence consecutive to the sentences that were handed down by the same court for the underlying and primary offenses.

When the manner and procedure that the Court used to apply the Large Habitual Criminal is reviewed, it is clear that in this instant case, that the Court applied multiple punishments for a single offense. While NRS 201.010(b) allows for an enhanced penalty to be applied, it is only constitutional and legal if the Court follows the stipulations and requirements that are set forth within the statute itself. The record in this case clearly shows that the Court failed to fulfill the required requirements/stipulations that are necessary in order for the enhancement to be legally applied. If the Court attaches the habitual enhancement to the primary sentence consecutively, in addition to, then it violates the Double Jeopardy Clause. See Benton v. Md., 395 U.S. 784, 794 (1969) (Fourteenth Amendment's Due Process clause extends the Fifth Amendment Double Jeopardy Clause protections to state prosecutions).

The standard for review begins with examination of NRS 201.010 and how the enhancement is meant to be served. The Habitual Criminal adjudication was meant to serve as a deterrent to those who were repeat offenders or violators of the public peace as a way of life, but it did not allow multiple punishments/sentences for a single offense. See State v. Bardmoss, 64 Nev. 84, 7, P.2d 817 also Lisby v. State, 82 Nev. 183, 414 P.2d 592 (only one sentence may be imposed for a single offense)

NRS 207.010 is not a statute that was enacted to create a separate and additional criminal offense for which multiple punishments are to be applied. But it is a statute that allows the state to present or allege a fact that allows the District Court to mete out a more severe punishment than allowed by the statutory limits for the offense committed. This enhancement is to be served instead of, not in addition to, the primary/underlying offense.

The Appellant raised this issue with the District Court and referred to the record on file as evidence of double jeopardy. The application of a habitual offender sentence to be served after the offender served the original punishment for one offense is what was done here.

The Double Jeopardy Clause of the fifth amendment states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The prohibition of double jeopardy applies not only to "life and limb" but also to "imprisonment and monetary penalties." *Yeager v. U.S.*, 557 U.S. 110, 117 (2009)

While the Double Jeopardy Clause protects against repeated prosecutions for the same offense after an acquittal and repeated prosecutions for the same offense after a conviction but it also protects against multiple punishments. Even though the Double Jeopardy clause does not prevent a defendant from being subjected to both criminal punishment and civil sanctions for the same offense, but it does protect a defendant from the imposition of multiple criminal punishments for the same offense. A review of the record will provide evidence that the District violated double jeopardy by handing down a sentence for the primary offense(s), then, without the required level of due process, the District Court handed down a Habitual Offender Sentence of Life without the possibility of parole

for the Defendant to serve after he served the three primary sentences. Unfortunately the District Court failed to abide by the required steps within the statute that would have granted him due process. When the District Court failed to abide by the correct statutory interpretation then it applied what was, for all intents and purposes a separate sentence for a separate offense in addition to the primary sentence as well. This means that the District Court hand down an illegal sentence.

The Ninth Circuit held that "The greatest dangers to liberty lurk in the insidious encroachment made by men of zeal, who are well meaning but are without clear understanding and fail to allow all to be heard." United States v. Wells 2017 U.S. App. LEXIS 25676 (9th Cir 2017)

While Defendant did not claim that NRS 207.010(b) was unconstitutional but he did challenge the constitutionality of how it was applied to him. Constitutional due process establishes that procedural due process mandates that defendant receive proper notice and be provided the opportunity to be heard. In re: American Aluminum Window Corp. 15 BR. 503. The District Court never allowed the Appellant to be heard concerning the three prior convictions that allegedly qualified him to be adjudicated as a habitual offender. Even though the District Court claimed that due process was provided during the trial for the primary offense, the Defendant was not required to serve that sentence alone. He was also required to serve the habitual criminal sentence as well. Even though NRS 207.010 was enacted by the legislature the courts have held that a person's liberty is equally protected even when the liberty itself is a "statutory creation of the state". KLOPF v. McDONNELL 416 U.S. 539, 945 S. Ct. 2963 (1974)

The Habitual Offender Sentence of Life with-out needs to be vacated and

dismissed, because of its violation of Nevada Const. Article 1, Sec. 9.

Submitted on the 29 day of July 2020

~~Roy D. Moraga~~

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed informal brief form upon all parties to the appeal as follows:

- ☐ By personally serving it upon him/her; or
☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served):

OFFICE OF THE ATTORNEY GENERAL
100 N. CARSON ST.
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DATED this 29 day of July, 2020.

Roy D. McCrage
Signature of Appellant

Roy D. McCrage
Print Name of Appellant

NNCC - P.O. Box 7000
Address

CARSON CITY, NV 89702
City/State/Zip

Telephone

AFFIRMATION
Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, Opening Brief
for Appeal

Filed in case number: 80897 (Title of Document)

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 7-29-20

Roy D. Moraga
(Signature)

Roy D. MORAGA
(Print Name)

(Attorney for)