

SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM,
Appellant,
v.
STATE OF NEVADA,
Respondent.

Docket No. 82405

FILED

OCT 06 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

APPELLANT'S PETITION FOR REVIEW
NRAP 40B

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PETITION FOR REVIEW

Appellant John Francis Dunham, through his appointed counsel of record, John Malone, petitions this court pursuant to NRAP 40B for review of the order of affirmance entered by the court of appeals in the instant case.

NRAP 26.1 DISCLOSURE

John Francis Dunham is an individual person with no affiliations to any corporation or publicly held company. Attorney John Malone is the principal of the Law Office of John Malone and appears as appointed counsel on behalf of appellant.

JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. The court of appeals entered an order affirming the order of the district court. Appellant now petitions the supreme court for review pursuant to NRAP 40B.

MEMORANDUM OF POINTS AND AUTHORITIES

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred by concluding that Dunham can be convicted of felony home invasion of his own home based solely on the existence of a temporary restraining order.

STATEMENT OF THE CASE

In 2016 appellant John Dunham was charged with "Invasion of the Home," a violation of NRS 205.067, and in a separate information, with burglary (NRS 205.060), both category B felonies. After trial on both charges, Dunham was acquitted of burglary, but convicted by the jury of home invasion. *Appendix*, Vol. II, p. 500-Vol. III, p. 501. Dunham appealed, and this court issued an opinion affirming the conviction. *Dunham v. State*, 134 Nev. 563, 426 P.3d 11 (2018). Dunham filed a timely postconviction petition, counsel was appointed, and the district court denied the petition. Dunham has appealed; the court of appeals affirmed the district court's order. Dunham now seeks this court's review pursuant to NRAP 40B.

The home invasion charge was based upon the allegation that, in violation of a temporary protective order, Dunham entered a South Lake Tahoe condominium he and his wife had bought the year before. *Appendix*, Vol I, pp. 1-9. *Appendix*, Vol. II, p.437-499. Dunham has argued that while he could properly have been convicted of a misdemeanor violation of the TPO, as a matter of law, he could not be convicted of felony home invasion because he cannot be convicted of home invasion of his own home.

1 Dunham's claim of ineffective assistance was in part based on the argument
2 that his counsel should have made the above argument, and had counsel made this
3 appropriate argument, Dunham would not have been convicted of a felony.
4 *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100
5 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*).
6

7 By focusing on this narrow legal issue, Dunham does not waive any of the
8 other arguments submitted to the district court or the court of appeals.
9

10 BACKGROUND FACTS

11 Patricia Scripko and John Dunham were married in Boston in November
12 2012. *Appendix*, Vol. I, pp. 200-201. In July 2014, the couple moved to Salinas,
13 California. *Appendix*, Vol. I, pp. 198, 203. In October of 2015 Mr. Dunham and
14 Ms. Scripko purchased a condominium at 311 Olympic Court in Stateline, Nevada,
15 using community property funds. They put the condominium in Ms. Scripko's
16 name. *Appendix*, Vol. I, p. 212. During November 2015, a month after the
17 condominium was purchased, the pipes froze causing considerable damage.
18 *Appendix*, Vol II, p. 277. During the reconstruction, Mr. Dunham was frequently at
19 the condominium supervising the renovations. *Appendix*, Vol. II, p. 316-18. In
20 June 2016, Mr. Dunham and Ms. Scripko separated. *Appendix*, Vol. I, p. 200. Ms.
21 Scripko remained in Monterey and Mr. Dunham spent the summer at the Stateline
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1 condominium. *Appendix*, Vol. II, p. 279. On August 23, 2016, Ms. Scripko
2 obtained a temporary protective order from a California court against Mr. Dunham.
3 *Appendix*, Vol. I, p.214, 216. The order restrained Mr. Dunham from contacting
4 Ms. Scripko and purported to exclude him from both the condominium in Stateline
5 and the apartment in Monterey – in effect preventing him from living in any of his
6 homes. *Appendix*, Vol. I, p. 216. Despite this provision, Mr. Dunham continued to
7 stay in the Stateline condo, with Ms. Scripko's knowledge. *Appendix*, Vol. II, p.
8 295, 317. After issuance of the TPO, Douglas County police encountered Dunham
9 at the condo at least twice. *Appendix*, Vol. I, p. 156, 157. They advised Mr.
10 Dunham that he could not be at that address, and Mr. Dunham acknowledged he
11 understood. *Id.* On October 21, 2016, the police again found Mr. Dunham there
12 and arrested him for a violation of the protective order. *Appendix*, Vol. I, pp. 66-
13 68; 126. On the morning of October 26, 2016, shortly before Ms. Scripko was
14 expected to arrive for a visit, the contractor went to the condominium to install
15 some doors. *Appendix*, Vol. II, p. 311. When he arrived, he saw the screen was off
16 the kitchen window and the window itself was broken. *Appendix*, Vol. II, p. 311-
17 312. He also found the door unlocked. *Id.* Ultimately, he found Dunham asleep in
18 the loft. *Appendix*, Vol. II, pp. 312-314. The contractor called the sheriff's office
19 and Ms. Scripko. *Appendix*, Vol. II, p. 314.

1 Deputies responded and arrested Dunham. *Appendix*, Vol. II, pp. 336, 339-
2 340. Based on this arrest, Mr. Dunham was charged with home invasion. Several
3 days later, the State filed a new information charging burglary.
4

5 ARGUMENT

6 Nevada's "Home Invasion" offense is codified at NRS 205.067(1) and
7 provides:
8

9 A person who, by day or night, forcibly enters an
10 inhabited dwelling without permission of the owner,
11 resident or lawful occupant, whether or not a person is
present at the time of the entry, is guilty of invasion of
the home.

12 Trial counsel focused her arguments both at trial and on appeal on the legal
13 definition of "reside" and whether or not Ms. Scripko "resided" in the
14 condominium under NRS 205.067(5)(b). By focusing solely on this limited issue,
15 counsel failed to identify other tenable – and persuasive - arguments. This was not
16 merely a strategic decision, but was instead a failure to present controlling law, and
17 led directly to Dunham being improperly convicted.
18

19 There is no factual dispute that the condo unit was purchased with
20 community funds during the marriage. "In this state, unless otherwise provided by
21 law decree, or agreement, all property acquired after marriage is considered to be
22 community property, NRS 123.220, and that presumption can only be overcome by
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1 clear and convincing evidence.” *Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713,
2 715 (1976) (citing *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972); *Kelly v.*
3 *Kelly*, 86 Nev. 301, 468 P.2d 359 (1970)). This court has further confirmed that
4 merely putting one party’s name on the deed does not transmute community
5 property into separate property. Specifically, in *Burdick v. Pope*, 90 Nev. 28, 518
6 P.2d 146 (1974), the wife, during the marriage, took real property solely in her
7 name; this court expressly held that the mere phrase “her sole and separate
8 property” in the deed standing alone without supporting evidence was not clear and
9 certain proof required to overcome the presumption of community property. No
10 evidence – other than Ms. Scripko’s name on the deed - was offered or admitted at
11 trial to suggest the condominium was Ms. Scripko’s separate property. As a matter
12 of law, therefore, the condo was community property and Dunham was the legal
13 owner of the property.
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17 Under Nevada law, “a person cannot commit the crime of home invasion by
18 forcibly entering his or her own home if that person is a lawful occupant or
19 resident of the home.” *Truesdell v. State*, 129 Nev. 194, 202, 304 P.3d 396, 401
20 (2013) (emphasis added). Trial counsel should have argued that Mr. Dunham
21 owned the home and could not have invaded his own home.
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1 The court of appeals relied on this court's opinion in *White v. State*, 130
2 Nev. 533, 330 P.3d 482 (2014) to conclude that the TPO effectively vitiates
3 Dunham's ownership interest. In *White*, this court held that a person with an
4 unconditional right to enter a structure cannot burglarize the structure and
5 therefore, by extension, because of the TPO, Dunham's right of access was not
6 unconditional and therefore he was subject to a home invasion conviction. But
7 Dunham was the owner of the condo, and he gave himself permission to enter.
8

9 The court of appeals failed to address the argument that NRS 193.166
10 provides a sentencing enhancement for a home invasion committed in violation of
11 a TPO, but the underlying home invasion felony must be established first. The
12 violation of the TPO cannot be used to establish the felony and then be used once
13 again for the enhancement. This principle is akin to the rule this court developed
14 under *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). In
15 *McConnell*, this court held that it is "impermissible under the United States and
16 Nevada Constitutions to base an aggravating circumstance in a capital prosecution
17 on the felony upon which a felony murder is predicated." 120 Nev. at 1069, 102
18 P.3d at 624. By the same token, the violation of a TPO cannot be used both to
19 establish a home invasion and then be used again to enhance – or aggravate – the
20 sentence.
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CONCLUSION

Mr. Dunham respectfully requests this court review the decision of the court of appeal and order the district court's order reversed and the judgment of conviction vacated.

Dated this 6th day of Oct, 2021.


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Certificate of Compliance
NRAP 32(a)(9)

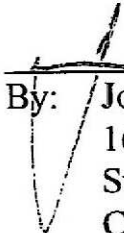
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4 1. I hereby certify that this brief complies with the formatting requirements
5 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style
6 requirements of NRAP 32(a)(6) because this brief has been prepared in a
7 proportionally spaced typeface using Microsoft Word in New York Times font size
8 14 pt.
9

10 2. I further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
12 NRAP 32(a)(7)(C), it does not exceed 10 pages.
13

14 3. Finally, I hereby certify that I have read this petition for review, and to the
15 best of my knowledge, information, and belief, it is not frivolous or interposed for
16 any 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
20 where the matter relied on is to be found. I understand that I may be subject to
21 sanctions in the event that the accompanying brief is not in conformity with the
22 requirements of the Nevada Rules of Appellate Procedure.
23
24
25

1 Finally, I certify that no social security number of any person is referenced
2 in this document.

3 Dated this 10 day of Oct, 2021.

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CERTIFICATE OF SERVICE

I affirm that I served the foregoing PETITION FOR REVIEW by:

Personal service ☒

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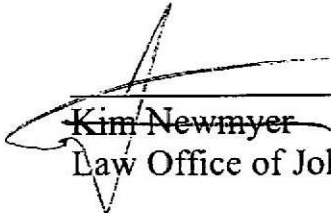
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