

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK SIMS,)	No. 84717
)	
Appellant,)	Electronically Filed
)	Jun 21 2022 02:58 p.m.
v.)	E-File Elizabeth A. Brown
)	Clerk of Supreme Court
THE STATE OF NEVADA,)	
)	
Respondent.)	
)	

FAST TRACK STATEMENT

1. **Name of party:** Mark Sims.

2. **Name of attorney submitting this fast track statement:**

 ROBERT J. SCHMIDT, #14611
 Clark County Public Defender's Office
 309 S. Third St., Ste. 226
 Las Vegas, Nevada 89155
 (702) 455-4685

3. **Name of appellate counsel if different from trial counsel:**

Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C-20-352400-1.

5. **Name of judge issuing order appealed from:** Judge Jerry A. Wiese.

6. **Length of trial.** N/A. (Plea of Guilt).
7. **Conviction(s) appealed from:** Ct. 1 – Battery by Strangulation; Ct. 2 – Battery Constituting Domestic Violence.
8. **Sentence for each count:** Probation reinstated with added conditions: 1) Temporary revocation of ninety (90) days flat time in Clark County Detention Center. 2) Upon release, return on probation with the same conditions as previously imposed. 3) Stay away from the victim.
9. **Date district court announced decision:** 02/01/22.
10. **Date of entry of written judgment:** 04/13/22.
11. **Habeas corpus:** N/A.
12. **Post-judgment motion:** N/A.
13. **Notice of appeal filed:** 05/11/22.
14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).
15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.
16. **Disposition below:** Judgment upon entry of plea, probation revoked and reinstated with added conditions.
17. **Pending and prior proceedings in this court:** N/A.
18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Fast Track Statement.** No objection to assignment to the Court of Appeals.

21. **Procedural history.**

A Criminal Complaint was filed against Mark Sims (hereinafter “Appellant”) on October 27, 2020, charging him with Coercion Constituting Domestic Violence, a B-felony; Battery Constituting Domestic - Strangulation, a C-felony; and Battery Constituting Domestic Violence - First Offense, a Misdemeanor. (Appellant’s Appendix “App.” at 1-3). The Appellant allegedly committed these crimes against the named victim Endria Castillo. (App. 15-16). At Arraignment, the Public Defender’s Office was appointed, and an Individualized Custody Status Hearing was held. (App. 1D). The Appellant unconditionally waived his right to a Preliminary

Hearing with negotiations, was bound over to District Court, and pled guilty pursuant to negotiations on December 2, 2020. (App. 34).

On March 11, 2021, Appellant was found guilty of Battery by Strangulation, a C-felony; and Battery Constituting Domestic Violence - First Offense, a Misdemeanor. (App. 29-30). Appellant was sentenced to 12-36 months in the Nevada Department of Corrections and was placed on a period of probation not to exceed twenty-four (24) months. (App. 1-3).

In June of 2021, P&P filed a violation report requesting that the Court revoke Appellant's probation. (App. 5-6). That request was based upon Appellant's arrest for Ownership or Possession by a Firearm by a Prohibited Person, a B-felony. (App. 4). That new case was dismissed by the State at the Preliminary Hearing. (App. 7). At the corresponding probation revocation hearing, the violation report was withdrawn, and Appellant was reinstated on probation. (App. 39-41).

P&P filed a second violation report requesting that the Court revoke Appellant's probation. (App. 10-11). That request was based upon Appellant's arrest for Battery Constituting Domestic Violence - Strangulation, a C-felony, against Ebony Thomas. (App. 8-9). That new case was dismissed by the State at the Preliminary Hearing. (App. 12). At the corresponding probation revocation hearing, the parties stipulated to

Appellant's first technical violation. (App. 42-47). The Court reinstated Appellant on probation with twenty (20) days in the Clark County Detention Center (CCDC) with twenty (20) days of credit. Id. Appellant was also placed on Intensive Supervision for sixty (60) days. Id.

P&P filed a third violation report requesting that the Court revoke Appellant's probation. (App. 13-14). That request was based upon Appellant's arrest for Battery Constituting Domestic Violence - First Offense, a Misdemeanor, against a different alleged victim, Ebony Thomas. (App. 27). That case is still scheduled for a status check on the filing of the Criminal Complaint on October 11, 2022. Id. At the corresponding probation revocation hearing, the parties stipulated to a second technical violation. (App. 48-53). Appellant was reinstated on probation with thirty (30) days flat time in CCDC and Appellant agreed that he would not contact Ebony Thomas. Id.

P&P filed a fourth violation report requesting that the Court revoke Appellant's probation. (App. 20-21). That request was based upon Appellant's arrest for Residential Burglary, a B-felony; Battery Constituting Domestic Violence - Strangulation, a C-felony, and Battery Constituting Domestic Violence - First Offense, a Misdemeanor, against Ebony Thomas. (App. 17-19).

P&P filed a supplemental report detailing Appellant's alleged contact with Ebony Thomas after his arrest. (App. 23-24). But that new case was also dismissed by the State at the Preliminary Hearing. (App. 22). At the corresponding probation revocation hearing, Appellant stipulated to another second technical violation. (App. 54-67). Appellant was reinstated on probation with ninety (90) days flat time in CCDC and again ordered to have no contact with Ebony Thomas. Id.

P&P filed a fifth violation report requesting that the Court revoke Appellant's probation based solely upon his alleged violation of the aforementioned No Contact Order with Ebony Thomas by allegedly calling her using CCDC phones. (App. 25-26). At the corresponding probation revocation hearing, Appellant stipulated that this was his third technical violation, but not his fourth, and cited N.R.S. 176A.630(2)(c)(3). (App. 68-73). Appellant argued that the Court could not revoke his probation. Id. In the alternative, Appellant requested that the instant case be closed, and he be given a Dishonorable Discharge with some flat time in CCDC. Id. Appellant reminded the Court that the State had not charged him with Dissuasion or any other crime for this alleged conduct, nor had he been convicted of any other crimes. Id. The Court revoked Appellant's probation and imposed his underlying sentence. Id.

This Fast Track Appeal was then timely filed on June 21, 2022.

22. Statement of facts.

A Criminal Complaint was filed against Appellant charging him with Coercion constituting Domestic Violence, a B-felony; Battery Constituting Domestic - Strangulation, a C-felony; and Battery Constituting Domestic Violence - First Offense, a Misdemeanor. (App. at 1A-C). The named victim in that case was Endria Castillo. (App. 15-16). At the Arraignment, the Public Defender's Office was appointed, and an Individualized Custody Status Hearing was held. (App. 1D). The Appellant unconditionally waived his right to a Preliminary Hearing with negotiations, was bound up to District Court, and pled guilty pursuant to negotiations on December 2, 2020. (App. 34).

On March 11, 2021, Appellant was found guilty of Battery by Strangulation, a C-felony; and Battery Constituting Domestic Violence - First Offense, a misdemeanor. (App. 29-30). Appellant was sentenced to 12-36 months in the Nevada Department of Corrections and was placed on a period of probation not to exceed twenty-four (24) months. (App. 1-3).

In June of 2021, Parole and Probation (P&P) filed a violation report requesting that the Court revoke Appellant's probation, but at the corresponding revocation hearing the Violation Report was withdrawn, and

Appellant was reinstated on probation. (App. 39-41). P&P filed a second violation report requesting that the Court revoke Appellant's probation, but at the corresponding revocation hearing the parties agreed to a technical violation, and the Court reinstated the Defendant on probation with twenty (20) days in the Clark County Detention Center (CCDC) with twenty (20) days of credit. (App. 42-47).

P&P filed a third violation report requesting that the Court revoke Appellant's probation, but at the corresponding revocation hearing the parties agreed to a second technical violation and Appellant was reinstated on probation with thirty (30) days flat time in CCDC with the stipulation that the Appellant would have no contact with Ebony Thomas. (App. 48-53). P&P filed a fourth violation report requesting that the Court revoke Appellant's probation but at the corresponding revocation hearing, Appellant stipulated to another second technical violation, and he was reinstated on probation with ninety (90) days flat time in CCDC and again ordered to have no contact with Ebony Thomas. (App. 54-67).

P&P filed a fifth violation report requesting that the Court revoke Appellant's probation based solely upon Appellant's alleged violation of the No Contact Order via CCDC phone calls. (App. 25-26). At the corresponding revocation hearing, Appellant stipulated that this was his third

technical violation, but not his fourth. (App. 68-73). The Court revoked Appellant's probation and imposed his underlying sentence. Id.

23. Issues on appeal.

1.) Whether the District Court's imposition of Mr. Sim's suspended sentence was a misapplication of N.R.S. 176A.630, the law governing technical and non-technical probation violations.

2.) Whether the District Court's imposition of Mr. Sim's suspended sentence violated the Rule of Lenity.

24. Legal argument, including authorities:

I. The District Court's imposition of Mr. Sims' suspended sentence was a misapplication of NRS 176A.630, the law governing technical and non-technical probation violations

Nevada State Assembly Bill 236 contained a statutory overhaul of the procedures governing probation revocation hearings for criminal defendants.¹ Per the changes made in that legislation, probation violations are now categorized into technical and non-technical violations. N.R.S. 176A.630. Subsection (5)(b) specifically details what constitutes a technical

¹ This law went into effect on July 1, 2020. The underlying incident to which Appellant pled guilty in the instant case occurred on September 19, 2020. (App. 1). Therefore, N.R.S. 176A.630 governs this case.

or non-technical violation.² And all violations of the terms of probation not specifically outlined in subsection (5)(b) are classified as technical violations. Id.

Technical violations are dealt with on a graduated scale. N.R.S. 176A.630(1). For a probationer's first technical violation, the Court may temporarily revoke probation and impose a maximum term of imprisonment of thirty (30) days. N.R.S. 176A.630(2)(c)(1). The Court is empowered to impose a maximum term of imprisonment of ninety (90) days for a second technical violation and one hundred and eighty (180) days for a third violation. N.R.S. 176A.630(2)(c)(2-3). For a fourth finding of a technical violation probation may be fully revoked. N.R.S. 176A.630(2)(d). The Court also has the discretion to reinstate the probationer to probation immediately,

² "Technical violation" means any alleged violation of the conditions of probation that does not constitute absconding and is not the commission of a:

- (1) New felony or gross misdemeanor;
- (2) Battery which constitutes domestic violence pursuant to N.R.S. 200.485;
- (3) Violation of N.R.S. 484C.110 or 484C.120;
- (4) Crime of violence as defined in N.R.S. 200.408 that is punishable as a misdemeanor;
- (5) Harassment pursuant to N.R.S. 200.571 or stalking or aggravated stalking pursuant to N.R.S. 200.575;
- (6) Violation of a temporary or extended order for protection against domestic violence[...]; or
- (7) Violation of a stay away order involving a natural person who is the victim of the crime for which the probationer is being supervised.

order some form of electronic monitoring, or impose additional non-confinement conditions. N.R.S. 176A.630(2).

In contrast, a probationer who is found to have committed a non-technical violation faces the possibility of full revocation and the imposition of their suspended sentence at their first revocation hearing. N.R.S. 176A.630(1). A court may also opt to reinstate a probationer to probation after the finding of a non-technical violation, or to impose a modified sentence. N.R.S. 176A.630(1).

And, if applicable, the Court must consider the system of graduated sanctions adopted pursuant to N.R.S. 176A.510. Id. N.R.S. 176A.510(6) mandates that P&P “may not seek revocation of probation for a technical violation of the conditions of probation until all graduated sanctions have been exhausted.”

Here, Appellant’s argument made at the final revocation hearing hinged on whether or not Appellant’s conduct constituted a third or fourth technical violation. (App. 68-73). Because the Court skipped the third technical violation by failing to sentence Appellant to a term of “[o]ne hundred and eighty days for the third temporary revocation” per N.R.S. 176A.630(2)(c)(3), the Court did not have statutory authority skip to step 4 and revoke the Defendant’s probation under N.R.S. 176A.630(2)(d). The

Court's interpretation of N.R.S. 176A.630(2), focusing on the number of technical violations rather than the exhaustion of all three (3) steps of graduated sanctions, renders N.R.S. 176A.630 meaningless. The court's interpretation of N.R.S. 176A.630(2), focusing on the number of technical violations rather than the exhaustion of all three (3) steps of graduated sanctions, also renders N.R.S. 176A.510(6) meaningless. Those statutes should be read harmoniously.

Based upon the negotiations of the parties at the aforementioned revocation hearings, and the clear court record, Appellant's violation should have been deemed to be his third technical violation. And thus, not a violation for which Appellant could be revoked from probation.

II. The Rule of Lenity Necessitates that the Appellant's Revocation be Interpreted as his Third Technical Violation

The Rule of Lenity demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor, and it applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. State v. Lucero, 127 Nev. 92, 99 (2011) (internal citations omitted). This rule "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." U.S. v. Santos, 553 U.S. 507, 514 (2008); State v. Fourth Judicial District Court in and for

County of Elko, 481 P.3d 848 (2021). And because ambiguity is the cornerstone of the rule of lenity, it only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, of the statute have failed to resolve statutory ambiguity. Barber v. Thomas, 560 U.S. 474, 486 (2010).

The Nevada Supreme Court's primary goal when construing a statute is to give effect to the Legislature's intent, so the Court will first examine the statute's plain language to determine its meaning. Hobbs v. State, 127 Nev. 234, 237 (2011). The Court will look beyond the statute's language only if that language is ambiguous, or its plain meaning was clearly not intended, or that interpretation would lead to an unreasonable result. Ramos v. State, 499 P.3d 1178, 1180 (2021).

The statutory language of N.R.S. 176A.630 clearly delineates the difference between technical and non-technical probation violation and establishes a graduated level of sanctions for technical violations. See N.R.S. 176A.630(1). The statute also identifies how much time the Court may impose based upon the number of times the Court found the Defendant had committed a technical violation of probation. Id. But the Statute is ambiguous as to whether the Defendant, State, or Court can stipulate by

agreement that the Defendant is stipulating to a technical violation in a particular subsection of the graduated sanctions statute.

When the Supreme Court interprets an ambiguous statute, they then “look to the legislative history and construe the statute in a manner that is consistent with reason and public policy.” State v. Lucero, 127 Nev. 92, 95 (2011). This particular change in the law was based on a recommendation from the Justice Reinvestment Initiative subgroup to address the issue of “increasing revocations reentering prison... [and] establish limits on the time an individual on probation or parole can be incarcerated for a revocation due to a technical violation.”³ The underlying policy is clearly designed to prevent probationers and parolees from being revoked based violations that were insufficiently egregious to merit revocation.

Thus, because the text of N.R.S. 176A.630 is ambiguous regarding how the Court is required to interpret the number of technical violations, and the structure, purpose, and legislative history of the statute leans in the Appellant's favor, the Rule of Lenity should apply.

³ Assembly Bill 236, Makes various changes related to criminal law and criminal procedure, Assembly Committee on Judiciary Minutes (Eightieth Session) March 8, 2019, Page 14, available at <https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/JUD/Final/403.pdf>

25. **Preservation of issues:** Appellant preserved this issue by duly filing an appeal on June 21, 2022, within the governing time limit outlined by NRAP4(b).

26. **Issues of first impression or of public interest:** This issue of how the Court must interpret the graduated system of technical violation under NRS 176.630 is one without binding precedent.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Robert J. Schmidt
ROBERT J. SCHMIDT, #14611
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VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 2,692 words which does not exceed the 7,267 word limit and 15 pages which does not exceed the 16 page limit.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in

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this fast track statement is true and complete to the best of my knowledge,
information and belief.

DATED this 21 day of June, 2022.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Robert J. Schmidt
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with
the Nevada Supreme Court on the 21st day of June, 2022. Electronic Service
of the foregoing document shall be made in accordance with the Master
Service List as follows:

AARON D. FORD
ALEXANDER CHEN

ROBERT J. SCHMIDT

I further certify that I served a copy of this document by
mailing a true and correct copy thereof, postage pre-paid, addressed to:

MARK SIMS
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BY /s/ Carrie M. Connolly
Employee, Clark County Public Defender's Office