

IN THE SUPREME COURT OF THE STATE OF NEVADA

Mark Zana
Appellant

Supreme Court no. 84854

- vs -

District Court no. 05C218103

State of Nevada
Respondent

FILED

OCT 14 2022

APPELLANT'S INFORMAL BRIEF

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

Filed Date Name of Order

6-20-22 Order Denying Defendant's Motion for Modification of Sentence

Notice of Appeal: 6-6-22

Related Cases:

Bradley v. State, 109 Nev. 1090, 1094-95, 844 P.2d 1272, 1275 (1995)

Castaneda v. Nevada, 373 P.3d 108 (2016) Nev. Supreme Court

Colwell v. Nevada, 118 Nev. 807, 59 P.3d 463 (2002) Nev. S. Ct.

Passanisi v. Nevada, 105 Nev. 318, 321, 831 P.2d 1371, 1372 (1992) Nev. S. Ct.

U.S. v. Alex Jose Tejeda, 784 Fed. Appx. 493 (2019)

Pro Bono Counsel YES

Statement of the Facts

This is a pro se appeal from the Eighth Judicial District Court's (HERETO EJDC) denial of Appellant's (HERETO Zana) Motion for Modification of Sentence (also known as a Motion to correct an illegal sentence) and Motion for a New Trial based on the fact the EJDC lacked the jurisdiction to sentence Zana to multiple counts for a single offense under NRS 200.730, in violation of Zana's double jeopardy protections and his due process rights.

In reliance on the Nevada Supreme Court's decision in Castaneda v. Nevada, 373 P.3d 108 (2016), the district court lacked the jurisdiction to

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1 charge, convict, and sentence Zana to multiple counts for a single offense under
2 NRS 200.730. The district court's sentencing of Zana to multiple, consecutive
3 counts violated his double jeopardy protections, due process rights, and equal pro-
4 tection rights.

5 "A district court has inherent authority to correct an illegal sentence at
6 any time. The same is true of a sentence that, although within the statutory
7 limits, was entered in violation of the defendant's right to due process. Thus,
8 time limits and other restrictions with respect to a petition for post-conviction
9 relief do not apply to a motion to modify a sentence based on an untrue
10 assumption of fact that amounted to a denial of due process."

11 Passanisi v. Nevada, 108 Nev. 318; 837 P.2d 1371 (1992)

12 Castaneda confirms the state exceeded its authority when it illegally
13 charged Zana with 12 counts of possession instead of the single count NRS.
14 200.730 intended, just like they did in Castaneda. The state's untrue
15 assumption of fact that they could legally charge Zana with 12 counts of possession
16 amounted to a denial of Zana's due process rights. Castaneda also confirms
17 the district court lacked the jurisdiction to sentence Zana to multiple counts
18 for a single violation of NRS 200.730. The district court's untrue assumption
19 of fact that the state correctly and legally charged Zana amounted to
20 violations of his double jeopardy protections and his due process rights.

21 Retroactivity is **not** an issue since the Nevada Supreme Court merely
22 interpreted and clarified NRS 200.730 for the first time in Castaneda and did not
23 make a new rule of law. Therefore, Castaneda applies to Zana even though his
24 case was final at the time of their decision. This fact is substantiated
25 by Colwell v. Nevada, 118 Nev. 807; 59 P.3d 463 (2002).

26 "Retroactivity is an issue only when a rule is new. If a rule is not
27 new, then it applies even on collateral review of final cases." (Colwell)

1 - "When a decision merely interprets and clarifies an existing rule
2 - and does not announce an altogether new rule of law, the court's
3 - interpretation is merely a restatement of existing law." (Colewell)
4 - Colewell substantiates that Castaneda applies to all similar cases, including
5 Zana's, and not just those on collateral review. Castaneda applies to Zana
6 because it was the first time the Nevada Supreme Court interpreted and
7 clarified NRS 200.730. Passanisi establishes that time bars and procedural
8 bars do not apply to Zana's Motion For Modification of Sentence.
9 - According to Castaneda, Zana committed one felony when he simultaneously
10 possessed 12 digital images, consistent with the reasoning of Liberty
11 and Sutherby and the rule of lenity, Zana's simultaneous possession at one
12 time and in one place of 12 images constituted a single violation of
13 NRS 200.730. (Liberty, 370 S.W.3d at 551; State v. Sutherby, 138 Wn. App
14 609, 158 P.3d 91, 441 4; 2007)
15 - Zana cites protection against multiple punishments for the same
16 offense afforded by the double jeopardy clause of the United States and Nevada
17 Constitutions. (U.S. Constitution amendment V and Nevada Constitution
18 articles 1 § 8)
19 - NRS 200.730 penalizes possession, and the state proved only a singular
20 act of digital possession of items seized on the day police took Zana's
21 computers into police custody, just like in Castaneda. The state prosecuted
22 the 12 images as a group and did not attempt to show, other than that there
23 were 12 different images, individual distinct crimes of possession, just
24 like in Castaneda. Evidence of possessing multiple images at one time
25 and in one place constituted one crime because the state did not
26 otherwise attempt to distinguish the offenses by showing that they were
27 separated by time or location or by otherwise demonstrating that Zana

1 formed a new intent as to each image, just like in Castaneda.
2 In Zana's case the police found 12 images in one room of Zana's
3 house and at one time, just like in Castaneda. Zana was only con-
4 victed of 6 of those 12 counts. Castaneda was convicted of all 15
5 counts against him. Zana was sentenced to two of the six counts
6 consecutively. Castaneda was sentenced to one count with the other.
7 Fourteen counts run concurrently. The district court lacked the juris-
8 diction to sentence Zana to two counts consecutively under NRS.
9 200.730, making his sentence illegal. Zana's six counts must be
10 vacated, his judgement rendered void, and new sentencing ordered
11 to correct his illegal sentence.
12 "When a defendant is sentenced on multiple counts and one of them
13 is later vacated on appeal, the sentencing package comes unbundled.
14 Under these circumstances, vacating the sentence is required in
15 order to allow the district court to put together a new package
16 reflecting its considered judgement as to the punishment the
17 defendant deserves for the crimes of which he remains convicted."
18 U.S. v. Alex Jose Tejeda, 734 Fed. Appx. 493 (2019)
19 Castaneda confirms that, had Zana been correctly charged with one-
20 count for the 12 images as NRS 200.730 intended, the jury would have
21 been required to find all 12 images to be violations of NRS 200.730 in
22 order to convict Zana of the single charge. The jury failed to do this
23 in Zana's case when they only convicted him of 6 of the 12 images.
24 Which is why, unlike Castaneda, Zana's remaining 6 counts must be
25 vacated, his judgement rendered void, and a new trial ordered for him.
26 Castaneda was convicted of all 15 counts, which is why 14 counts
27 were vacated and not all 15 counts. The state had Castaneda's admission

1 "those are kids" along with verification from the FBI. to that fact.
2 In Castaneda's case the state had sufficient evidence to support his
3 conviction of the single count. Not so in Zana's case.
4 In Zana's case he was only convicted of 6 of the 12 counts. The
5 state sent the 12 images to the F.B.I. but received **no** confirmation
6 as to the age of anyone in the 12 images. The trial judge ordered the
7 state to provide an expert who would "explain the differences between
8 a 16 and 17 year old or the state wouldn't have proven their case." The
9 state's expert failed to do this. At trial, the state's expert was asked
10 if he could determine the age of anyone in the 12 images to a reasonable
11 degree of medical certainty. He testified that he had "no basis to be
12 able to do that."
13 The people depicted in the 12 images were **not** obviously under the age
14 of 16 and the state provided **no** evidence at trial as to their ages. At
15 trial **no one** testified that anyone in the 12 images was obviously under
16 the age of 16. Not the police, ~~not~~ the state's expert, **no one**.
17 This is why several jurors conducted outside experiments, against
18 the court's admonition not to do so, in an attempt to help them
19 determine the ages of the people in the 12 images. One juror
20 compared girls at the mall to the 12 images. Another juror compared
21 girls at church to the 12 images. Another juror compared girls in
22 a casino to the 12 images. Yet another juror went online, viewed
23 several pornographic websites, and compared those girls to the 12
24 images. These jurors conducted those experiments because **no one**
25 in the 12 images was obviously under the age of 16 and because the
26 state provided **no** evidence at trial that they were. Trial trans-
27 scripts substantiate these facts.

1 All of this substantiates that had Zana been correctly charged
2 with a single count as NRS 200.730 intended, he would have been found
3 not guilty of that single count. Therefore, Zana's 6 remaining possession
4 counts should be vacated, his judgement rendered void, and a new trial
5 ordered due to cross-contamination of the issues and the fact that the State
6 used the possession counts, exclusively, to prove state of mind in the
7 lewdness charge and refused to sever these unrelated charges.

8 The state exceeded its authority when it made an untrue assump-
9 tion as to the intent of NRS 200.730 and illegally charged Zana with
10 12 duplicious counts of possession. The district court illegally con-
11 victed Zana of 6 of those 12 counts. The district court then illegally
12 sentenced Zana to two counts, consecutively, in violation of his double
13 jeopardy protections and his due process rights. The district court
14 lacked the jurisdiction to sentence Zana to multiple counts for a
15 single offense. These mistakes of material fact worked to the extreme
16 detriment of Zana by prejudicing him with the jury when they were
17 introduced to 12 duplicious felony possession counts at trial and again
18 when Zana received multiple punishments for a single offense.

19 "A motion to modify a sentence is the functional equivalent of a
20 motion for a new trial. In timing and scope, the two actions
21 are essentially the same." (Passanisi)

22 "We believe that a motion to modify a sentence is the functional
23 equivalent of a motion for a new trial. In both instances the
24 defendant seeks an entirely new proceeding based on the claim
25 that the factual underpinnings of the district court's decision
26 are incorrect. Such challenges are direct attacks on the
27 decision itself." (Passanisi)

1 — "such a challenge is similar to a claim of newly discovered
2 — evidence that might justify a new trial, and may be brought
3 — by motion for a new sentencing hearing." (Rossano)
4 — Zana has established that Castaneda applies to his case. Zana
5 has further established that, had he been correctly charged with a
6 single count under NRS 200.730, he would have been found not
7 guilty of that single count. Zana has established, through Colwell,
8 that retroactivity is not an issue. Zana established that the district
9 court lacked the jurisdiction to sentence him to multiple punishments
10 for a single offense of NRS 200.730.
11 — Due to the state using the possession courts, exclusively, to
12 prove state of mind in the lewdness charge and refusing to sever
13 these unrelated charges, a new trial should be ordered due to
14 cross-contamination of the issues and the prejudice Zana suffered
15 by having these unrelated charges tried together in one trial.
16 — The EJDC abused its discretion when it ignored controlling caselaw
17 and precedent set forth in Castaneda, Colwell, and Rossano and
18 ~~denied~~ denied Zana's Motion for Modification of Sentence. To
19 date, the state has failed to ever serve Zana with a copy of their
20 opposition to his motion for modification of sentence and Zana
21 can substantiate this fact with documentation in the form of a
22 record of all incoming legal mail from his prison law library. The
23 state should be sanctioned for this failure. The EJDC failed to ever
24 provide Zana with a copy of their opinion, which severely impeded
25 Zana's ability to thoroughly and effectively complete this appeal.
26 The EJDC should be sanctioned for this failure.
27 — Zana respectfully contends that his 6 remaining possession

1 counts should be vacated to correct his illegal sentence. Zana further
2 contends that a new trial is warranted as Passarisi establishes and
3 due to the state's refusal to sever these unrelated charges. Also the fact
4 the state used the possession counts, exclusively, to prove state of mind
5 in the lewdness charge. Zana was severely prejudiced by having the
6 jury introduced to ~~the~~ duplicative possession counts and cross-
7 contamination of the issues by having these unrelated charges tried
8 together in one trial.

9 Statement of District Court Error

10 To date, the EJDC has failed to ever provide Zana with a copy of their
11 opinion. The EJDC only provided a copy of their written order, which
12 simply states:

13 "Without argument, based on the pleadings and with good cause

14 appearing, IT IS HEREBY ORDERED that Defendant's Motion for
15 Modification of Sentence shall be and is DENIED."

16 The EJDC failed to ever provide an opinion containing their legal
17 rationale in support of their denial and claim of "good cause appearing."
18 This abuse of discretion violated Zana's due process rights, denied
19 Zana his right to file a motion for rehearing, and has severely impeded
20 Zana's ability to effectively and thoroughly complete this appeal.

21 The EJDC abused its discretion when it denied Zana's motion for
22 modification of sentence without providing an opinion containing
23 their legal rationale for the denial. The EJDC abused its discretion
24 when it ignored clearly established precedent, controlling caselaw, and
25 statutory law in Castro, Colwell, Passarisi, and NRS 20.730.
26 These abuses of discretion violated Zana's due process rights and
27 severely prejudiced him.

Castaneda applies to Zona. Colwell establishes that retroactivity is not an issue. Passonis establishes that time and procedural bars don't apply and that a new trial should be ordered for Zona. The material facts of Castaneda and Zona's case are nearly identical and warrant the vacating of his 6 remaining possession counts, his judgement rendered void, and a new trial ordered.

DATED this 12th day of October, 2022.

Mark Zona
Signature of Appellant

Mark Zona
Print Name of Appellant

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):

Clark County District Attorney
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DATED this 12th day of October, 2022

Mark Zona
Signature of Appellant

Mark Zona
Print Name of Appellant

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