

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK SIMS

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jul 12 2022 08:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 84717

FAST TRACK RESPONSE

ROUTING STATEMENT: Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals.

- 1. Name of party filing this fast track response:** The State of Nevada
- 2. Name, law firm, address, and telephone number of attorney submitting this fast track response:**
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- 3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**
Same as (2) above.
- 4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:** None
- 5. Procedural history.**

On November 25, 2020, appellant Mark Sims (hereinafter "Sims") was charged by way of Information as follows: Count 1 – Battery by Strangulation

(Category C Felony – NRS 200.481) and Count 2 – Battery Constituting Domestic Violence (Misdemeanor – NRS 200.485(1)(A). 33.018). Appellant’s Appendix (hereinafter “AA”) at 15-16. On November 30, 2020, Sim’s Guilty Plea Agreement was filed, wherein he agreed to plead guilty to both Counts contained in the Information filed. Respondent’s Appendix (hereinafter “RA”) at 001-11. On December 2, 2020, Sims was arraigned and pled guilty to the negotiations contained in the Guilty Plea Agreement. RA at 012.

On March 11, 2021, Sims was adjudged guilty of both Counts. AA at 29. As to Count 1, Sims was sentenced to a minimum of twelve months and a maximum of thirty-six months in the Nevada Department of Corrections. AA at 29. Sims’ sentence was suspended and he was placed on probation for an indeterminate period not to exceed twenty-four months. AA at 29. In addition to the standard Parole and Probation (hereinafter “P&P”) conditions, seven special conditions were imposed. AA at 29-30. As to Count 2, Sims was sentenced to credit for time served. AA at 29. The Judgment of Conviction was filed on April 1, 2021. AA at 1-3.

On June 2, 2021, P&P authored a Non-Technical Violation Report indicating that Sims had violated his probation by being arrested for Possession of a Firearm by a Prohibited Person, a felony (Case No. 21-CR-025303). AA at 5-6. On June 24, 2021, a revocation of probation was held. AA at 39. The parties agreed to withdraw

the violation report because the case that led to the violation was dismissed at preliminary hearing. AA at 40. Accordingly, no violation was found. AA at 41.

On September 14, 2021, P&P authored a second Non-Technical Violation Report. AA at 10-11. Sims was arrested for Domestic Battery by Strangulation, a felony, and Domestic Battery (First Offense)(Misdemeanor) under Case No. 21-CR-042491. AA at 10. On September 30, 2021, a revocation of probation was held. AA at 42. The district court found Sims' actions amounted to a technical violation. AA at 46. Sims' probation was temporarily revoked for twenty days with twenty days credit. AA at 45-46. Additionally, Sims was placed on intensive supervision for sixty days to run concurrent with Case No. C-20-352764-1. AA at 46.

On October 26, 2021, P&P authored a third Non-Technical Violation Report because Sims was arrested for Domestic Battery, (First Offense) (Misdemeanor) against victim, Ebony Thomas in Case No. 21-CR-049159. At the revocation hearing held on November 2, 2021, the parties stipulated to a second technical violation. AA at 49-50. Sims' probation was reinstated and he was required to serve thirty days flat time in Clark County Detention Center with zero days credit for time served and to stay away from Ebony. AA at 52.

On January 5, 2022, P&P authored a fourth Non-Technical Violation Report because Sims was arrested for Burglary, a felony; Battery Constituting Domestic Violence – Strangulation, a felony; Domestic Battery (First Offense)

(Misdemeanor); and Coercion Constituting Domestic Violence with Threat of use of Physical Force, a felony under Case No. 22-CR- 000128 wherein Ebony Thomas was the victim again. AA at 20-21. A Supplemental (Non-Technical) Violation Report was created on January 26, 2022, stating that Sims had been harassing Ebony Thomas. AA at 23-24. Since his arrest, Sims called Ebony multiple times a day and at different numbers Ebony could be reached, violating the Stay Away Order. AA at 23. The jail calls showed Sims was verbally aggressive and argumentative towards Ebony. AA at 23. At the revocation hearing held on February 1, 2022, the district court found Sims in violation of his probation, making it his third technical violation. AA at 58, 64-65. The district court reinstated his probation with ninety days in CCDC and ordered Sims to stay away from Ebony. AA at 64. The district court added an additional condition that P&P could impose whatever restrictions were necessary to ensure that Sims obey the Stay Away Order pertaining to Ebony. AA 64-65.

On January 12, 2022, an Amended Judgment of Conviction (Plea of Guilty) was filed to reflect the additional conditions imposed resulting from Sims' probation violations. RA at 013-16.

On February 10, 2022, P&P authored a Technical Violation Report for violating the Stay Away Order pertaining to Ebony. AA 25-26. Immediately after the February 1, 2022 revocation hearing, Sims called Ebony and continued to call

her at different numbers. AA 25. On March 3, 2022, Sims appeared at his fifth revocation hearing. AA at 68. The district court noted that Sims was reinstated on June 24, 2021; reinstated on September 30, 2021; reinstated on November 2, 2021; and reinstated again on February 1, 2022. AA at 72. The district court further noted that if Sims were to be dishonorably discharged, Sims would continue to contact Ebony and a domestic violence incident was probable. AA at 72. The district court revoked Sims' probation and imposed the underlying sentence, twelve to thirty-six months. AA at 73.

On March 18, 2022, the district court filed an Order for Revocation of Probation and Amended Judgment of Conviction. RA 017-19.

On April 13, 2022, a second Amended Judgment of Conviction (Plea of Guilty) was filed listing all the probation violations and additional conditions. RA 020-23.

On May 11, 2022, Sims filed a Notice of Appeal.

6. Statement of Facts.

The following facts, which were included in P&P's Violation Reports, summarize Sims' probation violations:

On May 28, 2021, Mr. Sims was arrested by officers from the Las Vegas Metropolitan Police Department for Possession of a Firearm by a Prohibited Person (F). A vehicle stop was conducted and a firearm was found in the rear floorboard. (Weapons, Laws)

AA at 5-6.

On September 11, 2021, Mark Sims was arrested by the Las Vegas Metropolitan Police Department and charged with DOM BATTERY BY STRANGULATION (F) and DOM BATTERY, (1ST) (M) all under case #21-PC-042491. The subject was placed to appear in Justice Court on September 28, 2021. (LAWS)

On May 3, 2021, during Mr. Sims' intake, he was instructed to complete an Adult Education program to obtain High School Diploma or GED. As of date of this report, the subject has failed to provide the Division with proof of completing said program. (Directives and Conduct; Special Condition 1)

AA at 10-11.

Mark Sims was previously reinstated on September 30, 2021, for DOM BATTERY BY STRANGULATION (F) and DOM BATTERY, (1ST) (M) under case #21-PC-042491. Ebony Thomas who is the victim in the above case lives at [] where the crime occurred. On October 4, 2021, Mr. Sims was directed to move out of Ms. Thomas' home at the above address by October 25, 2021. On October 23, 2021, 2021, Mark Sims was arrested by the Las Vegas Metropolitan Police Department and charged with DOM BATTERY, (1ST) (M) UNDER CASE #21-CR-049159 which also occurred at the above address. The subject was placed in the Clark County Detention Center (CCDC). The subject is scheduled to appear in Justice Court for status check on December 23, 2021. (Laws)

On May 3, 2021, during Mr. Sims' intake, he was instructed to complete an Adult Education program to obtain High School Diploma or GED. As of the date of this report, the subject has failed to provide the Division with proof of completing said program. (Directives and Conduct; Special Condition 1)

AA at 13-14.

Mark Sims was previously reinstated on November 02, 2021, with the added conditions: STAY AWAY ORDER – EBONY THOMAS; 3-DAYS FLAT TIME and 48HRS TO REPORT TO P&P ONCE

RELEASED. On January 01, 2021, Mr. Sims was arrested by the Las Vegas Metropolitan Police Department and charged with RESIDENTIAL BURGLARY, FIRST OFFENSE (F); DOM BATTERY BY STRANGULATION (F); DOMESTIC BATTERY, FIRST OFFENSE (M) and COERCION CONSTITUTING DOMESTIC VIOLENCE WITH THREAT OR USE OF PHYSICAL FORCE (F) all under case #22-CR-000128. The court should know the victim in these new charges is Ebony Thomas. According to the detailed police report, after a brief foot pursuit, the subject was taken into custody and placed in the Clark County Detention Center (CCDC). The Subject is scheduled to appear in Justice Court on January 18, 2022. The arrest report will be available for the Court's review (Directives and Conduct; Laws)

AA at 20-21.

On December 8, 2021, the Division received information from the Las Vegas Metropolitan Police Department (LVMPD) that Mark Sims had been harassing Ebony Thomas. According to LVMPD, Mr. Sims has been to Ms. Thomas' residence banging on the door and may have even possibly entered her residence. The subject flees when Ms. Thomas states she is going to call LVMPD and is gone upon arrival. All under event #LLV211200029404 and #LLV211200029841. (Directives and Conduct)

On the Domestic Violence Report dated October 23, 2021, under event #LLV211000096909, Mr. Sims has called Ms. Thomas at the above number approximately every day, multiple times a day with the last date being January 26, 2022. It should be noted that Mr. Sims makes calls to Ms. Thomas at []. During some of these calls Mr. Sims can be heard being verbally aggressive and argumentative towards Ms. Thomas. Mr. Sims uses his Clark County Detention Center (CCDC) inmate number along with the pin numbers of other inmates. The phone records can be available for the Courts review upon request. (Directives and Conduct)

The Court should be reminded that Your Honor advised Mr. Sims to have no contact with Ms. Thomas during reinstatement on November 2, 2021. It is evident that Ms. Sims is intentionally disregarding Your Honor's orders. Given the facts and circumstances it is apparent that Mr. Sims cannot control his emotions. The Division is fearful that if the

subject is reinstated, Ms. Thomas' well being will be in jeopardy. The Division does not deem him a suitable candidate for community supervision. (Directives and Conduct)

AA at 23-24.

On February 01, 2022, Mr. Sims was reinstated probation with 90 days flat in Clark County Detention Center and re-advised no contact with Ebony Thomas. Your Honor made it clear if Mr. Sims continued to contact Ms. Thomas, even while in custody, he will reappear before the court for possible revocation.

It has been discovered that Mr. Sims is still making calls to Ms. Thomas. Mr. Sims immediately contacted Ms. Thomas after court on February 01, 2022, and has been continuing to communicate with her with the last date of February 9, 2022. In several of these calls Mr. Sims acknowledges that he cannot have contact with her.

On the call of February 01, 2022, at 2:46 minutes the two discuss Ms. Thomas having two phones. Further, Mr. Sims knows the Stae is tracking jail calls and communicates that he should not be contacting her on the phone number of []. During the previous revocation hearing, it was mentioned that Mr. Sims has also contacted her at []. As of the date of this report, Mr. Sims is continuing to contact Ms. Thomas at []. Mr. Sims is continuing to prove that he has no regard for Your Honor's orders. The jail calls will be available for the Court's review. (Directives and Conduct)

Feb 10 AA at 25-26.

On March 3, 2022, the district court held a revocation hearing. AA at 68. At that hearing, Sims admitted to violating the directive and conduct. AA at 69-70. The district court found a probation violation. AA at 70. Based on this violation and numerous reinstatements, the district court found that "at this point [Sims] established that he's not going to listen to me about staying away from Ebony

Thomas. If I give him a dishonorable he's just going to go out there and contact her again and we're going to end up with another DV." AA at 72. Accordingly, the district court revoked Sims' probation. AA at 73.

7. Issue(s) on appeal.

I. Whether the district court correctly interpreted NRS 176A.630 by applying its plain meaning.

II. Whether the Rule of Lenity is inapplicable to NRS 176A.630 as the statute is clear and unambiguous.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT PROPERLY INTERPRETED NRS 176A.630 BY APPLYING ITS PLAIN MEANING

Sims argues the district court misapplied NRS 176A.630(2)(c) when 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'" and revoked Sims' probation. Fast Track Statement at 11. Sims further argues that the district court's interpretation of NRS 176A.630(2), which focuses on the number of technical violations rather than the three-step graduated sanctions, makes NRS 176A.630(2) and NRS 176A.510(6) meaningless. Fast Track Statement at 11-12. The district court correctly interpreted NRS 176A.630 by applying its plain meaning.

"Statutory interpretation is a question of law subject to de novo review."

Williams v. State Dep't of Corr., 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017).

Interpretation of a statute should reflect the Legislature's intent. Id. The

Legislature’s intent is ascertained by first looking to the statute’s plain language. Id. “[W]hen a statute’s language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction.” Id. (quoting Edginton v. Edginton, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003)). Any “statutory interpretation that renders language meaningless or superfluous” must be avoided. Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). The Court will look beyond the statute’s language only if the language gives rise to multiple reasonable interpretations. Id. The language of NRS 176A.630(2) is clear and unambiguous with only one reasonable interpretation.

NRS 176A.630(2) authorizes district courts to use its discretion when a probationer commits a technical violation. According to the statute,

2. If the court finds that the probationer committed one or more technical violations of the conditions of probation, the court *may*:

- (a) Continue the probation or suspension of sentence;
- (b) Order the probationer to a term of residential confinement pursuant to NRS 176A.660;
- (c) Temporarily revoke the probation or suspension of sentence and impose a term of imprisonment of *not more than*:
 - (1) Thirty days for the first temporary revocation;
 - (2) Ninety days for the second temporary revocation; or
 - (3) One hundred and eighty days for the third temporary revocation; or
- (d) Fully revoke the probation or suspension of sentence and impose imprisonment for the remainder of the sentence for a fourth or subsequent revocation.

NRS 176A.630(2) (emphasis added).

The Legislature's intent is ascertained from the NRS 176A.630(2)'s plain language. That is, to provide some leeway for probationers when they commit technical violations while still holding them responsible. This purpose is accomplished by authorizing the district court to do certain things detailed in subsections (a)-(d), none of which allow for an automatic revocation of probation on the first technical violation. NRS 176A.630(2)(c) allows the district court to "temporarily revoke the probation," and "impose a term of imprisonment," the length of which varies by the number of technical violations previously found.

The plain meaning of the text "Impose a term of imprisonment of *not more than*" simultaneously gives the district court discretion to set the length of imprisonment and limits that discretion. "Not more than" is followed by specific lengths of time outlined in subsections (1)-(3). This signals that the detailed time in subsections (1)-(3) are not fixed but rather gives the district court discretion to impose a length that is equal to or less than the time stated in subsections (1)-(3). Accordingly, for a first technical violation, the district court can impose any number of days of imprisonment not exceeding thirty days. Likewise, for a second technical violation, the district court has discretion to impose any number of days not exceeding ninety days. And for a third technical violation, the district court has discretion to impose up to one hundred and eighty days but is not required to do so.

Not only is this the only reasonable interpretation attained from the plain meaning of the text, but it also gives effect to the Legislature’s apparent intent because the penalty for numerous technical violations gradually increases with the district court’s discretion to impose imprisonment. Therefore, the district court correctly interpreted and executed the statute by increasing the penalty at its discretion for each of Sims’ technical violations.

Sims contends the district court “skipped the third technical violation by failing to sentence Appellant to a term of one hundred and eighty days.” Fast Track Statement at 11. Essentially, Sims argues that the length of imprisonment prescribed in NRS (1)-(3) determines the number of technical violations. Sims’ logic is flawed twofold. First, as discussed above, the time prescribed in subsections (1)-(3) are not fixed terms. Second, a technical violation must first be found before the term of imprisonment is imposed. Accordingly, the number of violations guides the district court with the length of imprisonment it can impose. Thus, the district court’s focus on the number of violations is correct. Such interpretation is harmonious with NRS 176A.510 because it allows for gradual sanctions: The more technical violations a probationer commits, the longer the term of imprisonment can be.

Further, an application of Sims’ logic would lead to unreasonable and unintended results. It would render the text “not more than” meaningless, and any interpretation that renders language of the statute meaningless should be avoided.

Hobbs, 127 Nev. at 237, 251 P.3d at 179. Additionally, it would strip the district court of its discretion regarding imprisonment term by making the guidelines detailed in subsections (1)-(3) a fixed amount of time.

In the instant case, Sims received twenty days for his first technical violation; thirty days for his second technical violation; and ninety days for his third technical violation. AA at 45-46, 52, 64. In applying Sims' reasoning, his second violation would be his first and only because that is when he was imposed a thirty-day imprisonment and according to Sims, the statute dictates thirty days is for a first violation. This is clearly contradictory to the statute's plain meaning.

Notably, the district court used its discretion authorized by the statute to sentence Sims more leniently than it could have. To Sims' benefit, he received 33%, 66%, and 50% less time for his first, second, and third technical violations, respectively, than the maximum amount of time allowed by the statute. Within the statute's discretion, the district court did not maximize Sims' imprisonment term despite Sims failing to take advantage of that fact and repeatedly committing new offenses.

Sims is also incorrect about the number of technical violations he has committed. The record demonstrates Sims committed four violations and thus the district court was authorized to, and did, revoke his probation under NRS 176A.360(2)(d).

At the September 30, 2021, revocation hearing, Sims indicated to the district court that the matter had not been negotiated as to how the violation should be handled. AA at 43-44. The State asserted that Sims' arrest amounted to a conduct violation and requested the district court to find Sims' conduct a technical violation. AA at 44-45. The district court agreed and temporarily revoked his probation for twenty days with twenty days credit. AA at 46. This was Sims' first technical violation.

On November 2, 2021, the parties negotiated a resolution to prevent a complete revocation whereby Sims stipulated to the violation and thirty days in jail with zero days credit for time served, after which he would be reinstated on probation. AA at 49-50. The State also agreed not to seek revocation if Case No. 21CR049159, mentioned in the Non-Technical Violation Report, was filed. AA at 50. As part of the negotiation, an additional condition was added under which Sims could not return to live with Ebony as he had battered her twice. AA at 50-51. Upon Sims stipulating to the violations, the district court found a technical violation and followed the parties' negotiations. AA at 52. This was Sims' second technical violation.

At the revocation hearing on February 1, 2022, the parties did not have a negotiated revocation hearing. AA at 57. The State submitted to the district court that Sims' violation of the no-contact order and arrest for new felony charges were

non-technical violations. AA at 57. Nonetheless, upon Sims admitting he violated the no-contact order, the district court found a technical violation, temporarily revoked probation, imposed ninety days in jail, and reminded Sims to stay away from Ebony. AA at 57-58, 64-65. This was Sims' third technical violation. Accordingly, pursuant to NRS 176A.630(2)(d), Sims' probation could be revoked if he committed a fourth technical violation – which he did.

On March 3, 2022, Sims went before the district court again for violating the no-contact order pertaining to Ebony. AA at 68-70. There were no negotiations as the State sought revocation. AA at 70. The district court found a technical violation after Sims admitted to the violation. AA at 69-70. NRS 176A.630(2)(d) is clear that the district court can permanently revoke probation and impose the suspended sentence “for a fourth or subsequent revocation,” which is exactly what the district court did here. AA at 73. The record is also clear about the fact that Sims had multiple opportunities and failed to take advantage of them. Accordingly, the sanctions – length of imprisonment – increased with each violation. Thus, the district court's interpretation of NRS 176A.630(2) is correct and properly revoked Sim's probation under that statute's authority. Thus, this Court should affirm the district court's statute interpretation and ruling.

II. THE RULE OF LENITY IS INAPPLICABLE TO NRS 176A.630 AS THE STATUTE IS CLEAR AND UNAMBIGUOUS

Sims asserts that the Rule of Lenity applies herein because the statute is

ambiguous in two aspects. First, the statute is ambiguous as to whether the parties can stipulate to a technical violation in any subsection of NRS 176A.360(2)(c). Fast Track Statement at 13-14. Second, “the text of NRS 176A.630 is ambiguous regarding how the Court is required to interpret the number of violations, and the structure, purpose, and legislative history of the statute leans in the Appellant’s favor.” Fast Track Statement at 14. The Rule of Lenity is inapplicable because NRS 176.630 is clear and unambiguous.

The Rule of Lenity only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity. Barber v. Thomas, 560 U.S. 474, 488, 130 S. Ct. 2499, 2508–09 (2010); Bifulco v. U.S., 447 U.S. 381, 387, 100 S. Ct. 2247, 2252; see also Moore v. State, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006).

Sims makes much ado about NRS 176A.360 being ambiguous despite the statute being clear on its face. Sims asserts the rule is applicable, yet fails to analyze other potential sources to resolve the statutory construction.

Moreover, Nevada law is well established that unrefuted or stipulated facts and violations are sufficient for the court to determine that the probationer violated probation. McNallen v. State, 91 Nev. 592, 592–93, 540 P.2d 121, 121 (1975); see also Archie v. State, 126 Nev. 690, 367 P.3d 746 (2010) (holding that Appellant violated probation based on probationer’s admission that he was in company of gang

members). This Court has “explained, an order revoking probation need not be supported by evidence beyond a reasonable doubt. Lewis v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). Instead, “[t]he evidence and facts must reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.” Id. Thus, Sims’ contention regarding parties’ ability to stipulate to a violation is without merit, especially in light of Sims’ admission to the violations, police reports, and jail calls demonstrating his violations.

As discussed above, the language of the statute is clear that there is no question as to how technical violations should be counted or handled. Accordingly, the Rule of Lenity is inapplicable when analyzing the statute.

9. Preservation of the Issues.

The issues were properly preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points and contains 3,992 words and 380 lines of text.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 12th day of July, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ John Afshar*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 12, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

ROBERT J. SCHMIDT
Deputy Public Defender

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BY /s/ E. Davis
Employee,
Clark County District Attorney's Office

JA/Maricela Leon/ed