No. 86112

IN THE NEVADA SUPREME COURT

James Howard Hayes,

Appellant,

v.

State of Nevada,

Respondent.

On Appeal from the Order Denying
Motion to Correct Illegal Sentence
Eighth Judicial District, Clark County (C-16-315718-1)
Honorable Monica Trujillo, District Court Judge

Appellant's Reply Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Kelli Devaney-Sauter
2. Michael W. Sanft
3. Anthony L. Abbatangelo

/s/ Martin L. Novillo
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

Other

ARGUMENT

A. Hayes' adjudication was based on materially untrue assumptions and mistakes of fact

Respondents make various uncompelling arguments to assert that the sentencing court did not misapprehend Hayes' criminal record. First, Respondents argue that Hayes' 2007 convictions out of Harris County, Texas[1] "are considered two separate convictions for purposes of NRS 207.010(a)" because the State provided "two judgments of convictions" that showed different case numbers. AB at 17-18. Respondents are wrong. As set forth by this Court in *Rezin*, prior convictions will comprise a single prior conviction for purposes of the habitual criminal statute if they "[grew] out of the same act, transaction or occurrence, and [were] prosecuted in the same indictment or information." *Rezin v. State*, 95 Nev. 461, 462 (1979).

The rule articulated by this Court in *Rezin* sought to further "the policy and purpose of the recidivist statute . . . to discourage repeat

[1] Namely, March 2, 2007 convictions in Case No. 1083785 and Case No. 1083786 for Credit/Debit Card Abuse and for Fraudulent Use/Possession of Identifying Information, respectively. II.App.335.

offenders and to afford them an opportunity to reform." *Id.* at 462-63. Treating convictions arising out of the same transaction as distinct offenses because they involve different case numbers or were recorded in separate pleadings would in essence place form over substance and contravene the policy and purpose of NRS 207.010, as explained in *Rezin*.

Respondents further argue that Hayes has not demonstrated that "the Texas convictions [were] prosecuted in the same indictment or information." AB at 18. To the extent Respondents argue that Hayes does not meet the *Rezin* rule because he cannot produce a single charging document that lists both counts, Respondents once more erroneously place form over substance. Given the aforementioned policy goals of NRS 207.010, providing that charges must be "prosecuted in the same indictment or information," *Rezin*, 95 Nev. at 462, can only be reasonably be interpreted to require that offenses be charged and prosecuted simultaneously. Such an interpretation would "allow[] for reform between felonious acts" and would not overlook recidivism. *LaChance v. State*, 130 Nev. 263, 278 (2014).

Here, Hayes demonstrates that the same grand jury indicted him on both charges. *See* I.App.001 (Indictment for Case No. 1083785); I.App.047 (Indictment for Case No. 1083786). And, as previously discussed, *see* OB at pp. 13-15, both charges grew out of the same transaction and were tried together. *See* I.App.052-070.

Respondents further argue that the district court's consideration of the 2017 Nevada conviction in Case No. C315125 when adjudging him a habitual criminal was immaterial—even if the conviction did not precede the primary offense—because Hayes had two other prior, predicate felony convictions. AB at 18. Respondents misapprehend Hayes' argument. Even if Hayes had two predicate convictions, the district court's decision to adjudicate him a habitual criminal was discretionary. *See* NRS 207.010(3). And—to the extent it exercised any discretion—the sentencing court relied upon ineligible convictions and misapprehended Hayes' record.

"[T]he district court has authority to correct or modify a sentence which is the result of the sentencing judge's misapprehension of a defendant's criminal record." *See also State v. Eighth Judicial Dist.*

Court (Husney), 100 Nev. 90, 97 (1984). Here, it is evident that, at the very least, the sentencing court misapprehended Hayes as qualifying for treatment as a habitual criminal due to two distinct and unrelated convictions out of Texas and an ineligible 2017 conviction out of Nevada. II.App.339. At sentencing, the State moved into evidence four exhibits, which included three distinct judgments of conviction for the above-referenced offenses. *See* II.App.334. The State treated the same as comprising eligible and (in the case of the Texas case) distinct convictions. *See also* II.App.358 ("We've provided to you the judgments of conviction, four of them to be exact."). Respondents argue that the district court "never state or specified that it was adjudicating [Hayes] under four (4) convictions." AB 21. However, because it admitted the exhibits into evidence, it can only be presumed that the sentencing court considered the convictions when it decided to adjudicate Hayes. II.App.334.

In addition, the sentencing court improperly considered unadjudicated conduct, namely: an unadjudicated 2019 Mirage burglary offense in Case No. 19F01534X and a 2011 incident during which Hayes allegedly stole from a convenience store tip jar. *See* II.App.354-56. The

aforementioned assumptions prompted this court to adjudicate Hayes as a habitual criminal when in fact he did not meet the criteria set forth in NRS 207.010(a). Alternatively, even if Hayes qualified under the statute, the Court's sentence was based upon mistaken assumptions about Hayes' criminal record which worked to his "extreme detriment." *Edwards v. State*, 112 Nev. 704, 708 (1996)

B. The district court failed to follow the statutory requirements set forth in NRS 207.010(3) when it adjudicated Hayes a habitual criminal

Hayes demonstrates that the sentencing court did not exercise that discretion mandated by NRS 207.010(3) and consider whether it was "just and proper" to adjudicate Hayes as a small habitual criminal. *Clark v. State*, 109 Nev. 426, 428 (1993).

Respondents argue that Hayes "failed to acknowledge that [*Hughes v. State*, 116 Nev. 327 (2000)][,] cautions that "nothing in *Clark* stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal." *Id.*

Hayes discussed *Hughes* at length in his Opening Brief. *See* OB at 18-19. As previously noted, *see id.*, *Hughes* did not revoke the requirement that the district court consider "whether it [is] *just and proper* for [a defendant] to be punished and segregated as a habitual criminal." *Clark*, 109 Nev. at 428 (emphasis added). In this case, the lower court incorrectly concluded that "just and proper was not the state of the law." III.App.500. Contrary to Respondents' arguments, the lower court went far beyond reiterating the ruling in *Hughes'* that no particularized findings need be made. AB at 25.

Because "just and proper" is still the state of the law, the lower court was required to look at the totality of the circumstances, as this Court did in *Hughes*, to ascertain whether the sentencing court "understood that it had discretion . . . and that it actually exercised that discretion." *Hughes*, 116 Nev. at 335. In *Hughes*, this Court cited to specific statements by the sentencing court acknowledging it had considered and weighed mitigation evidence and ascertained that it was just and proper to adjudicate the defendant a habitual criminal. *See id.* (noting the court had "read and considered . . . the correspondence

delivered from Mr. Hughes's counsel."). The Court noted that the record reflected "the court understood that it had discretion in deciding whether to adjudicate Hughes as a habitual criminal and that the court exercised that discretion in adjudicating Hughes a habitual criminal." *Id.*

The record in this case stands in stark contrast to that in *Hughes*. As in *Clark*, the record in Hayes' case "does not clearly disclose that the court weighed the appropriate factors for and against the habitual criminal enhancement." 851 P.2d at 427. Respondents nevertheless argue that the sentencing transcript "shows that the sentencing judge extensively heard mitigating evidence from [Hayes] and weighed that against what the State had to say and the evidence the State presented." AB at 25. Respondents' characterization regarding the mitigation evidence heard by the court is grossly inaccurate. *See* II.App.349-67. Irrespective, that Hayes and his counsel were allowed to address the sentencing court to "explain [Hayes'] Texas convictions" does not mean the court considered and weighed the nature of Hayes' prior convictions, including their non-violent and remote nature. In fact, the court's failure

to altogether address or comment upon the prior convictions strongly suggests otherwise. *See id.*

Respondents argue that the district court weighed the evidence but fail to cite to a single statement from the sentencing proceedings that would support that assertion. Here—at best and as in *Clark*—it is unclear whether the sentencing court exercised the discretion mandated by NRS 207.010. And the court's pronouncement when adjudicating Hayes—as well as the sequence of those statements made—strongly suggests it did not. The court noted:

> All, Mr. Hayes, I do believe that the State has satisfied any obligations statutorily under 207.010 to support their claim for habitual treatment. I am going to adjudicate you guilty in this matter based on your plea . . . and you are going to be treated as a -- under the small habitual 207.010(a).

II.App.366. The court's comment that it would adjudicate Hayes a habitual criminal immediately after noting the State had met its statutory obligations informs the entire basis for the adjudication: the State meeting the statutory pre-requisites.

Here, there is no evidence whatsoever that the court "weighed and considered mitigating evidence[,]" much less that it determined "it was

just and proper to adjudicate [Hayes] a habitual criminal." AB at 26. And—given the district court's above-noted pronouncement—"[i]t appears likely, or at least strongly possible," that the district court failed to exercise the required discretion when adjudicating Hayes. *Clark*, 109 Nev. at 429.

C. The district court's failure to abide with NRS 207.010(3) violated Hayes' due process rights

Respondents construe Hayes' argument as asserting that the failure to make "particularized findings" demonstrates that the sentencing judge automatically sentenced Hayes as a habitual criminal. AB at 27. Respondents misconstrue Hayes' argument.

Here, that the court failed to exercise the mandatory discretion is evidenced by its pronouncements. *See* II.App.366. It is also demonstrated by its failure to scrutinize the 2017 Nevada or the Texas judgments of conviction. Here, had the sentencing court exercised any discretion it would have taken a closer look at those judgments of conviction and concluded that the underlying offenses did not conform with the prior felony convictions contemplated by NRS 207.010(1). At the very least, the court would have concluded that the non-violent and remote nature of

Hayes' prior convictions did not warrant a habitual criminal adjudication. *See Sessions v. State*, 106 Nev. 186 (1990) (finding it was an abuse of discretion for the court to enter a habitual adjudication when the convictions were nonviolent and remote in time).

The court's failure to abide with NRS 207.010 and, specifically, to weigh the evidence, exercise discretion, and ascertain whether it was just and proper to adjudicate Hayes a habitual criminal, violated Hayes' due process rights. The language of NRS 207.010(3) is mandatory. When the court failed to follow that statute, it denied Hayes his right to due process.

CONCLUSION

For the reasons discussed herein, this Court should order that the sentence be vacated and that Hayes' case be remanded for re-sentencing.

Dated September 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated September 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Alexander Chen, Aaron Ford, and Jonathan VanBoskerck.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following people:

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