

IN THE COURT OF APPEALS OF THE STATE OF NEVADA
No. 84854-COA

Mark Zana
Appellant

vs.

State of Nevada
Respondent

FILED

APR 18 2023

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

PETITION FOR REHEARING

This petition for rehearing comes about due to this court overlooking or misapprehending material questions of law and decisions directly controlling dispositive issues of Appellant's appeal which are supported by Nevada Supreme Court precedent and controlling caselaw in Castaneda v. Nevada, 373 P.3d 108 (2016), Colwell v. Nevada, 118 Nev. 807; 59 P.3d 463 (2002), and Passanisi v. Nevada, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992).

"Zana failed to demonstrate the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment."

(Order of Affirmance page 1, lines 17-19)

This statement is belied by Castaneda (pgs. 1-4, 7-9), which this court overlooked or misapprehended. At sentencing, the district court based its sentence on the mistaken assumption that Appellant was legally convicted of 6 counts under NRS 200.730. This court overlooked or misapprehended Castaneda which determined these (6) multiple convictions for a single offense were not legal and worked to his extreme detriment when he was sentenced on 4/11/2019, in violation of his double jeopardy protections and

1 due process rights.

2 This court also overlooked or misapprehended the Nevada
3 Supreme Court's decision in Castaneda whereby that court
4 determined the legislature only ever intended for a single charge
5 when multiple images are found in one place and at one time.
6 Because this was the first time that court interpreted and clarified
7 that statute and did not make a new rule of law, it applies retroactively
8 to Appellant as he substantiated through Colwell (pgs. 2-3, 7-8) and
9 Clem v. Nevada, 119 Nev. 605; 81 P.3d 521 (2003).

10 "Zana also failed to demonstrate that his sentence
11 was facially illegal." (Order of Affirmance page 1, lines 19-20)

12 This statement by the court demonstrates it overlooked or mis-
13 apprehended Castaneda. The Nevada Supreme Court's clarification
14 of NRS 200.730 in Castaneda clearly establishes that Appellant
15 should have only been charged and sentenced to a maximum of
16 one count, not the multiple counts he was charged with and
17 sentenced to. Through Castaneda Appellant has clearly demon-
18 strated that his consecutive sentences for a single violation
19 of NRS 200.730 is illegal. As such, his appeal should be granted.

20 This court clearly overlooked or misapprehended that
21 the Nevada Supreme Court's clarification of NRS 200.730 was
22 merely a restatement of existing law and demonstrates that
23 Appellant's consecutive sentences are illegal. Therefore, the
24 district court lacked the jurisdiction to sentence Appellant
25 to multiple counts consecutively for a single violation of NRS
26 200.730. The Nevada Supreme Court decisions in Castaneda,
27 Colwell, and Clem, make these facts indisputable and should.

1 result in Appellant's appeal being granted.

2 "Scarpace did not announce a new rule of law. Our
3 ruling merely clarified the plain language of the statute...
4 Our interpretation (119 Nev. 623)... in Scarpace
5 furnishes the proper statement of law at the date
6 Fiore's conviction became final." (Clem)

7 "The United States Supreme Court then held that Fiore's
8 case 'presented no issue of retroactivity' because,
9 in Scarpace's case, the court merely clarified
10 what the statute meant at the time of Fiore's
11 conviction. Thus, Scarpace was 'not new law.' (Clem)

12 This court overlooked or misapprehended a material
13 question of Appellant's appeal. Retroactivity. Clem and
14 Colwell substantiate that Castro applies retroactively
15 to Appellant.

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

19 "When a decision merely interprets and clarifies an
20 existing rule and does not announce an altogether new
21 rule of law, the court's interpretation is merely a
22 restatement of existing law." (Colwell)

23 This court overlooked or misapprehended a material question
24 of law when it alluded to Castro not applying retroactively
25 to Appellant when it stated:

26 "Zona claimed, based on a case that was decided several
27 years after his conviction was final..." (Order of Affirmance pg 1, lines 13-14)

1 The case this court refers to (Castaneda) applies retroactively
2 to Appellant because it did not make a new rule of law. This court
3 either overlooked Castaneda or misapprehended that ^{the} Nevada Supreme
4 Court merely clarified what the statute (NRS 200.730) meant at the
5 time Appellant's conviction was final. Castaneda furnishes the
6 proper statement of law at the date Appellant's conviction
7 became final. Therefore, Castaneda was not new law, it applies
8 to Appellant retroactively, it substantiates that Appellant's
9 sentence is illegal, and that the district court lacked the
10 jurisdiction to sentence Appellant to multiple punishments
11 for a single offense under NRS 200.730. Due to these facts,
12 Appellant's appeal should be granted.

13 This court overlooked or misapprehended the Nevada Supreme
14 Court's decision in Passanisi (pages 3, 6-9) when on page 2,
15 paragraph 2 (order of affirmance) this court stated that
16 Appellant's claims, of being illegally charged with multiple (12)
17 counts under NRS 200.730 and a new trial being warranted
18 due to the outcome of the trial being different had he correctly
19 been charged with a single count, to be "outside the narrow
20 scope of claims permissible in a motion to modify or correct
21 an illegal sentence."

22 That statement by this court demonstrates it overlooked
23 or misapprehended Passanisi. In his appeal, Appellant quoted
24 Passanisi (pages 6-7, lines 19-27 and 1-3). In Passanisi, the
25 Nevada Supreme Court determined:

26 "We believe that a motion to modify a sentence is
27 the functional equivalent of a motion to modify for

1 a new trial. In both instances the defendant
2 seeks an entirely new proceeding based on the
3 claim that the factual underpinnings of the district
4 court's decision are incorrect. Such challenges
5 are direct attacks on the decision itself. "Passanisi")

6
7 "Such a challenge is similar to a claim of newly discovered
8 evidence that might justify a new trial, and may be
9 brought by motion for a new sentencing hearing." (Passanisi)

10 As in Passanisi, Appellant contended in his appeal that he's
11 entitled to a new trial based on the claim that the factual underpinnings
12 of the district court's decision are incorrect. As Passanisi
13 determined, this is the equivalent of newly discovered evidence.
14 Of which, the Nevada Supreme Court determined may be brought
15 by motion to modify a sentence and motion for a new sentencing
16 hearing. Both of which Appellant requested by motion to
17 the district court and on appeal to this court.

18 Eighth Judicial District Court (here to EJDC) Rule 3.20(c.)

19 States:

20 "Within 7 days after service of the motion, the opposing
21 party **must** serve and file written opposition thereto."

22 (emphasis added)

23 This court overlooked this rule. The state deprived
24 Appellant of his right to respond to an opposition, which
25 violated his due process rights. Appellant's response to an
26 opposition could have changed the EJDC's decision.
27 With no opposition or factual findings and conclusions

1 of law to refer to, Appellant had to guess how the EDC
2 erred when denying his motion and ^{this} violated his right
3 to petition the EDC for reconsideration. These violations
4 substantially affected his rights and ability to thoroughly
5 and effectively present his claims. Appellant's appeal
6 should be granted due to the prejudice he suffered by
7 the EDC and state violating his due process rights.
8 The EDC and the state should be held to a higher
9 standard as they have earned a law degree, passed the bar,
10 and presumably have years of experience. Appellant has none
11 of those qualifications yet is held to an impossibly high
12 standard at every turn. Failure by this court to sanction
13 the EDC and state for violating Appellant's due process
14 rights will show clear bias and prejudice toward Appellant
15 ~~and~~ while showing clear preferential treatment to the EDC
16 and state, which will encourage future official lawlessness
17 from them as they will know there are no consequences
18 for their actions.

19 Castaneda, Colwell, Clem, and Passanisi clearly
20 demonstrate and substantiate that Appellant's sentence is
21 illegal, the district court lacked jurisdiction to impose the
22 sentence, and that a new trial should be ordered. These
23 facts are indisputable. These cases are Nevada Supreme
24 Court precedent and controlling case law directly controlling
25 the dispositive issues and material questions of law in
26 Appellant's appeal that this court overlooked or mis-
27 apprehended. Therefore, Appellant's appeal should be granted.

1 Double jeopardy protections were established to ensure
2 that ~~an~~ appellate court will reverse redundant convictions
3 that don't comport with legislative intent. In Castoreo,
4 the Nevada Supreme Court established that Appellant's
5 multiple convictions under NRS 200.730 are redundant
6 and must be vacated. Appellant's consecutive sentences
7 under NRS 200.730 are also redundant and must be vacated.
8 As such, Appellant's appeal should be granted.

9 Failure by this court to grant Appellant's appeal will be
10 to go against Nevada Supreme Court precedent and
11 controlling caselaw. Judicial equality demands this court
12 apply the law and standards of these cases equitably to
13 Appellant lest they will show clear bias and prejudice.
14 toward him.

15 _____

16 _____

17 _____

18 Dated this _____ day of April, 2023

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Mark Zane

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served
a copy of this Petition for Rehearing upon all parties
as follows:

Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

Dated this 12th day of April, 2023

~~Mark Zaro~~
Mark Zaro
1200 Prison Road
Lovelock, NV 89419