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Summary of Sherriff v. Andrews, 128 Nev. Adv. Op. 51

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CRIMINAL LAW & PROCEDURE - PRISONER

Summary

In an appeal from a district court order granting a pretrial petition for a writ of habeas corpus and dismissing a charge for possession of an item commonly used to escape, the Court determined whether NRS 212.093(1) encompasses a prohibition on cell phones.

Disposition/Outcome

NRS 212.093(1) does not prohibit county jail inmates from possessing cell phones.

Facts and Procedural History

While Nickolas Mark Andrews was in custody at Pershing County jail, officers discovered a cell phone hidden in a box beneath Andrews' bed. The State charged Andrews under NRS 212.093(1), which in pertinent part, prohibits prisoners from possessing "any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook or any other tool or item adapted, designed, or commonly used for the purpose of escaping" from custody.

Andrews filed a petition for a writ of habeas corpus, arguing that NRS 212.093(1) is unconstitutionally vague and overbroad and, by its terms, does not prohibit possession of cell phones. The Sixth Judicial District Court agreed with Andrews, granted a pretrial petition for a writ of habeas corpus, and dismissed the charge. The Nevada Supreme Court took the State's appeal.

Discussion

Justice Saitta wrote the opinion for the unanimous three-justice panel. The Nevada Supreme Court declined to determine the constitutionality of NRS 212.093(1). Instead, the Court deemed it only necessary to determine whether the plain language of the statute justified the district court's order.

The Court acknowledged that while NRS 212.093(1) prohibits prisoners from possessing the expressly listed items (*e.g.*, picklock, bolt cutters, ladder), the statute also includes a catchall provision that prohibits prisoners from possessing any other device that is "adapted, designed or commonly used for the purpose of escaping." However, the Court disagreed with the State and concluded that the scope of the catchall provision did not encompass cell phones.

In making this determination, the Court looked at the statute as a whole and found that the aim of the statute is to prohibit the possession of devices used to forcibly break out of or physically flee from a jail cell. The Court noted that "it would be virtually impossible to use a cell phone to forcibly break out of, or physically flee from, a jail cell."

¹ By Robert Stewart.

The Court then compared the State’s “overambitious” interpretation of NRS 212.093(1) to a statutory interpretation argued for in *Puglisi v. State*.² In that case, the statute in question, NRS 205.080, prohibited the possession of any tool commonly used for burglary. The Court in *Puglisi* reasoned that a souvenir-type shopping bag, although capable of being used for the commission of burglary, was not encompassed within the scope of NRS 205.080 because “trouser pockets, pocket books, coat sleeves, girdles, and Adidas” could also be arguably used for burglary, yet the statute does not encompass them. Using the same reasoning of *Puglisi*, the Court explained that although a cell phone could arguably be used to assist in an escape as is could be used to help enlist a third party to provide a getaway ride, so too could “virtually any item—even shoes or spectacles.” The Court stated that if the State’s argument were credited, then practically any item could fall within the scope of the statute.

The Court then stated that its conclusion was further bolstered by reference to NRS 212.165(3), which provides that an inmate in state prison “shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device.” Based on this statute, which speaks solely of state prison (*i.e.*, not county jail, which is what Andrews was in), the Court reasoned that the Legislature “clearly knows how to prohibit inmates from possessing cell phones but did not do so with respect to county jail inmates.” The Court concluded that the distinction between the two statutes leads to the inference that the Legislature’s omission of cell phones in NRS 212.093(1) was deliberate.

Conclusion

The district court order dismissing the statutory charge against Andrews was affirmed.

² *Puglisi v. State*, 102 Nev. 491, 728 P.2d 435 (1986).