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Steve Dell McNeill v. The State of Nevada, 132 Nev. Adv. Op. 54 (July 28, 2016)

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CRIMINAL LAW

Summary

The Supreme Court determined that the plain language of NRS 213.1243 does not grant the State Board of Parole Commissioners authority to impose additional conditions not enumerated in the statute when supervising sex offenders on lifetime supervision.

Background

Appellant Steve McNeill is a convicted sex offender on lifetime supervision. After five years of supervision, McNeill was arrested for noncompliance for failure to attend counseling, make curfew, and maintain employment. After the state declined to proceed on charges, McNeill responded by sending a cease and desist letter to the Division of Parole and Probation (DPP), saying that it had no authority over him and to stop contacting him. The State subsequently charged McNeill with two counts: (1) violating conditions of his lifetime supervision and (2) prohibited acts by a sex offender. The charges alleged that McNeill violated his lifetime supervision conditions by refusing to submit to a urinalysis, failing to report, failing to obtain residence approval, failing to cooperate with his supervising probation officer, failing to maintain full-time employment, failing to abide by a curfew, and being terminated from his sex offender counseling.

After a three day trial, the jury found McNeill guilty on count one and the district court dismissed count two. The court also denied McNeill's motion for an arrest of judgment because it determined that the Board had authority through the language of NRS 213.1243 to establish supervision conditions not enumerated by the statute.

Discussion

McNeill contended that NRS 213.1243 did not delegate authority to the Board to impose additional lifetime supervision conditions not enumerated in the statute. McNeill, therefore, did not violate NRS 213.1243, even if he violated the additional conditions imposed by the Board. The Supreme Court agreed, concluding that “the plain language of NRS 213.1243 does not delegate authority to the Board to impose additional conditions not enumerated.”

NRS 213.1243(1) provides that “[t]he Board shall establish by regulation a program of lifetime supervision of sex offenders” and that the program must provide for supervision by officers in the DPP. Sections 2-12 explicitly set forth the conditions of supervision. Not included in the statute is any suggestion that the Board may impose additional conditions not enumerated. Without any explicit grant of authority, the omission is presumed deliberate.² Reading the statute as the State suggested—allowing the Board to create additional conditions—would allow the Board to create new law, an unconstitutional delegation of legislative authority.

The State argued that the Legislature may appropriately delegate authority to administrative agencies to facilitate the practical execution of laws it enacts without violating the separation of powers. The State cited *Sheriff v. Luqman* where the Clark County Sheriff's

¹ By Adrian S. Viesca.

² *Sheriff v. Andrews*, 128 Nev. 544, 547–48, 286 P.3d 262, 264 (2012)

Department appealed from orders granting pretrial habeas corpus relief to people detained for violating Nevada’s controlled substance act.³ One of the issues raised in *Luqman* was whether an amendment to the Uniform Controlled Substances Act unconstitutionally delegated legislative power to define the elements of a crime to the state board of pharmacy.⁴

The Court determined that delegating authority to the state board of pharmacy was not unconstitutional because the board was acting as a fact-finder.⁵ The Act “retained both the general and specific guidelines listing various factors which are to be taken into account by the pharmacy board when scheduling drugs as well as delineating the requirements by which a drug is classified in an appropriate schedule.”⁶

The Court found this case distinguishable from *Luqman* because when the Legislature enacted NRS 213.1234, it “did not explicitly provide the Board the authority to create additional conditions.”⁷ Even if the Court assumed that the Legislature meant to do so, “that delegation of power would fail” because the Legislature did not provide guidelines to the Board on how it may create additional conditions.⁸

The district court incorrectly justified its conclusion that the Board may establish additional conditions in the text of NRS 213.1243(8): “[A] sex offender who commits a violation of a *condition imposed on him or her pursuant to the program of lifetime supervision* is guilty of a category B felony.” (Emphasis added). The district court reasoned, presumably, that if the Legislature did not intend to allow the Board to add conditions, it would have narrowed the statute to say “a condition imposed . . . pursuant to NRS 213.1243,” instead of “a condition imposed . . . pursuant to the program of lifetime supervision.”

The Court concluded that the language stating, “pursuant to the program of lifetime supervision” encompasses conditions enumerated by the Legislature in NRS 213.1243.

Conclusion

Since the Board had no authority to impose additional conditions not enumerated in NRS 213.1243, the non-enumerated conditions imposed on McNeill were unlawful. And he did not violate the law when he did not comply with them.

However, it is unclear which condition(s) the jury found McNeill violated. The charging document and jury instructions allowed the jury to find him guilty based on one or more of the identified violations. And only one—failure to have a residence approved—is listed in the statute.⁹

Therefore, the Court reversed the judgment of conviction and remanded for a new trial for allegedly failing to have his residence approved.

³ *Sheriff v. Luqman*, 101 Nev. 149, 151, 697 P.2d 108 (1985).

⁴ *Id.*

⁵ *Id.* at 154, 697 P.2d at 110–11.

⁶ *Id.*

⁷ *McNeill v. State*, 132 Nev. Adv. Op. 54 1, 8 (2016).

⁸ *Luqman*, 101 Nev. at 154, 697 P.2d at 110–11.

⁹ *See* NEV. REV. STAT. 213.1243(3).