

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

9-29-2011

Summary of Ford v. State, 127 Nev. Adv. Op. No. 55

Alan R. Smith
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Smith, Alan R., "Summary of Ford v. State, 127 Nev. Adv. Op. No. 55" (2011). *Nevada Supreme Court Summaries*. 229.

<https://scholars.law.unlv.edu/nvscs/229>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Ford v. State, 127 Nev. Adv. Op. No. 55 (Sept. 29, 2011)¹
CRIMINAL LAW AND PROCEDURE – Pandering of Prostitution and Intent

Summary

Appeal from a district court judgment of conviction, by way of a jury verdict, for pandering of prostitution.

Disposition / Outcome

The Supreme Court of Nevada held that NRS 201.300(1)(a) is not unconstitutionally overbroad because of its specific intent requirement. The statute is also not unconstitutionally overbroad because it punishes speech promoting criminal conduct, which is not protected by the First Amendment. Further, the statute is not vague because it: (1) provides sufficient notice of prohibited conduct, and (2) provides law enforcement officers sufficient standards with which to act. Finally, the Court found that NRS 201.300(1)(a) applies to undercover sting operations. However, the Court reversed and remanded the matter for a new trial because the district court failed to provide the jury with a specific intent instruction.

Factual and Procedural History

Jerome Ford (“Ford”) was convicted of pandering of prostitution. His conviction arose from a prostitution sting operation, which the Las Vegas Metropolitan Police Department conducted on the Las Vegas strip. Leesa Fazal (“Fazal”), an undercover officer posing as a prostitute, was wearing a wire underneath her dress when Ford approached her. During their conversation, Ford elicited from Fazal that she was “working.” Thereafter, Ford explained the nature of his business and the services that he could provide Fazal, including protection, management, care, advice on collecting money from a “trick,” and instruction on recognizing an undercover officer. After Fazal indicated that she did not employ the services of a pimp, Ford suggested that she should work with him, boasting that Fazal would realize a greater profit through his services.

The State of Nevada charged Ford with pandering of prostitution and attempted pandering of prostitution. During Ford’s trial, the jury did not receive an instruction on specific intent. Instead, the jury received a general intent instruction, which contained the text of NRS 201.300(1)(a) and enumerated the elements for general intent under NRS 193.190. Additionally, the general intent instruction indicated that motive was not an element of the crime charged and that the State did not have to prove motive to convict. Ford did not object to the failure to instruct the jury on specific intent.

The jury returned a guilty verdict for Ford, and he was sentenced as a habitual criminal to five to twenty years in prison. Ford appealed his conviction of pandering for prostitution, arguing that NRS 201.300(1)(a): (1) is unconstitutionally overbroad under the First Amendment, (2) is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment, and

¹ By Alan R. Smith

(3) does not apply because the target, Fazal, was an undercover police officer for whom becoming a prostitute was not a realistic possibility.

Discussion

The Court began its analysis by construing the challenged statute. NRS 201.300(1)(a) provides that “a person who: (a) Induces, persuades, encourages, inveigles, entices, or compels a person to become a prostitute or to continue to engage in prostitution... is guilty of pandering.”² While “prostitute” and “prostitution” are statutorily defined terms, the verbs “induces, persuades, encourages, inveigles, entices, or compels” are without definition. Moreover, unlike most modern criminal statutes, NRS 201.300(1)(a) does not designate a *mens rea*, or bad-mind, requirement.

Given the absence of an express *mens rea* requirement, Ford asserted that the statute imposed strict liability, based on cause and effect rather than intent. The Court disagreed, finding that NRS 201.300(1)(a) requires a defendant to act with the specific intent of inducing, persuading, encouraging, inveigling, enticing, or compelling his target to take up, or continue to engage in, prostitution. Thereafter, the Court delineated five factors influencing its conclusion.

First, the Court found that the mere absence of an express intent requirement does not automatically indicate that a statute imposes strict liability. While strict liability offenses do exist in the criminal law and do not inevitably violate constitutional requirements, such offenses nevertheless receive a disfavored status.³ As such, courts require more than mere omission of a *mens rea* requirement from the statutory definition to construe a statute as imposing strict liability.⁴

Second, the Court determined that the history and apparent purpose of NRS 201.300(1)(a) support construing the statute to require a defendant to act with the specific intent of encouraging the target to become a prostitute or continue to engage in prostitution. NRS 201.300(1)(a) closely mirrors the Mann Act, which did not focus on whether prostitution actually occurred, but rather, whether the defendant intended to prostitute the target.⁵ Similarly, Nevada case law recognizes that NRS 201.300(1)(a) concentrates on whether the defendant sought to recruit a target into the practice of prostitution, not whether prostitution actually occurred.⁶ Thus, the law distinguishes between a pimp who solicits business for a prostitute, and a panderer who recruits a target for prostitution.⁷ In contrast to the pimp/prostitute relationship, the panderer’s target is not considered a co-conspirator, but rather, the victim of a crime.

The Court also argued that if it were to construe NRS 201.300(1)(a) as imposing strict liability, the effect would be to shift the statute’s “focus from the panderer’s efforts to recruit

² NEV. REV. STAT. § 201.300(1)(a) (2007).

³ *E.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 437-38 (1978); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

⁴ *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).

⁵ The Mann Act, 18 U.S.C. § 2422 (1910); *E.g.* United States v. Rashkovski, 301 F.3d 1133, 1137 (9th Cir. 2002).

⁶ *Stanifer v. State*, 109 Nev. 304, 308, 849 P.2d 282, 285 (1993).

⁷ *Id.*

prostitutes to the success of the recruiting program.”⁸ As such, liability would stem from whether the target engaged in prostitution, regardless of the panderer’s intent.

NRS 175.301 was a further influence on the Court’s analysis of the history and purpose of NRS 201.300(1)(a). NRS 175.301 required corroboration of a target’s testimony during a “trial for... inveigling, enticing or taking away any [person] for the purpose of prostitution.”⁹ The Court reasoned that the Legislature’s inclusion of the “for the purpose of” language in the NRS 201.300(1)(a)’s companion statute confirmed the reasonableness of construing NRS 201.300(1)(a) as requiring specific intent.

Third, the Court determined that there are no grammatical barriers to reading a specific intent requirement into NRS 201.300(1)(a). Furthermore, the statutory language supports such an interpretation. The Court noted that even in the absence of an adverb or phrase indicating fault, fault may be inherent in the verbs within the statute.

Fourth, the Court noted that throughout the country, the statutory formulations of pandering laws vary; however, no decision interpreting a pandering statute applies anything other than a specific intent requirement. For example, in a recent decision, the California Supreme Court held that “pandering is a specific intent crime.”¹⁰

Finally, the Court noted that courts are careful to avoid construing a statute to impose strict liability where the absence of an intent requirement would encompass a broad range of innocuous conduct.¹¹ Such a broad sweep would criminalize innocent conduct, while rendering the statute vulnerable to constitutional challenges under the Due Process Clause and the First Amendment.

Overbreadth Analysis

The Court acknowledged that Ford was correct in his argument that NRS 201.300(1)(a) permits conviction based on speech. However, while the First Amendment provides broad protection for speech, such protection is not unlimited.¹² In fact, criminal prohibitions of speech intended to encourage or instigate illegal activities are well-rooted in the legal system.¹³ Such speech is not afforded First Amendment Protection because it promotes criminal conduct.¹⁴

According to the Court, pandering is a variety of criminal solicitation, and statutes prohibiting solicitation punish a type of speech: “asking another to commit a crime.”¹⁵ Such prohibition is narrowed to illegal employment offers in the case of pandering, which prohibits encouraging another to become, or remain, a prostitute. Moreover, where prostitution is illegal, as in Nevada, the First Amendment does not protect pandering.

⁸ Ford v. State, 127 Nev. Adv. Op. No. 55, at 11 (Sept. 1, 2011).

⁹ NEV. REV. STAT. § 175.301 (repealed 2005).

¹⁰ People v. Zambia, 254 P.3d 965, 974 (Cal. 2011).

¹¹ Staples v. United States, 511 U.S. 600, 610 (1994).

¹² United States v. White, 610 F.3d 956, 960 (7th Cir. 2010).

¹³ United States v. Williams, 553 U.S. 285, 298 (2008).

¹⁴ *Id.*

¹⁵ *White*, 610 F.3d at 960.

In addition, Ford asserted that NRS 201.300(1)(a) permits conviction of individuals who did not act with the requisite specific intent. However, the Court determined that such issues do not establish overbreadth, but rather, are examples of the inferences that jurors can draw from the facts. The Court also concluded that NRS 201.300(1)(a) does not prohibit the advocacy of prostitution in the abstract because it requires the specific intent of encouraging a target to become a prostitute or continue to engage in prostitution.

Vagueness Analysis

Ford asserted two vagueness arguments: (1) pursuant to *Silvar v. District Court*,¹⁶ NRS 201.300(1)(a) is unconstitutionally indeterminate because conviction depends on the effect of a defendant's conduct upon the target, and (2) the statute violates the due process principles enunciated in *Flamingo Paradise Gaming v. Attorney General*,¹⁷ by failing to define its operative verbs. The Court disagreed, holding that NRS 201.300(1)(a), due to its requirement of specific intent, is distinguishable from the statutes considered in *Silvar* and *Flamingo Paradise Gaming*.

In *Silvar*, the Court considered a county ordinance that prohibited loitering “in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting for or procuring another to commit an act of prostitution.”¹⁸ In construing the statute, the Court determined that the statute's prohibition was triggered by a hypothetical viewer's interpretation of a defendant's loitering rather than the defendant's subjective intent.

Unlike the city ordinance in *Silvar*, NRS 201.300(1)(a) requires that the defendant actually intends for his target to engage in prostitution. Under NRS 201.300(1)(a), conviction does not turn on a subjective determination regarding the defendant's conduct, but rather, entails a question of fact – whether the defendant acted with the requisite intent. Additionally, the Court determined that the omission of a definition for the operative verbs in NRS 201.300(1)(a) does not render the statute void for vagueness. While the words induces, persuades, encourages, inveigles, entices, or compels are not defined in the statute, they are all words with common dictionary definitions.

Statutory Analysis

Ford also asserted two statutory arguments. First, Ford argued that NRS 201.300(1)(a) did not apply in his situation, regardless of his intent, because Fazal testified that she did not intend to become a prostitute, nor to continue to engage in prostitution. Alternatively, Ford suggested that, at most, the State could charge him with attempted pandering.

The Court noted that in focusing on the victim's intent, Ford conflated pandering of prostitution, an inchoate crime requiring specific intent, with the crime of prostitution. NRS

¹⁶ *Silvar v. Dist. Ct.*, 122 Nev. 289, 129 P.3d 682 (2006).

¹⁷ *Flamingo Paradise Gaming v. Attorney Gen.*, 125 Nev. 502, 514, 217 P.3d 546, 554-55 (2009).

¹⁸ *Silvar*, 122 Nev. at 289, 129 P.3d at 682 (2006) (citing CLARK CNTY. ORDINANCE § 10.08.030 (2006)).

201.300(1)(a) looks to the defendant's intent, not the victim's.¹⁹ The Court also recognized that the crime of pandering is complete upon some uttering of encouragement for the target to become a prostitute or continue to engage in prostitution.

Additionally, the Court found that NRS 175.301, the statute requiring corroboration of a witness's testimony to convict a defendant of pandering, demonstrates that NRS 201.300(1)(a) applies to undercover sting operations. After the Court reversed a pandering conviction on the ground that a police officer could not corroborate a fellow officer's testimony, the Legislature amended NRS 175.301(2) to exclude from the corroboration requirement witnesses who were on-duty police officers at the relevant time.²⁰ Notwithstanding repeal of NRS 175.301's corroboration requirement in 2005, the statute's provision excluding an undercover police officer's testimony from the corroboration requirement demonstrated the Legislature's intent for NRS 175.301 to apply to undercover sting operations.

As to Ford's attempted pandering argument, the Court looked to *People v. Zambia*,²¹ a California Supreme Court decision involving similar facts. There, the Court held that "the crime of pandering is complete when the defendant 'encourages another person to become a prostitute.'" ²²Further, the fact that Ford mistakenly believed Fazal to be a prostitute is not sufficient to overcome conviction under NRS 201.300(1)(a). In determining a defendant's culpability for a solicitation-type crime, courts look to the facts as the defendant believed them to be.²³ Finally, the Court noted that a defendant could be convicted of attempted pandering if he sought to recruit the target for prostitution, but the target failed to hear the defendant's solicitations.

Conclusion

NRS 201.300(1)(a) is not unconstitutionally overbroad because it requires a specific intent of inducing, persuading, encouraging, inveigling, enticing, or compelling a target to take up, or continue to engage in, prostitution. Additionally, NRS 201.300(1)(a) is not unconstitutionally vague, as the statute provides both notice of the prohibited conduct and sufficient standards to guide the actions of law enforcement officers. Finally, NRS 201.300(1)(a) applies to undercover sting operations.

¹⁹ *United States v. Rashkovski*, 301 F.3d 1133, 1137 (2002) (applying the Mann Act).

²⁰ *Sheriff v. Jilliard*, 96 Nev. 345, 608 P.2d 1111 (1980)

²¹ *People v. Zambia*, 254 P.3d 965 (Cal. 2011).

²² *Id.* at 975 n. 8.

²³ *United States v. Williams*, 553 U.S. 285, 300 (2008).