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Summary of Gallegos v. State, 123 Nev. Advanced Opinion 31

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***Gallegos v. State*, 123 Nev. Advanced Opinion 31 (Aug. 2, 2007)¹**

CRIMINAL LAW – UNLAWFUL POSSESSION

Summary

Appellant Albert Gallegos was charged under NRS 202.360(1)(b),² in 2004, with one count of unlawful possession of a firearm after police arrested him at his home in Clark County and found a firearm inside that home. That charge was based on a 1998 felony warrant issued by a California superior court. The California court issued the warrant when Gallegos failed to appear for sentencing after pleading *nolo contendere* to seven felony charges. At his Nevada trial, Gallegos testified that he did not appear for his sentencing hearing because the California superior court told him when he entered his plea that “he’d recommend me not stepping a foot back in California ever again.” He further testified that he did not know he needed to return for sentencing because when he reported to the probation office shortly after he entered his plea, as directed by the California superior court, that office had no record of Gallegos’s charges in its system. Believing that his case had been resolved, he left California and returned to Las Vegas.

Prior to his Nevada trial, Gallegos filed a motion to dismiss the unlawful possession charge, arguing that NRS 202.360(1)(b) is unconstitutionally vague and fails to provide sufficient notice that he cannot possess a firearm because it does not define the term “fugitive from justice.” The court denied the motion and conducted a trial during which the court instructed the jury that “[a] fugitive from justice is any person who has fled from any state to avoid prosecution for a crime.” That instruction was derived from the federal definition of “fugitive from justice” found in 18 U.S.C. § 921(a)(15). At the end of the evidentiary portion of his trial, Gallegos renewed his motion to dismiss the charge on constitutional grounds and the court again denied. The jury found that Gallegos was a “fugitive from justice” and was guilty of unlawfully possessing a firearm in violation of NRS 202.360(1)(b). Gallegos was sentenced to a prison term of 1 to 6 years. This appeal followed.

The Nevada Supreme Court performed a Due Process analysis: “A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is

¹ By Matthew Engle

² The applicable part of the statute reads:

1. A person shall not own or have in his possession or under his custody or control any firearm if he:
 - (a) Has been convicted of a felony in this or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, unless he has received a pardon and the pardon does not restrict his right to bear arms;
 - (b) Is a fugitive from justice; or
 - (c) Is an unlawful user of, or addicted to, any controlled substance.

A person who violates the provisions of this subsection is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.

prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.”³

NRS 202.360(1)(b) gives insufficient notice

The notice to citizens that a statute provides is insufficient if it is so imprecise and vague that people of ordinary intelligence cannot understand what conduct is prohibited.⁴ However, when the Legislature does not define each term it uses in a statute, the statute will survive a constitutional challenge “if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision.”⁵

Here the Court concluded that the statute does not survive this first prong of the test because the Legislature did not define the term “fugitive from justice.” NRS 202.360(1)(b). While the statute appears to be modeled on a similar federal law, that law contained a definition of “fugitive from justice.” By not including that portion in the Nevada law, the Legislature left it unclear whether that was intended to mean that the Nevada definition should differ from the federal statute. As such, NRS 202.360(1)(b) as written, leaves citizens to guess whether even an unpaid parking or traffic ticket subjects them to the ambit of the statute.

The Court also noted that it cannot determine from the statute’s provisions whether the person has to have been formally charged with a crime, be wanted as a suspect but not yet indicted, be guilty of a crime but not yet discovered, be wanted for general questioning relating to a crime, or whether the person even has to know he has committed a crime.

Furthermore, other Nevada cases fail to give a single, well-defined definition for the term “fugitive from justice.” For these reasons, the statute does not provide enough notice as to what conduct it prohibits.

NRS 202.360(1)(b) lacks specific standards and thereby allows for its arbitrary and discriminatory enforcement

Under the second prong of the vagueness test, a statute is unconstitutional if it “lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.”⁶ In *Silvar v. District Court*, the Court analyzed and struck down a Clark County ordinance under this second prong because, among other things, law enforcement officers had too much discretion in determining whether the ordinance had been violated.

Like the ordinance in *Silvar*, the Court held that NRS 202.360(1)(b) is susceptible to arbitrary and discriminatory enforcement because it does not specify the circumstances under which a person can be arrested and prosecuted as a fugitive from justice in possession of a firearm. It therefore establishes no clear standards to guide law enforcement officers, prosecutors, district courts, and, ultimately, jurors as to whether a

³ *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

⁴ *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 864, 59 P.3d 477, 481 (2002).

⁵ *Woolfer v. O’Donnell*, 91 Nev. 756, 562, 542 P.2d 1396, 1400 (1975).

⁶ *Silvar*, 122 Nev. at 293, 129 P.3d at 685.

violation has occurred. Without a statutory or well-settled and commonly understood definition of “fugitive from justice” to which Gallegos’s actions could be compared, the prosecutor, defense counsel, and district court were left to their own personal predilections to determine whether NRS 202.360(1)(b) could be enforced against Gallegos.

Because NRS 202.360(1)(b) fails both prongs of the test, the Nevada Supreme Court reversed Gallegos’s conviction and ruled the statute unconstitutional.

Issue and Disposition

Issue

Is NRS 202.360(1)(b) unconstitutionally vague because it fails to define “fugitive from justice?”

Disposition

Yes, the Nevada Supreme Court held the statute was unconstitutionally vague because it: (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.

Dissent

Justice Parraguirre issued a dissenting opinion in which he disagrees with the proposition that the term “fugitive from justice” is unconstitutionally vague. In it he writes that the term has a well-settled and ordinarily understood meaning. In the past, he argues, this court has defined the term “fugitive from justice” as a person who has (1) committed a crime in another state, (2) been charged in that state with the commission of such crime, and (3) fled from justice and is within this state.⁷ This definition, he continues, fits within the meaning supplied by *Webster’s New International Dictionary*, which identifies a “fugitive from justice” as “[o]ne who, having committed, or being accused of, a crime in one jurisdiction, flees to avoid punishment.”⁸

In light of these compatible, common definitions, the Justice argues that Gallegos has failed to meet his burden of demonstrating that the term “fugitive from justice” fails to provide sufficient notice of prohibited conduct. For this reason, Justice Parraguirre dissented from the majority’s conclusion that NRS 202.360(1)(b) is unconstitutionally vague.

Commentary

State of Law before *Gallegos v. State*

Prior to this case there was no single, well-defined definition for the term “fugitive from justice.” Different cases have taken different approaches. For example, in

⁷ Ex parte Lorraine, 16 Nev. 63, 63 (1881); Castriotta v. State, 111 Nev. 67, 69 n.2, 888 P.2d 927, 929 n.2 (1995).

⁸ *Webster’s New International Dictionary* 1016 (2d ed. 1961).

*Ex parte Lorraine*⁹ and *Castriotta v. State*,¹⁰ the Court concluded that four elements are necessary to qualify a person as a “fugitive from justice.” The person must have (1) committed a crime in another state, (2) been charged in that state with the commission of that crime, (3) fled from justice, and (4) been found within this state.¹¹

However, in *Robinson v. Leypoldt* the Court used a definition inconsistent with those two cases because it stated that a person must have merely “departed” from another state rather than “fled” - the underlying intent differs.¹² Similarly, the Court noted, the common dictionary definition of “fugitive from justice” is broad enough to include anyone who is absent from another state for “any reason,” without clarifying whether that person must have intended to flee or whether leaving the state for some other purpose or under some other state of mind is sufficient.¹³

In either case, this statute was being enforced as-is until this case brought the inconsistencies of the various definitions of “fugitive from justice” before the Court.

Other Jurisdictions

This statute is modeled after federal law 18 U.S.C. § 922. However, unlike the Nevada statute, the federal law included a specific definition of “fugitive from justice,” thus avoiding the issue before the Nevada Supreme Court in this case. 18 U.S.C. § 921(a)(15) provides that “[t]he term ‘fugitive from justice’ means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” Congress enacted this definition of “fugitive from justice” in 1968.¹⁴

Effect of *Gallegos v. Nevada* on Current Law

This law has now been struck down as unconstitutional. To fix it the Legislature will have to define the term “fugitive from justice” in the statute.

Unanswered Questions

This case brings up several issues for the prosecution and defendants who are accused or have been convicted under this statute. For defendants facing charges under the statute, the prosecution must rethink its strategy. It no longer appears that a person can be convicted under this statute alone. However, in this case the defendant’s situation was somewhat unusual in that it was a situation where “fugitive from justice” may or may not have applied. The court did not address cases where the previous offense may have been more severe, thus leaving less room for misinterpretation of the statute.

The case also calls into question any previous convictions that have been made under this statute. Defense attorneys may be able to appeal and seek reversal for any convictions now that the statute has been declared unconstitutional.

Lastly, an unanswered question is whether or not the Legislature will revisit that statute in light of this opinion and add more detail to the statutory language.

⁹ 16 Nev. 63 (1881).

¹⁰ 111 Nev. 67, 69 n.2, 888 P.2d 927, 929 n.2 (1995).

¹¹ *Id.*; *Ex parte Lorraine*, 16 Nev. at 63.

¹² 74 Nev. 58, 61-62, 322 P.2d 304, 306 (1958) (holding that the “mode or manner of a person’s departure from the demanding state generally does not affect his status as a fugitive from justice”).

¹³ Webster’s Third New International Dictionary 918 (2002).

¹⁴ 18 U.S.C. § 921(a)(15) (1970).

Conclusion

NRS 202.360(1)(b), which prohibits possessing a firearm when one is a “fugitive from justice,” is unconstitutional because the term “fugitive from justice” is too vague. The Court held that it (1) failed to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacked specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.