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Summary of Roberts v. State

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Roberts v. State, 89 P.3d 889 (Nev. 2004)¹

**CRIMINAL LAW AND PROCEDURE –
MANDATORY/DISCRETIONARY PROBATION, SENTENCING, NOTICE**

Summary

Appeal from a judgment of conviction, pursuant to a guilty plea, of one count of possession of a controlled substance.

Disposition/Outcome

Judgment of conviction affirmed.

Factual and Procedural History

On September 23, 2003, appellant Tyrone David Roberts (Roberts) pled guilty to one count of possession of a controlled substance. Pursuant to the terms of the plea agreement, the State promised not to oppose probation, if recommended by the Nevada Division of Parole and Probation and, otherwise, to concur in any other sentencing recommendation made by the Division.

Ultimately, the Division recommended that Roberts serve a prison term of 12 to 30 months and, subsequently at the sentencing hearing, the State concurred in that recommendation. Defense counsel, however, argued that probation was mandatory in Roberts' case. The State responded that Roberts was ineligible for mandatory probation because he had previously had his probation revoked in an unrelated case. The district court agreed with the State that the imposition of probation was discretionary and sentenced Roberts to serve a prison term of 12 to 34 months to run concurrently with any sentences in other cases. Roberts subsequently appealed his sentence.

After considering whether the State was required to provide a criminal defendant with formal notice in the charging document that probation is discretionary rather than mandatory, the Nevada Supreme Court concluded that no formal notice is required.

Discussion

Generally, a defendant convicted of a category E felony, including first-offense possession of a controlled substance, is entitled to probation.² However, probation is discretionary, rather than mandatory, where at sentencing it is established that at the time of the commission of the crime, the defendant: (1) was serving a term of probation or was on parole for a felony conviction; (2) had previously had a grant of probation or parole revoked for a

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² NEV. REV. STAT. 176A.100(1)(b).

felony conviction; (3) had previously failed to successfully complete an assigned treatment program pursuant to NRS 453.580, or (4) had two prior felony convictions.³

Roberts argued that he was entitled to mandatory probation because the State failed to allege in the charging document that probation was discretionary under NRS 176A.100(1)(b). More specifically, citing to *Lewis v. State*⁴, Roberts argued that he was entitled to formal notice in the charging document that probation was not mandatory because discretionary probation is a sentencing enhancement under NRS 453.336. However, the Nevada Supreme Court found that Robert's contention lacked merit.

In *Lewis*, the Nevada Supreme Court held that, where the State seeks a sentencing enhancement for a simple possession conviction under NRS 453.336(2), the State must give the defendant formal notice by alleging the prior convictions in the charging document.⁵ In so holding, the court reasoned that the Legislature had no rational basis for excluding persons charged with simple possession from the statutory formal notice requirement set forth in NRS 453.348⁶ because, like persons charged with more serious controlled substance offenses, persons charged with simple possession were subject to a sentencing enhancement for prior convictions involving controlled substances.⁷ A sentencing enhancement is an additional penalty for the primary offense.⁸ The sentence for simple possession, which is normally a category E felony, is enhanced to a category D felony if the State alleges the prior controlled substance convictions in the charging document and the State proves the existence of those convictions prior to sentencing.⁹

In this case, the court found that Roberts did not receive a sentence enhancement under NRS 453.336. Although in Roberts' case probation was discretionary because one of the exceptions set forth in NRS 176A.100(1)(b) applied, the court disagreed that application of that statute is the equivalent of a sentencing enhancement. The court noted that NRS 176A.100(1)(b) does not increase the maximum potential sentence for simple possession, but instead merely sets forth guidelines for the district court with regard to the suspension of execution of the actual sentence imposed. Accordingly, the court held that the State is not required to allege circumstances that would render probation discretionary in the charging document. Moreover, because Roberts previously had a grant of probation revoked, the court concluded that the district court acted within its discretion in refusing to suspend execution of the sentence imposed.

³ *Id.*

⁴ 109 Nev. 1013, 862 P.2d 1194 (Nev. 1993).

⁵ *Id.* at 1014-15, 862 P.2d at 1195.

⁶ NEV. REV. STAT. 453.348 provides, in relevant part, that: In any proceeding brought under NRS 453.316, 453.321, 453.322, 453.333, 453.334, 453.337, 453.338 or 453.401, any previous convictions of the offender for a felony relating to controlled substances must be alleged in the indictment or information charging the primary offense If the offender pleads guilty to or is convicted of the primary offense but denies any previous conviction charged, the court shall determine the issue after hearing all relevant evidence. A certified copy of a conviction of a felony is prima facie evidence of the conviction.

⁷ *Lewis*, 109 Nev. at 1014-15, 862 P.2d at 1194-95.

⁸ *Domingues v. State*, 112 Nev. 683, 692, 917 P.2d 1364, 1371 (Nev. 1996); *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

⁹ *See* NEV. REV. STAT. 453.336(2); *Lewis*, 109 Nev. at 1014-15, 862 P.2d at 1194-95; *see also* *Hudson v. Warden*, 117 Nev. 387, 394-95, 22 P.3d 1154, 1159 (2001) (discussing burden of proving prior convictions to enhance a sentence under NRS 453.336).

Conclusion

Under this holding, a criminal defendant is not entitled to formal notice in the charging document that probation is discretionary rather than mandatory.