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# Dunham (John) v. State, 134 Nev. Adv. Op. 68 (Sept. 6, 2018)

Katrina Brandhagen
*University of Nevada, Las Vegas -- William S. Boyd School of Law*

*Dunham (John) v. State*, 134 Nev. Adv. Op. 68 (Sept. 6, 2018)[1]

CRIMINAL APPEAL: STATUTORY INTERPRETATION

## Summary

The Court determined that the word "resides" in NRS 205.067(5)(b)[2] does not require that the owner of a dwelling live permanently or continuously in the dwelling. The Court also held that the sentence of a maximum of 96 months in prison with parole eligibility after 38 months imposed on the appellant when a jury convicted him of home invasion, was not cruel and unusual punishment.

## Background

Appellant John Dunham and his wife Patricia Scripko lived in a rented a home in California. Scripko also owned a condominium in her name only in Stateline, Nevada. After their separation in June 2016, Dunham moved into the condominium, while Scripko maintained the California residence. In August 2016, Scripko obtained a protective order, ordering Dunham to stay at least 100 yards away from her and from the condominium. Dunham did not abide by the protective order. On October 21, 2016, police arrested Dunham at Scripko's condominium. Later that day, Scripko arrived at the condominium to have the locks changed and have some repairs done in anticipation of renting the condominium out as a vacation rental. Scripko left the condominium on October 23, 2016. On October 26, 2016, the contractor performing repairs found Dunham at the condominium and found the kitchen window broken. Police arrested Dunham and he was charged with home invasion and burglary. A jury convicted Dunham. Dunham was sentenced to 96 months in prison, with parole eligibility after 38 months.

## Discussion

*The district court did not abuse its discretion in instructing the jury*

Appellant argued that his proposed jury instruction should have been allowed, which stated that "resides" as used in the home invasion statute in Nevada should be interpreted as requiring the dwelling be permanently or continuously occupied. Dunham's proposed jury instruction was taken from *Petrowsky v. Krause*,[3] a Wisonsin case. The Court held, however, that the *Petrowsky* case was distinguishable from Dunham's case because the court in the *Petrowsky* considered an instruction based on a domestic violence statute, not a property-related statute. In *Petrowsky*, the purpose in defining "reside" was to determine who was a "household member." Dunham argued that he was entitled to his jury instruction because under *Crawford v. State*, the defense is entitled to instruct the jury on their theory of the case.[4] The Court held, however, that although the defense

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[1] By Katrina Brandhagen.
[2] NEV. REV. STAT. § 205.067(5)(b) (2017).
[3] 588 N.W.2d 318, 319 (Wis. Ct. App. 1998).
[4] 121 Nev. 744, 751, 121 P.3d 582, 586 (2005).

is entitled to those instructions, they are not allowed to give "misleading, inaccurate, or duplicitous" instructions.[5]

The plain language of NRS 205.067(1)[6] indicates that a dwelling is inhabited when the owner or other lawful occupant resides in it. However, the Court held that the word "resides" does not require permanent or continuous presence in the dwelling. Since the dwelling in question was a vacation home, Scripko could still be "residing" in the condominium, even if she only intended to return and continue to use it as a "sleeping place"[7] in the future. The purpose of using the word "resides" in NRS 205.067(5)(b)[8] is to determine which dwelling places should have more protection than uninhabited ones.

While the *Petrowsky* case's definition of "reside" in determining who a "household member" is would require permanency and continuity, inhabiting a dwelling does not require that same degree of permanency and continuity. The present case is more similar to *Hess v. State*,[9] than it is to *Petrowsky*. In *Hess*, the Court held that "[t]here is no requirement in the law that a house be continuously occupied in order to be a 'dwelling.' It is sufficient that it is occasionally occupied for residential purposes."[10] The present case is also similar to *State v. Kautz*,[11] which said that residence was still a dwelling, even though it had been empty for six months.[12]

Because the language and purpose of the NRS 205.067(5)(b)[13] does not require the permanence and continuity that the appellant wanted to indicate in his jury instruction, the Court held that the district court did not abuse its discretion in refusing Dunham's jury instruction. To allow the jury instruction would have been an inaccurate statement of law.

*Dunham's sentence is not cruel and unusual punishment*

Dunham argues that because he only had one misdemeanor, had substance abuse problems, had familial support, and he was a good father, his sentence of 96 months in prison with parole eligibility after 38 months should be considered cruel and unusual punishment. The Court, however, considers that NRS 205.067(2)[14] provides that "a person convicted of home invasion can be sentence to a minimum term of 1 year in prison and to a maximum term of 10 years." Since Dunham's sentence falls within those parameters, it is not cruel and unusual punishment.

## Conclusion

The Court held that the district court did not err when it refused the appellant's jury instruction because it would have been an inaccurate statement of law. Further, the sentence imposed on Dunham is not cruel and unusual punishment because the sentence falls within the parameters of NRS 205.067(2).[15] Accordingly, the Court affirmed the district court's decision.

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[5] *Id*. at 754, 121 P.3d at 589.
[6] NEV. REV. STAT. § 205.067(1) (2017).
[7] NEV. REV. STAT. § 205.081(2017).
[8] NEV. REV. STAT. § 205.067(5)(b) (2017).
[9] 207 S.E. 2d 580, 581 (Ga. Ct. App. 1974).
[10] *Id.* at 582 (internal quotation marks omitted).
[11] 39 P.3d 937, 939–40 (Or. Ct. App. 2002).
[12] *Id.*
[13] NEV. REV. STAT. § 205.067(5)(b) (2017).
[14] NEV. REV. STAT. § 205.067(2) (2017).
[15] *Id.*