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Hager v. State, 135 Nev. Adv. Op. 34 (Aug. 29, 2019)

Brittney Lehtinen

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CRIMINAL LAW: PROHIBITED PERSONS, JURY INSTRUCTIONS

Summary

The Court determined that (1) Defendants who successfully complete mental health specialty court diversion programs pursuant to NRS § 176A.250–265 are not “adjudicated mentally ill” under NRS § 202.360(2)(1); and (2) that the jury should have been instructed that under NRS § 202.360(1)(d), an “unlawful user” is someone who regularly uses substances over a period of time consistent with their possession of a firearm.

Background

In 2013, police confiscated two firearms when Defendant was stopped and arrested for outstanding warrants. After negotiating, Defendant plead guilty to illegally carrying a concealed weapon in exchange for suspension of his criminal case and a referral to the mental health specialty court diversion program established under NRS § 176A.250 through 265. Defendant was referred to the program because he was diagnosed with PTSD and had no prior violent felony convictions. During the intake process, Defendant admitted he was addicted to methamphetamine until he was nineteen and that he was sober for nine years with the exception of a one-time use in January 2013. Regardless, after giving consent to be in the program, Defendant was assigned to Washoe County’s mental health diversion program and no judgment of conviction was entered. In 2014, Defendant successfully completed the program and his criminal case was dismissed. Defendant also filed paperwork asking the State to return his confiscated firearms which was granted in 2015.

In 2016, Defendant contacted the police requesting they reopen their investigation into his brother’s death which Defendant believed was not accidental. Defendant became furious when the request was denied and sent the police a link to a Facebook video where he vented about their incompetence and snorted a white substance. The police reported the video also showed Defendant had firearms with him. Defendant was arrested for illegal possession of firearms and the police executed a search warrant at Defendant’s home where they recovered firearms, a glass pipe and empty baggies typically used to hold drugs. The police did not find drugs or trace evidence, but during Defendant’s interview, they claimed he admitted firearm possession and to snorting meth in the video. Defendant later denied snorting meth and claimed that it was salt, but eventually was charged with and convicted of three counts of possession of a firearm after being adjudicated mentally ill and three counts of possession of a firearm while being an unlawful user of a controlled substance.

Discussion

Under NRS § 202.360, illegal firearm possession has three elements: (1) a status element meaning whether a defendant can be classified as one of the persons statutorily prohibited from

¹ By Brittney Lehtinen.

possessing firearms; (2) a possession element; and (3) a firearms element.² Defendant admitted the existence of the possession and firearms elements; therefore, his appeal only focuses on whether the State met the status elements for the two crimes he was convicted of.

A-1

Defendant was charged with violating NRS § 202.360(2)(a), where the status element is met if a court adjudicated a person as mentally ill. The State argued at trial that Defendant was adjudicated mentally ill when he was assigned to the mental health court diversion program in 2013. Defendant challenged whether completing the mental health court program constituted sufficient adjudication of mental illness and moved to dismiss counts one through three. The district court denied the motion and held that whether Defendant was adjudicated mentally ill was a question of fact for the jury to decide. The Court disagreed with the district court's determination that adjudication was a question of fact because when reviewing 18 U.S.C. § 922(g)(4), the federal equivalent of NRS § 202.360(2), Courts uniformly hold that whether a defendant is adjudicated as mentally ill is a question of law reserved for the court.³ Because of the legal issues presented, the Court conducted *de novo* review to determine whether assignment to a mental health court diversion program constitutes mental illness adjudication under NRS § 202.360(2)(a).

A-2

As NRS § 202.360(2)(a) does not define “adjudicated as mentally ill,” the State cited *Black's Law Dictionary* (10th ed. 2014) where to adjudicate is to rule on judicially and insisted that assignment to a mental health court diversion program is equivalent to being adjudged mentally ill. Conversely, Defendant presented definitions of adjudicate which implicitly required adversary proceedings followed with formal judicial decisions and final judgments. The Court felt both interpretations were logical but concluded that the plain meaning of adjudicated requires judicial involvement, consideration of the parties' arguments, resolution of a dispute, and due process proceedings.⁴

A-3

Using the *Franklin v. Sessions* measure of adjudication, the Court concluded that NRS § 202.360(2)(a) does not apply because assignment and successful completion of mental health diversion programs established under NRS § 176A.250 does not constitute adjudication of mental illness. Courts may recommend defendants participate in mental health diversion programs, but whether a defendant accepts is voluntary. Moreover, at the time relevant to Defendant's appeal, defendants were ineligible for the mental health programs if they were charged with or convicted of a crime involving violence or threats of violence. Defendant established through paperwork and trial testimony that his assignment to mental health court was not through a judicial order, decree or findings, but through an acceptance letter which a specialty court officer signed.

The Court used NRS § 179A.163 to support the conclusion that the Legislature did not intend for assignment to a mental health court to adjudicate a person as mentally ill nor to make

² See *Rehaif v. United States*, 588 U.S. ___, ___, 139 S. Ct. 2191, 2195-96 (2019) (wherein the elements of the federal firearms statute, 18 U.S.C. § 922(g) (2012), are stated).

³ *United States v. McLinn*, 896 F.3d 1152, 1156 (10th Cir. 2018); see *United States v. Rehlander*, 666 F.3d 45, 47, 50 (1st Cir. 2012).

⁴ *Franklin v. Sessions*, 291 F. Supp. 3d 705, 715 (W.D. Pa. 2017).

felonious for such persons to possess firearms under NRS § 202.360(2)(a). Additionally, state and federal firearm statutes emphasize preventing illegal possession. Therefore, when someone is adjudicated mentally ill and disqualified from possessing firearms in Nevada, the adjudicating court has five days to notify the Central Repository for Nevada Records of Criminal History and to give a statement that the record is being sent to the National Instant Criminal Background Check System (“NICS”) for inclusion in the appropriate databases. These reporting requirements are not included in NRS § 176A.250–265, which the Court used to conclude that the Legislature did not intend to prohibit mental health court attendees from owning firearms because neither a mandatory Central Repository nor NICS reporting obligation were included in the relevant statutes.

A-4

Even if the Court accepted the State’s contention that assignment to mental health court was an adjudication of mental illness, defendants who successfully complete such programs are restored to the status occupied prior to the program. Further, under NRS § 176A.260(1), when assigning defendants to mental health court programs, future criminal proceedings are suspended, and the defendant is on probation until successful completion of the program. A court may only enter a judgment of conviction if a defendant is unsuccessful in completing the assignment and will be prohibited from possessing firearms if they are convicted of a felony.⁵

Defendant successfully completed the court diversion program, was discharged and had his criminal case dismissed in 2013. As a result, Defendant was restored to the status he held prior to his arrest which was not a person adjudicated mentally ill.⁶ Even though Defendant was disarmed when he attended the mental health court program, the firearms were returned to him in 2015 which further validated the Court’s position that Defendant’s status as not mentally ill was restored.

The State insisted that Defendant’s disarmament as a result of entering the mental health court program survived the Defendant’s case dismissal and discharge because it equated an additional penalty under NRS § 176A.260(4). The Court disagreed finding the State’s interpretations misaligned with NRS § 176A.260(4)’s position that a defendant is restored to his or her pre-assignment status once they are discharged and their case is dismissed.⁷ Therefore, the Court held Defendant’s convictions on counts one through three were improper as a matter of law.

B

Counts four through six charged Defendant with illegal possession of a firearm as a person who is unlawfully using or addicted to controlled substances under NRS § 202.360(1)(d). Defendant challenges the sufficiency of evidence presented against him along with the sufficiency of the unlawful user definition presented in jury instructions.

B-1

Defendant’s challenge to the sufficiency of evidence asks whether any rational trier of fact could find the essential elements of a crime beyond a reasonable doubt, after viewing evidence in the light that most favors the prosecution.⁸ Again, Defendant admitted the possession and firearms

⁵ NEV.REV. STAT. § 202.360(1)(a) (2013).

⁶ NEV. REV. STAT. § 176A.260(4) (2013).

⁷ Lewis v. United States, 445 U.S. 55, 61 n.5 (1980).

⁸ Middleton v. State, 114 Nev. 1089, 1103, 968 P.2d 296, 306 (1998).

elements, but challenged the status element. Defendant claimed the State failed to provide sufficient evidence that he was an unlawful user of or addicted to drugs while in possession of firearms because the police only recovered drug paraphernalia. Neither NRS § 202.360(1)(d) nor 18 U.S.C. § 922(g)(3), which prohibit possession of firearms by unlawful drug users or addicts, define the meanings of unlawful user or addict. Nonetheless, the Court found that addiction is straightforward in meaning habitual use of a substance typically without the ability to stop by one's self.⁹ Although the meaning of unlawful user was deemed less clear, the Court relied on prevailing caselaw which has held unlawful user does not mean the same as addict¹⁰ and that a conviction under § 922(g)(3) will only prevail if the government proves a defendant took drugs regularly over an extended period of time in conjunction with his or her possession of a firearm.¹¹

The Court acknowledged that the jury might have acquitted Defendant if they accepted his testimony that he sobered from his addiction to meth when he was nineteen, that his last use of meth was once in the beginning of 2013, and that the substance in the Facebook video was salt. However, the Court found the jury was not required to believe Defendant's testimony and that sufficient evidence supported Defendant's convictions on counts four through six. Specifically, the State presented evidence that Defendant was addicted to methamphetamine until 2004, that he relapsed in 2013, that he appears to ingest meth with firearms present in the Facebook video he sent to police, that he admitted to using meth in the Facebook video during the police interview, and that the police found drug paraphernalia after searching his home. The Court determined that the State's evidence, although primarily circumstantial, sufficiently demonstrated that Defendant either maintained his prior addiction or was a regular user while in possession of his firearms.¹²

B-2

Defendant also challenged the jury instruction regarding the elements of the crime for possessing a firearm as an unlawful user or addict of controlled substances. Defendant objected to the instruction's definition of an unlawful user as "a person who uses any controlled substance" alleging that the definition was broad and improperly permitted his conviction based on a single use in relation to the charge for illegal firearm possession. The Court conducted *de novo* review because they were tasked with deciding whether a jury instruction contained correct statements of law.¹³ Following federal caselaw, the Court held that unlawful users of controlled substances under NRS § 202.360(1)(d) are those persons who regularly use the substance over a period of time consistent with possession of a firearm¹⁴ and deemed it improper for a person to be considered an unlawful user after a single use. The Court also concluded that there was doubt whether a correctly instructed jury would have convicted Defendant because it was unclear whether the instruction's misstatement of the law was harmless.

⁹ Addiction, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁰ See *United States v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003).

¹¹ *United States v. Purdy*, 264 F.3d 809, 813 (9th Cir. 2001); see *United States v. Augustin*, 376 F.3d 135, 138-39 (3d Cir. 2004).

¹² See *Canape v. State*, 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993) (where circumstantial evidence may be the sole basis supporting a conviction).

¹³ *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008).

¹⁴ See § II.B.1, *supra*.

Conclusion

Defendants who successfully complete mental health court diversion programs according to NRS § 176A.250–265 are not adjudicated mentally ill *per se*, and therefore cannot be charged or convicted of illegally possessing a firearm under NRS § 202.360(2)(a). Thus, the Court reversed Defendant's convictions for counts one through three.

Additionally, under NRS § 202.360(1)(d), a proper jury instruction would have stated that unlawful users are those who regularly use controlled substances over a prolonged period of time consistent with their possession of firearms. As such, the Court reversed and remanded counts four through six for a new trial with jury instructions that correctly state the law.