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Antonio Cruz Aldape v. State of Nevada, 139 Nev. Adv. Op. 42 (Sept. 28, 2023)

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Antonio Cruz Aldape v. State of Nevada, 139 Nev. Adv. Op. 42 (Sept. 28, 2023)[1]

AN APPEAL WAIVER DOES NOT PRECLUDE AN APPELLANT FROM CHALLENING PROBATION CONDITIONS WHERE THE WAIVER ONLY SPECIFIES THAT BY SIGINING THE PLEA, THEY "WAIVE THE RIGHT TO A DIRECT APPEAL OF CONVICTION."

PROBATION CONDITIONS UNDER NRS 176A.400 MUST SERVE A SIGNIFICANT GOVERNMENT INTEREST AND BE NARROWLY TAILORED TO BE IMPOSED ON CONVICTED SEX OFFENDERS.

Summary

The Supreme Court of Nevada considered whether the appellant Antonio Aldape could challenge the conditions of his probation if the appeal waiver in the plea agreement only specified that by entering the plea, you "waive your right to a direct appeal of conviction." Additionally, the Court evaluated the constitutionality of the appellant's probation conditions, condition 15, mandated by NRS 176A.410(1)(q), prohibiting internet access, and condition 11, pursuant to NRS 176A.400(1)(c)(3), restricting entry into specific geographic areas. The Court applied contract principles to the appellant's appeal waiver in his plea agreement and held the appellant's waiver did not preclude challenges to the conditions of his waiver because the State is bound by the plain meaning of the words it used, and the appellant was not canvassed about the appeal waiver's scope, thus he would not logically understand that it also precluded the right to appeal probation conditions. The Court further found condition 15 mandated by NRS 176A.410(1)(q) facially unconstitutional under the First Amendment because it restricts more speech than necessary to serve a significant government's interest and it was not narrowly tailored enough. Finally, the Court rejected the appellant's challenge that condition 11 pursuant to NRS 176A.400(1)(c)(3) was unconstitutional and the district court abused its discretion imposing such a condition because it is reasonable to restrict convicted sex offenders from areas where children are commonly found.

Background

Antonio Aldape pleaded no contest to two counts of attempted lewdness with a child under 14 for interactions in his home with his step-granddaughter. The plea agreement permitted Aldape to substitute a guilty plea to two counts of sexually motivated coercion upon successful completion of probation and waived his right to a direct appeal of the conviction. Aldape was adjudged guilty and given a suspended aggregate prison term of 8 to 20 years, with probation not to exceed 5 years. His judgment of conviction imposed two probation conditions: (1) condition 15 mandated by NRS 176A.410(1)(q), which prohibits any defendant who is on probation for a sexual offense from accessing the internet or possessing a device capable of accessing the internet without the probation officer's permission and (2) special condition 11 pursuant to NRS 176A.400(1)(c)(3), which prohibits the defendant from being "in or near" playgrounds, parks, schools, and businesses that primarily cater to children.

Aldape challenged both conditions in district court and was denied. He appealed the district court's decision.

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[1] By Toree Robinson.

Discussion

Aldape's appeal waiver did not preclude challenges to the conditions of his probation.

In response to Aldape's challenges to his probation conditions, the State argued that Aldape raised his right to appeal the conditions of his probation in his plea agreement under the section where he waived his right to a direct appeal of this conviction. To determine if an appeal waiver precludes an appellant's challenges, courts consider "whether: (1) the appeal falls within the scope of the waiver; (2) both the waiver and plea agreement were entered into knowingly and voluntarily; and (3) enforcing the waiver…would result in a miscarriage of justice."[2] Here, the Court focused on whether Aldape's challenges fall within the scope of the waiver in his plea agreement. In Aldape's plea agreement, he waived the right to appeal his conviction, not his sentence or the probation conditions associated with his sentence; therefore, the Court concluded that Aldape may proceed on his challenges.

The Supreme Court of Nevada has held that contract principles apply to plea agreements.[3] Additionally, the Supreme Court of the United States has held that contract principles also apply to appeal waivers in plea agreements.[4] Courts will enforce a plea agreement as written[5] based on what the defendant reasonably understood when they entered the plea,[6] and the State has the burden to prove that the plea agreement "clearly and unambiguously waives a defendant's right to appeal."[7] Here, in Aldape's plea agreement, the appeal waiver clause did not refer to his sentence or probation conditions. It stated that he waived his right to appeal his conviction:

> "By entering my guilty plea, I understand that I am waiving and forever giving up the following rights and privileges:
> …
>
> (6) The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34."

Aldape argued that the words "conviction" and "sentence" have two different meanings in which "conviction" denotes the finding of someone guilty of a crime whereas "sentence" is the judgment formally pronounced by the court after finding a defendant guilty and imposing punishment.[8] On the other hand, the State argued that Aldape's appeal waiver covered the probation conditions imposed at his sentencing citing *United States v. Wells* and *United States v.*

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[2] United States v. Adams, 12 F.4th 883, 88 (8th Cir. 2021); *see* United States v. Hahn, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc); *see* Burns v. State, 137 Nev. 494, 499–500, 495 P.3d 1091, 1099–1100 (2021).
[3] *Burns*, 137 Nev. at 496, 495 P.3d at 1097.
[4] *See* Garza v. Idaho, 139 S. Ct. 738, 744 (2019).
[5] *Burns*, 137 Nev. at 497, 495 P.3d at 1097.
[6] Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999).
[7] *Adams*, 12 F.4th at 888.
[8] *Conviction*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Sentence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Holzer as support; however, the Court found that both cases supported Aldape's position not the State's.[9] In *Wells* and *Holzer*, the defendants could not appeal their supervised release conditions because their appeal waivers applied to both the conviction and the sentence–their conditions were an aspect of sentencing.[10] Courts have also held that where an appeal waiver is not specific, or only references the conviction, appeals challenging the sentence or conditions of supervised release fall outside the appeal waiver and can proceed.[11] Here, the Court applied these holdings to conclude that the appeal waiver in Aldape's plea agreement does not preclude Aldape from challenging his probation conditions because he was not canvassed about the appeal waiver's scope, and[12] a defendant signing a plea agreement that waives only the right to appeal his conviction would not logically understand that it also precluded the right to appeal probation conditions.[13]

The State further argued that Aldape gave up his right to appeal his probation conditions because he waived the right to challenge the legality of the proceedings in his plea agreement; however, the Court found that in making this argument, the State misquoted the text of the appeal waiver clause by omitting "of this conviction, including." The Court concluded that the appeal waiver's usage of "the legality of the proceedings" does not expand the word "conviction" to include sentencing and release conditions.[14] The Court further found that the State's request to construe "conviction" to include "sentence" because NRS 176.105[15] requires both for a "judgment of conviction" fails as a matter of contract construction. The State only used the word "conviction," not the phrase "judgment of conviction;" therefore, the State is bound by the plain meaning of the words it used in Aldape's appeal waiver, and those words do not preclude his appeal.

Condition 15 mandated by NRS 176A.410(1)(q) is facially unconstitutional under the First Amendment.

The First Amendment protects the right of court supervisees, including Aldape, to access the internet.

A district court that convicts a defendant of a sexual offense as defined in NRS 179D.097 and grants the defendant probation must impose the probation conditions enumerated in NRS 176A.410(1) including subsection (q), which requires that the defendant "[n]ot possess any electronic device capable of assessing the Internet and not access the Internet through any such device or any other means, unless possession of such a device or such access is approved by the [defendant's] probation officer."[16] Aldape challenges the constitutionality of subsection (q) and special condition 15 under the First Amendment.

The Court applies the holding of *Packingham* v. *North Carolina* to determine whether the First Amendment protects Aldape's right to access the internet.[17] "A fundamental principle of the

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[9] United States v. Wells, 29 F.4th 580 (9th Cir. 2022); United States v. Holzer, 32 F.4th 875 (10th Cir. 2022).
[10] *Id*.
[11] *See* Williams v. Indiana, 164 N.E.3d 724, 725 (Ind. 2021).
[12] *Sullivan*, 115 Nev. at 387, 990 P.2d at 1260 (construing plea agreement to what a defendant reading it would reasonably understand).
[13] *See Williams*, 164 N.E.3d at 725.
[14] *Cf.* People v. DeVaughn, 558 P.2d 872, 875 (Cal. 1977) (construing the phrase to mean "the legality of the proceedings resulting in the plea").
[15] NEV. REV. STAT. 176.105 (2022).
[16] NEV. REV. STAT. 176A410(1) (2022).
[17] Packingham v. North Carolina, 528 U.S. 98, 104 (2017).

First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more"– this includes "cyberspace."[18] In *Packingham*, the Supreme Court struck down a North Carolina statute that made it a felony for a registered sex offender to access social media sites that children frequent because North Carolina failed to show its statute was necessary to "keep [] convicted sex offenders away was from vulnerable victims."[19] Moreover, the court recognized for the first time a broad First Amendment right to internet access to those convicted of serious sexual offenses who served their sentences. While Aldape's supervision status is different from the individuals in *Packingham*, that difference does not limit *Packingham's* application on de novo review. Courts have recognized that probations "do not enjoy the absolute liberty to which every citizen is entitled;" however,[20] probation restrictions under *Packingham* must be narrowly tailored with a view to the goals of supervised release– "deterring crime, protecting the public, [and] rehabilitating the defendant."[21] *Packingham* further held that there is no way to participate in modern society without internet access or a device capable of accessing the internet as it would make it extremely difficult if not impossible for probationers to communicate with their probation officers and work towards their rehabilitation such as finding a job.[22]

Thus, the Court held that the First Amendment protects the right of court supervisees, including Aldape, to access the internet.

NRS 176A.410(1)(q) is mandatory and restricts more speech than necessary to serve the government's interest with no tailoring mechanisms, and the State fails to show otherwise.

Courts apply intermediate scrutiny when a government imposes a content-neutral restriction on speech or conduct protected by the First Amendment to evaluate whether the restriction is "narrowly tailored to serve a significant government interest" and "leaves open ample alternative channels for communication."[23] Here, the Court applies intermediate scrutiny because NRS 176A.410(1)(q) restricts the time, place, and manner of a probationer's access to the internet and is otherwise neutral as to the content of any expressions made therein.[24] Both the State and Aldape agree that the State has a significant interest in protecting the public from online conduct that constitutes or "presages a sexual crime."[25] In dispute here was how narrowly subsection (q) is tailored to that goal. Under NRS 176A.410(7) and NRS 179D.097, the category of sexual offenses is quite broad including everything from public indecency to violent assaults to production of pornography. It is thus illogical that each sexual offender, regardless of crime, rehabilitative needs, history of internet usage, or victim, poses an equally grave threat online. This is not to say that a court cannot limit internet access by a person convicted of a sexual offense. Broad internet access restrictions may be justified "where (1) the defendant used the internet in the underlying offense; (2) the defendant had a history of improperly using the

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[18] *Id*.
[19] *Id.* at 107–08.
[20] Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).
[21] United States v. Holena, 906 F.3d 288, 295 (3d Cir. 2018).
[22] *Packingham*, 582 U.S. at 108.
[23] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see Packingham*, 582 U.S. at 105–06.
[24] *See Ward*, 491 U.S. at 791 (noting that "a regulation that serves purposes unrelated to the content of expression is deemed neutral," including time, place, or manner restrictions).
[25] *Packingham*, 582 U.S. at 107.

internet to engage in illegal conduct; or (3) particular and identifiable characteristics of the defendant suggested that such a restriction is warranted."[26]

Here, the problem with subsection (q) is not that an internet ban can never be applied; it is that it cannot be mandatorily applied to every person convicted of a sexual offense without the court considering the individualized factors that would justify such a ban. Additionally, subsection (q) does not permit the sentencing court to tailor internet restrictions to prevent only that "First Amendment activity [that is] necessary to protect anyone from misconduct that is a consequence of internet use."[27] Instead, the court should tailor the supervision condition to the supervisee to serve the government's interest in supervision while still respecting the supervisee's constitutional rights. The Court further acknowledged that Nevada appears to be the only state in the nation that statutorily mandates its sentencing courts to impose identical and total internet bans on every defendant convicted of a sexual offense that is granted probation without considering individualized factors despite the prevalence of the internet in our daily lives, thus deeming the statute fatally outdated. [28]

In response to Aldape's challenges to the constitutionality of subsection (q), the State argued that subsection (q) is adequately tailored because Aldape (1) is only subject to the condition for five years; (2) the district court can modify the conditions under "extraordinary circumstances;"[29] and (3) Aldape can access the internet or connected devices with the prior approval of his probation officer. The Court found that confining the court's discretion to only extraordinary circumstances does not permit the tailoring necessary to save the statute's constitutionality. The Court applied these findings, and ultimately concluded that Aldape was a perfect example of the impropriety of an overinclusive internet ban because the victim was his step-granddaughter who lived with or near him, and the record does not show any online predator behaviors by Aldape that would justify a generalized internet restriction.

Therefore, the Court concluded that NRS. 176A.410(1)(q) is mandatory and restricts more speech than necessary to serve the government's interest with no tailoring mechanisms. The State failed to show otherwise, making the statute facially unconstitutional under the First Amendment.

The district court did not abuse its discretion in denying Aldape's challenge to condition 11, restricting his entry into specific geographic areas where children are commonly found.

The Court reviewed NRS 176A.410(1)(m) de novo to resolve Aldape's argument that the district court exceeded their authority by imposing a condition on him meant only for Tier III offenders. The imposition of a nonmandatory condition of probation by a district court is reviewed for an abuse of discretion,[30] but questions of statutory interpretation are reviewed de novo.[31] Aldape is a Tier II offender; however, his probation condition 11 pursuant to NRS 176A.400(1)(c)(3) mirrored a mandatory condition, NRS 176A.410(1)(m), intended only for Tier III offenders. The Court answered Aldape's challenge by first looking at the "statute's plain

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[26] United States v. Perazza-Mercado, 553 F.3d 65, 71(1st Cir. 2009) (collecting cases); *see* United States v. Albertson, 645 F.3d 191, 197 (3d. Cir. 2011).

[27] Mutter v. Rose, 811 S.E.2d 866, 871 (W.Va. 2018) (invalidating a condition of parole similar to the probation condition mandated by subsection (q)).

[28] Jacob Hutt, *Offline Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOCIAL CHANGE 663, 681(2019).

[29] NEV. REV. STAT. 176A.410(6).

[30] Igbinovia v. State, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995).

[31] State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

language to determine its meaning," and if the language is "clear and unambiguous," the court will enforce it as written.[32] NRS 176A.410(1) read in conjunction with subsection (m) provides that, "the court shall…order as a condition of probation or suspension of sentence that the defendant…not knowingly be within 500 feet of any place…that is designed primarily for use by or for children….[33] In these provisions, the Court found that the meaning was clear–the court must impose subsection (m) if the defendant is a Tier III offender. Conversely, the court is not required to impose subsection (m) on a defendant who is not a Tier III offender; however, they may as there is no restriction. Therefore, the Court held that condition 11 is not prohibited by NRS 176.410(1)(m).

While condition 11 is not prohibited by NRS 176.410(1)(m), it must be a proper exercise of the district court's discretion under NRS 176A.400. NRS 176A.400(1)(c)(3) permits the imposition of any reasonable conditions including, without limitation, "[p]rohibiting the probationer from entering a certain geographic area."[34] The Court found that it is reasonable to restrict an adult convicted of a sexual offense involving a child from areas where children are commonly found, and thus concluded the district court did not abuse its discretion. Additionally, the Court did not find that condition 11 violated Aldape's First Amendment rights because he did not present a compelling argument to that effect in his opening brief.[35]

Therefore, the district court permissibly imposed condition 11 on Aldape, both as a matter of statutory interpretation and pursuant to the discretion granted under NRS 176A.400.

Conclusion

Because Aldape waived only the right to appeal his conviction in the plea agreement, and not his sentence or the probation conditions associated with his sentence, the Court found that his appeal may proceed because his challenges to his probation conditions fall outside the scope of the appeal waiver. The Court further found that condition 15 mandated by NRS 176A.410(1)(q) is facially unconstitutional under the First Amendment because it is both mandatory and restricts more speech than necessary to serve the government's interest with no tailoring mechanism, and the State failed to show otherwise. Thus, the Court reversed and remanded to the district court to remove condition 15, restricting Aldape's access to the internet and internet connected devices from the judgment of conviction. The Court affirmed the rest of the district court's conviction, including the imposition of condition 11 restricting Aldape's entry into specific geographic areas, pursuant to NRS 176A.400.

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[32] Ramos v. State, 137 Nev. 721, 722, 499 P.3d 1178. 1180 (2021).
[33] NEV. REV. STAT. 176A.410(1) (2022); NEV. REV. STAT. 176A.410(1)(m) (2022).
[34] NEV. REV. STAT. 176A.400(1)(c)(3) (2022).
[35] *See* Powell v. Liberty Mut. Five Ins. Co., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").