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Andrews v. State, 134 Nev. Adv. Op. 12 (Mar. 01, 2018)

Samantha Scofield

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

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CRIMINAL LAW: CONTROLLED SUBSTANCES

Summary

Under NRS 453.3385, simultaneous possession of different schedule I controlled substances creates separate offenses and the weights of the controlled substances shall not be aggregated together.

Background

I.

After appellant Ryan Andrews sold heroin and methamphetamine to a confidential informant inside his apartment, the police obtained a search warrant to search Andrews' apartment. The police discovered 9.445 grams of heroin and 9.532 grams of methamphetamine. Andrews was subsequently charged with one count of possessing 4 grams, but less than 14 grams of a schedule I substance,² one count of possession 14 grams, but less than 28 grams of schedule I substance,³ and one count of unlawful sale of a controlled substance.

Andrews filed a motion to strike the trafficking counts, arguing that the State could not charge him with an aggregate of separate controlled substances because the heroin and methamphetamine were not mixed together in one bag. The District Court denied the motion. The State then offered to combine the trafficking charges into one count. Andrews agreed. The State then filed an amended information that removed the NRS 453.3385(1) charge, but retained the other two charges. A jury convicted Andrews of the other two counts and the District Court entered a judgment of conviction. Andrews appealed.

Discussion

II.

Andrews argued that different schedule I controlled substances may not be aggregated together and, thus, it was a violation of NRS 453.3385(2) to have been charged with the aggregate amount of heroin and methamphetamine. Rather, he should have been charged with two counts of possessing less than 14 grams of each individual substance, in violation of NRS 453.3385(1). Conversely, the State argued that the weight of any of the schedule I controlled substances possessed by the defendant simultaneously must be aggregated together.

A.

This Court reviews de novo the issue of determining the appropriate unit of prosecution as it is an issue of statutory interpretation and substantive law.⁴ NRS 453.3385 is ambiguous with

¹ By Samantha Scofield.

² NEV. REV. STAT. § 453.3385(1) (2013).

³ NEV. REV. STAT. § 453.3385(2) (2013).

⁴ *Castaneda v. State*, 132 Nev. Adv. Op. 44, 373 P.3d 108, 110 (2016).

regard to the unit of prosecution and therefore, this Court must look at the legislative history and construe the statute in a manner consistent with public policy.

In *Castaneda v. State*, the Court addressed a similar issue when the unit of prosecution for a NRS 200.730 charge was ambiguous.⁵ NRS 200.730 prohibits a person from knowingly and willfully possessing “any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in...sexual conduct.”⁶ The Court first examined the plain language of the statute and concluded that the word “any” in the statute had multiple meanings.⁷ Other legitimate tools of interpretation also failed to assist the Court in determining meaning of “any.”⁸ In *Castaneda*, neither the plain meaning of the statute nor other means of interpretation solved the ambiguity in the statute. The Court thus held that the rule of lenity required that the statute be construed in favor of the accused.⁹

Here, NRS 453.3385 states that “a person who knowingly or intentionally sells...any controlled substance which is listed in schedule I...shall be punished.”¹⁰ NRS 453.3385’s use of the word “any” is ambiguous. The statute is unclear with whether simultaneous possession of different controlled substances must be aggregated. Unlike in *Castaneda* where the meaning of “any” could not be construed, here the Court examined related statutes, relevant legislative history, and prior judicial interpretations to conclude that the Legislature intended to create a separate offence for each controlled substance under NRS 453.3385.

1.

Other statutes under Nevada’s Uniform Controlled Substances Act refer to controlled substances in the singular.¹¹ Further, at least two statutes refer to NRS 453.3385 in the singular. NRS 453.3383 and NRS 453.3405 both use the phrase, “the controlled substance” in reference to NRS 453.3385.¹² Therefore, these statutes indicate that the relevant unit of prosecution under NRS 453.3385 is the weight of a single controlled substance.

2.

The State argues that the legislative history behind the statute indicates that “different controlled substances may be aggregated together.” Interpreting the statutes to not allow aggregation does not deter large-scale distribution of controlled substances. This Court disagreed with the State, finding that the legislation history provides that the main purpose of the statute was to curb heavy trafficking of controlled substances and to decrease the number of people harmed by drug use. Thus, Andrews’ interpretation of the unit of prosecution is correct and furthers the Legislature’s intent of deterring large-scale drug trafficking “by imposing harsher penalties for those who possess large quantities of controlled substances.”

⁵ *Id.*

⁶ NEV. REV. STAT. § 200.730

⁷ *Id.* at 111.

⁸ *Id.*

⁹ *Id.* at 111-14.

¹⁰ NEV. REV. STAT § 453.3385 (2013).

¹¹ NEV. REV. STAT. § 453.011.

¹² NEV. REV. STAT. § 453.3383; NEV. REV. STAT. § 453.3405.

3.

Further, caselaw from other jurisdictions supports this Court's finding. In *Cunningham v. State*, the Maryland Court of Appeals authorized a separate conviction and punishment for simultaneous possession of different controlled substances.¹³ The *Cunningham* Court cites to other states that have reached the same conclusion on the issue.¹⁴

Conclusion

III.

Though the text of NRS 453.3385 is ambiguous, the legislative intent behind the statute intends to create separate offenses for possession of each controlled substance simultaneously possessed by a person. Further, the weights of different controlled substances possessed simultaneously by a person may not be aggregated together to form a single offense under NRS 453.3385. Andrews' conviction for the unlawful sale of a controlled substance is affirmed and his conviction under NRS 453.3385(2) is reversed and remanded for further proceedings.

Dissent

Stiglich, J., dissenting

The majority erred in concluding that the Legislature intended that different schedule I substances under NRS 453.3385 not be aggregated. The State's position is correct in that trafficking 9 grams of heroin and 9 grams of methamphetamine does as much harm as trafficking 18 grams of either controlled substance alone. The Legislature did not intend to distinguish between different schedule I drugs.

Further, *Cunningham v. State* is factually and legally distinguishable from this case, in that the substances possessed by the defendant in *Cunningham* were listed under separate schedules, which could not be aggregated. The substances involved in this case are both listed as schedule I controlled substances. In Nevada, the punishments related under each of the five controlled substance schedules evince the Legislature's intent to allow the weight of different substances under the same schedule to be aggregated. Thus, NRS 453.3385 does allow for different schedule I substances to be aggregated.

¹³ *Cunningham v. State*, 567 A.2d 126, 129 (Md. 1989).

¹⁴ *Id.* at 130.