

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED D. GEORGE A/K/A FRED D.
GEORGE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

FRED D. GEORGE A/K/A FRED D.
GEORGE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44338

FILED

MAY 09 2007

No. 45815

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rehak*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals. Docket number 44338 is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm and one count of robbery with the use of a deadly weapon. Docket number 45815 is an appeal from the amended judgment of conviction entered in the same case. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge; Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Fred D. George first contends that the district court violated his rights to due process and equal protection because he was allowed only four peremptory challenges. George concedes that this court has previously held that in determining the number of peremptory

challenges, the district court should look to the offense charged.¹ In this case, the underlying offenses charged were burglary and robbery, neither of which carries the possibility of a life sentence. Accordingly, George was not entitled to the eight peremptory challenges he sought.² We reject George's argument that this court's decision in Schneider is flawed.

George further argues that due process requires that the notice of intent to seek adjudication as a habitual felon must be filed prior to trial. However, as George concedes, NRS 207.016(2) specifically permits the State to file a notice of intent to seek habitual felon or habitual criminal sentence enhancement even after the defendant has been convicted of the primary offense.³ Moreover, as previously discussed, the fact that the State sought the habitual enhancement did not entitle George to additional peremptory challenges. George cannot, therefore, demonstrate prejudice by the state's failure to file the notice prior to trial.

George next contends that his right to due process was violated because the photographic line-ups were impermissibly suggestive. As an initial matter, we note that George did not object to either the pretrial identification procedures or the in-court witness testimony regarding his identification. This court has stated that counsel's failure to

¹Schneider v. State, 97 Nev. 573, 635 P.2d 304 (1981).

²See NRS 175.051.

³See generally Oyler v. Boles, 368 U.S. 448, 452 (1962) (stating that due process does not require notice regarding sentence enhancement prior to the trial on the substantive offense; rather, it is enough that a defendant receive notice and the opportunity to be heard relative to the recidivist charge).

timely object to an allegedly suggestive photo line-up waives the issue for appellate review.⁴ Accordingly, we need not consider this issue, but even if it had been preserved, we conclude that under the totality of the circumstances, there was not a substantial likelihood of misidentification.⁵

George further contends that the "flawed procedures" used to adjudicate him a habitual felon and/or criminal violated his right to due process. Specifically, George argues that the notice of intent to seek adjudication as a habitual criminal cited NRS 207.012, which is the habitual felon statute. At sentencing, the State apparently argued for adjudication pursuant to NRS 207.010, which is the habitual criminal statute. The amended judgment of conviction that was finally entered stated adjudicated George a "habitual criminal pursuant to the provisions of NRS 207.010(1) and/or NRS 207.012." We note that the State provided proof of sufficient prior convictions to support adjudication under either statute.

NRS 207.012 provides for a mandatory sentence upon the showing of the requisite prior convictions, whereas NRS 207.010 allows the district court discretion to dismiss the habitual criminal allegation. We note that George's counsel argued at sentencing that George's prior convictions were remote in time and the district court should not,

⁴See Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1304 (1976) (citing Rodriguez v. State, 91 Nev. 782, 542 P.2d 1065 (1975)).

⁵See Simmons v. United States, 390 U.S. 377, 383 (1968) (holding that conviction based on identification at trial following pretrial photographic identification will be reversed only if there is "a very substantial likelihood of irreparable misidentification"); see Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997).

therefore, impose the habitual criminal sentence. Although the State stated in the notice that adjudication was sought pursuant to NRS 207.012, George and the State both argued the discretionary provisions of NRS 207.010, and the district court clearly exercised its discretion and decided not to dismiss the habitual criminal allegation. Under these circumstances, George has not demonstrated that he was prejudiced by any defect or error in the notice.

George also argues that a jury should have made the determination as to adjudication as a habitual criminal pursuant to Apprendi v. New Jersey.⁶ This court recently clarified that the sentencing court's determination of the habitual criminal allegation does not violate Apprendi.⁷ In particular, this court explained that NRS 207.010 vests the sentencing court with discretion to dismiss a habitual criminal allegation, not the discretion to impose such an adjudication based on factors other than prior convictions, and, therefore, a habitual criminal adjudication does not serve to increase the punishment.⁸ This argument is therefore without merit.

George also argues that the district court should have conducted a fact-finding determination to show that the prior convictions fit within the habitual felon statute. George's counsel conceded at sentencing that the convictions met the statutory requirements, however,

⁶530 U.S. 466 (2000).

⁷O'Neill v. State, 123 Nev. ___, 153 P.3d 38 (Adv. Op. No. 2, March 8, 2007).

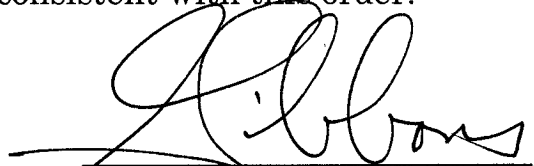
⁸Id. at ___, 153 P.3d at 43.

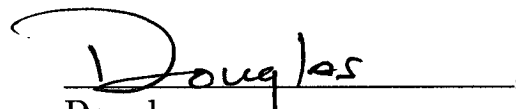
and our review of the record confirms that fact. George has therefore not demonstrated prejudice.

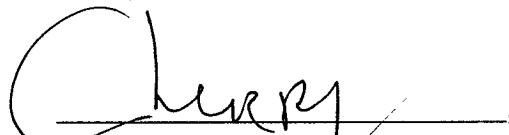
Finally, George contends that the district court erred in sentencing him to three consecutive terms because the sentence for robbery could not be enhanced pursuant to the habitual criminal enhancement and the deadly weapon enhancement. We agree. This court has held that the sentencing court may enhance each primary offense pursuant to only one enhancement statute.⁹ Because the district court stated that it was adjudicating appellant a habitual criminal for robbery, the district court should have only imposed one term for that count. Accordingly, we vacate the sentencing enhancement for use of a deadly weapon, imposed pursuant to NRS 193.165.

Having considered George's contentions, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁹Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986).

cc: Hon. Donald M. Mosley, District Judge
Hon. Stewart L. Bell, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk