IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM J. IRWIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45420

FILED

DEC 23 2005

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying appellant's motion to vacate, modify and correct sentence. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On October 4, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count each of possession of stolen property and failure to stop on the signal of a peace officer. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms of 60 to 150 months in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.[1] The remittitur issued on January 11, 2001.

On May 13, 2005, appellant filed a proper person motion to vacate, modify and correct sentence in the district court. Appellant contended that the district court made a mistake about his criminal record and improperly adjudicated him a habitual criminal because he only had one prior felony conviction.[2] On May 17, 2005, the district court denied appellant's motion. This appeal followed.

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[1]Irwin, Jr. v. State, Docket No. 34937 (Order Dismissing Appeal, September 8, 2000).

[2]Appellant raised this same issue on direct appeal.

Our preliminary review of this appeal revealed that the district court may have relied upon a materially untrue assumption about appellant's criminal record that worked to his extreme detriment,[3] and therefore erroneously denied appellant's motion. Specifically, it appeared that the district court erred in relying upon a prior conviction for appellant when it adjudicated appellant a habitual criminal because when he committed the instant offenses, he had only one prior felony conviction.

In Brown v. State, this court held that for a habitual criminal adjudication, "[a]ll prior convictions used to enhance a sentence must have preceded the primary offense."[4] Brown is the controlling authority for this case.

In Brown, Brown committed the crime of carrying a concealed weapon in October 1976. He then committed additional crimes in May 1977. Because the conviction for carrying a concealed weapon was not entered until October 1977, after the commission of the other crimes, this court held that the conviction for carrying a concealed weapon could not be used to enhance the sentence for the other crimes.

On October 21, 2005, this court directed the State to show cause why this appeal should not be remanded to the district court for a new sentencing hearing. The State argues that the language of the habitual criminal statute, NRS 207.010, does not mandate the holding in Brown. The State contends that this court decided this issue correctly on direct appeal when it upheld appellant's habitual criminal adjudication

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[3]See Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996).

[4]97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981) (citing Carr v. State, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980)).

stating "the plain language of the habitual criminal statute indicates that it is the status of the defendant at the time he is convicted that is relevant, not his status at the time the offense was committed."[5] The State further argues that re-visitation of this issue should be barred by the law of the case doctrine[6] because there can no manifest injustice under the facts of this case. We disagree.

The fact pattern in this case is nearly identical to that in Brown. On June 10, 1998, appellant pleaded guilty in district court case no. 2950 to possession of a controlled substance. A judgment of conviction was not entered at that time. Rather, appellant's sentence in that case was suspended and appellant was placed into a diversion program pursuant to NRS 453.3363. A bench warrant was issued for appellant's arrest after he failed to appear for the diversion program. On March 30, 1999, when the police attempted to arrest appellant pursuant to the bench warrant, appellant committed the instant offenses by evading the police on a stolen three-wheel off road vehicle. On May 19, 1999, the district court issued an order revoking appellant's participation in the diversion program and entered a judgment of conviction in district court case no. 2950. Several months later, on October 3, 1999, the district court convicted appellant, pursuant to a jury verdict, of possession of stolen property and failure to stop on the signal of a peace officer, the instant

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[5]Irwin, Jr. v. State, Docket No. 34937 (Order Dismissing Appeal, September 8, 2000).

[6]See Clem v. State, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003) ("The law of the case doctrine holds that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.").

offenses. The district court adjudicated appellant a habitual criminal, and in so doing, specifically relied on the felony conviction in district court case no. 2950.

Because the judgment of conviction in district court case no. 2950 was not entered until after the instant offenses were committed, the district court erred in relying on that conviction when it adjudicated appellant a habitual criminal. Further, because the conviction in district court case no. 2950 could not be used to support a habitual criminal enhancement, appellant was not eligible for habitual criminal adjudication at the time he was sentenced for the instant offenses. Accordingly, we conclude that appellant's adjudication as a habitual criminal was improper. We further conclude that our denial of this issue on direct appeal was erroneous and continued adherence to our prior ruling would work a manifest injustice.[7] Therefore, we vacate appellant's sentence and remand this case to the district court for a new sentencing hearing.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is only entitled to the relief granted herein, and that briefing and oral argument are unwarranted.[8] Accordingly, we

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[7]See Clem, 119 Nev. at 620, 81 P.3d at 525 (holding that this court will depart from its prior holdings when it determines that those holdings "are so clearly erroneous that continued adherence to them would work a manifest injustice.").

[8]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[9]

_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. John P. Davis, District Judge
William J. Irwin Jr.
Attorney General George Chanos/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk

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[9]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.