

IN THE SUPREME COURT OF THE STATE OF NEVADA

ATIBA MALIK MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47155

FILED

APR 06 2007

ORDER OF AFFIRMANCE

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

This is an appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Atiba Malik Moore was originally convicted, pursuant to a jury verdict, of count one, burglary; count two, fraudulent use of a credit card; and count three, possession of a credit without the cardholder's consent. The district court adjudicated Moore a habitual criminal and sentenced him to serve a prison term of 60 to 240 months for each count. The district court ordered Moore to serve the term imposed on count two consecutively to the term on count one, and the term on count three concurrently to the term on count two.

On appeal, we reversed the conviction and sentence for count two, affirmed the district court's adjudication of Moore as a habitual criminal, instructed the district court to resentence Moore to serve the term imposed on count three consecutively to the term imposed on count one, and remanded the case for further proceedings consistent with our opinion.¹ Thereafter, Moore requested an extension of time to file a

¹Moore v. State, 122 Nev. 27, 126 P.3d 508 (2006).

petition for rehearing. We granted his motion,² but when he subsequently failed to file the petition or otherwise communicate with this court, we ordered the clerk to issue the remittitur in his appeal.³

On remand, Moore filed a motion in the district court to set a sentencing hearing. Moore argued that a hearing was necessary to decide whether the prison term imposed on count three should run consecutively to the term imposed on count one, and to determine whether he was entitled to a jury trial on the charge of being a habitual criminal. The district court held a hearing on Moore's motion. The district court concluded that it was required by our opinion to correct the judgment of conviction and impose the sentences to run consecutively. Thereafter, the district court denied Moore's motion and entered an amended judgment of conviction in which it sentenced Moore to serve consecutive prison terms of 60 to 240 months for each count.

On appeal from the amended judgment of conviction, Moore contends that the district court erred by (1) "refusing to consider [his] request for concurrent time between counts [one] and [three], and for a jury trial on the habitual criminal allegations;" (2) concluding that the footnote in our opinion constituted binding authority; (3) imposing consecutive sentences in violation of NRS 176.035(1); (4) violating his due process and double jeopardy rights by vindictively imposing a sentence that is more severe than his original sentence; (5) basing its original

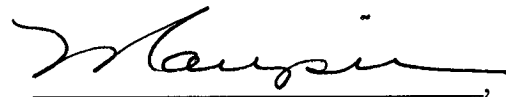
²Moore v. State, Docket No. 43248 (Order Granting Motion, February 9, 2006).

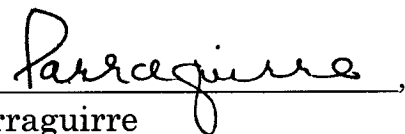
³Moore v. State, Docket No. 43248 (Order Directing Issuance of Remittitur, February 28, 2006).

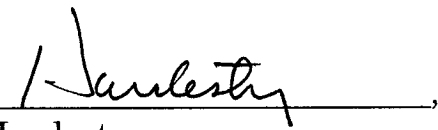
sentencing decision on an untrue assumption of material fact and then imposing the same sentence on remand; and (6) adjudicating him a habitual criminal without a jury determination that he had prior convictions.

The district court does not have discretion to disregard our disposition of a case on remand. A footnote in a disposition is a statement of the court. Footnote 46 addressed the resolution of an issue raised by the original appeal, it is not dicta and it is binding on the district court. Because the district court corrected Moore's judgment of conviction as directed in our disposition of his appeal, Moore's assignment of error in this regard is without merit. Additionally, we reject Moore's contention that he was entitled to a jury determination of the habitual criminal allegation.⁴ And we conclude that Moore's remaining contentions on appeal are without merit. Accordingly, we

ORDER the amended judgment of conviction AFFIRMED.


_____, C.J.
Maupin


_____, J.
Parraguirre


_____, J.
Hardesty

⁴*O'Neill v. State*, 123 Nev. ___, ___, P.3d ___ (Adv. Op. No. 2, March 8, 2007) (holding that NRS 207.010 and our case law interpreting NRS 207.010 does not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

cc: Hon. Michelle Leavitt, 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