

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EDWARD EUGENO ABARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47408

FILED

APR 06 2007

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

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and uttering a forged instrument. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court adjudicated appellant David Abara as a habitual criminal and sentenced him to serve two concurrent prison terms of 10 years to life. The district court also imposed a special sentence of lifetime supervision to commence after release and ordered Abara to pay \$994.97 in restitution.

Abara contends that the district court erred by adjudicating him as a habitual criminal. Specifically, Abara claims that he is entitled to a new sentencing hearing because (1) the State failed to provide proper notice of its intent to seek habitual criminal adjudication,¹ and (2) the procedure in place for habitual criminal adjudication violates Apprendi v. New Jersey.² We disagree.

¹See NRS 207.016(2).

²530 U.S. 466 (2000).

First, NRS 207.016(2) provides in part that "[a] count pursuant to NRS 207.010 . . . may be separately filed after conviction of the primary offense, but if it is so filed, sentence must not be imposed, or the hearing required . . . held, until 15 days after the separate filing." (Emphasis added.) In this case, the State filed its notice of intent to seek habitual criminal adjudication and the sentencing hearing was held only seven days later, in violation of the statute. Nevertheless, Abara did not object or request a continuance. Additionally, our review of the sentencing hearing transcript reveals that defense counsel was prepared and ready to proceed, defense counsel argued for leniency, and Abara made a statement in allocution. Abara has not demonstrated that he suffered any prejudice by the failure to wait 15 days to conduct sentencing after the filing of the notice. Therefore, we conclude that the violation of NRS 207.016(2) did not amount to reversible plain error.

Second, this court recently stated in O'Neill v. State that Nevada's habitual criminal statute, NRS 207.010, does not violate Apprendi.³ In affirming the habitual criminal adjudication in O'Neill, this court expressly distinguished Nevada's statutory scheme from the Hawaii scheme at issue in the same case relied upon by Abara in this appeal.⁴ Additionally, based on our review of the sentencing hearing transcript and Abara's extensive criminal history, we conclude that the district court did

³123 Nev. ___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

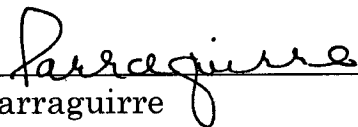
⁴Kaua v. Frank, 436 F.3d 1057, 1062 (9th Cir. 2006), cert. denied ___ S. Ct. ___, 2007 WL 506822 (U.S. February 20, 2007).

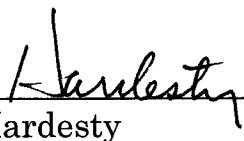
not abuse its discretion in deciding to adjudicate him as a habitual criminal.⁵


Finally, Abara contends that the district court erred by imposing a special sentence of lifetime supervision after release.⁶ The State concedes error. We agree and therefore remand this case to the district court for the entry of an amended judgment conviction vacating the special sentence of lifetime supervision.

Accordingly, 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.
Parraguirre

 J.
Hardesty

 J.
Douglas

⁵See NRS 207.010(2); Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

⁶See NRS 176.0931; NRS 175.547.

cc: Hon. Steven P. Elliott, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk