

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN AUER A/K/A JOHN MICHAEL
AUER,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 48921

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of grand larceny of a motor vehicle and attempted grand larceny of a motor vehicle. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court adjudicated appellant John Auer as a habitual criminal and sentenced him to serve a prison term of 5-20 years for the grand larceny and a concurrent prison term of 19-48 months for the attempted grand larceny. The district court ordered Auer to pay \$1,749.09 in restitution.

Auer contends that he is entitled to a new sentencing hearing, conducted before a jury, because the procedure in place for habitual

criminal adjudication violates Apprendi v. New Jersey.¹ Auer claims that O'Neill v. State² was wrongly decided by this court and must be revisited. We disagree.

In O'Neill, this court stated 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 one of the cases relied upon by Auer in this appeal.⁴ Additionally, based on our review of the sentencing hearing transcript and Auer's extensive criminal history, we conclude that the district court did not abuse its discretion in deciding to adjudicate him as a habitual criminal.⁵

¹530 U.S. 466 (2000).

²123 Nev. ___, 153 P.3d 38 (2007).


³See id.

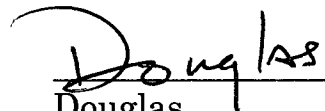
⁴Kaua v. Frank, 436 F.3d 1057, 1062 (9th Cir. 2006), cert. denied ___ U.S. ___, 127 S. Ct. 1233 (2007); see also Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007).

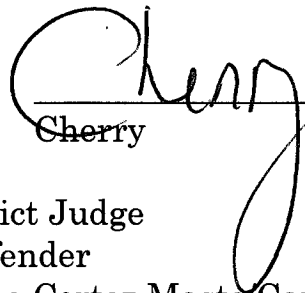
⁵See NRS 207.010(2); Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

Therefore, having considered Auer's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.⁶


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁶In O'Neill, this court held that “NRS 207.010 only grants a district court the discretion to dismiss a count of habitual criminality, not the discretion to adjudicate that status based on factors other than prior convictions.” O'Neill, 123 Nev. at ___, 153 P.3d at 42. Thus, we remind the district court that once it has declined to exercise its discretion to dismiss an allegation of habitual criminality under NRS 207.010, the only factual findings the district judge may then make must relate solely to the existence and validity of the prior convictions.