

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS ADAMS,
Appellant,
vs.
THE STATE OF NEVADA, BOARD OF
PAROLE COMMISSIONERS,
Respondent.

No. 51985

FILED

OCT 08 2009

TRACIA K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. J. Sharp*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a parole revocation action. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

BACKGROUND

Appellant Jesus Adams was convicted of felony sexual assault of a minor under 14 years of age. In 2005, Adams was granted parole, subject to certain conditions, one being that he “[s]ubmit to periodic polygraph examinations, as requested by the parole and probation officer assigned to [Adams].” Thus, in 2007, as part of his parole, Adams was required to submit to a polygraph examination. According to the polygraph examiner’s report, Adams was asked two questions during the actual examination: “[s]ince you began parole, have you had sexual contact with any minor?” and “[s]ince you began parole, have you had sexual contact with any minor, in violation of your agreement.” Adams answered “no” to both questions and, after reviewing the polygraph charts, the polygraph examiner determined that Adams’ responses were deceptive.

Based, apparently at least in part, on the information obtained from the polygraph examination, Adams was taken back into custody and brought before respondent the State of Nevada, Board of Parole Commissioners for a parole violation hearing. Adams' parole was thereafter revoked.

In February 2008, Adams filed a complaint for declaratory relief in district court seeking, primarily, a ruling that the statute requiring periodic polygraph examinations, NRS 213.1245(1)(f), was unconstitutional. The district court entered an order granting the Board's NRCP 12(b)(5) motion to dismiss Adams' complaint and Adams has now appealed. On appeal, Adams seeks immediate reinstatement of his parole, credit for additional time served, and a declaration that both NRS 213.1245(1)(f) and a similar statute for those receiving probation or suspended sentences, NRS 176A.410(1)(g) are unconstitutionally vague, ambiguous, and overbroad.

DISCUSSION

Standard of review

This court reviews a district court's dismissal of a complaint under NRCP 12(b)(5) de novo, and will uphold such a dismissal only if it appears beyond a doubt that the plaintiff "could prove no set of facts, which, if true, would entitle [him] to relief." Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 (2008). Statutes are presumed to be valid, and it is the challenger's burden to make a "clear showing" of invalidity. Sheriff v. Burd, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

NRS 213.1245(1)(f) and NRS 176A.410(1)(g)

Under NRS 213.1245(1)(f), if the Board paroles a prisoner convicted of an offense listed in NRS 179D.097 (sexual offenses), the Board must require that the parolee “[s]ubmit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the parolee.” Similarly, under NRS 176A.410(1)(g), if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court must require the defendant to “[s]ubmit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant.”

Adams argues that both statutes are facially unconstitutional because they permit the Board to conduct a polygraph examination on any issue, which he asserts is unconstitutionally overbroad as set forth in this court’s decision in Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001). Adams further contends that the issues that are properly within the scope of the polygraph examination cannot be discerned from the language of the statutes, NRS 213.1245(1)(f) and NRS 176A.410(1)(g), and, as a result, the statutes are unconstitutionally vague and fail to properly prevent arbitrary and discriminatory enforcement. We disagree, and for the reasons set forth below, affirm the district court’s dismissal of Adams’ complaint.

Adams’ challenge to NRS 176A.410

As an initial matter, because the issue before us is the revocation of Adams’ parole and not a suspended sentence or sentence of probation, we need not consider Adams’ challenge to NRS 176A.410, because that statute had no bearing on the polygraph examination

administered to Adams or the revocation of Adams' parole. We nonetheless note, however, that the language of NRS 213.1245(1)(f), which is the statute relevant to Adams' parole issues, and that of NRS 176A.410(1)(g) are effectively identical, and thus, our analysis of NRS 213.1245(1)(f) would apply equally to a challenge to the constitutionality of NRS 176A.410(1)(g) brought by someone whose probation or suspended sentence was governed by that statute.

Constitutionality of NRS 213.1245(1)(f)

We now turn to Adams' challenge to the constitutionality of NRS 213.1245(1)(f). In Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001), this court addressed a similar challenge to the constitutionality of a previous version of NRS 176A.410(1)(e). At the time, that statute provided that, as a term of the defendant's probation, he shall "[s]ubmit to periodic tests to determine whether the defendant is using a controlled substance and submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant."¹ Id. at 132-33, 17 P.3d at 991. The Mangarella court noted that there were three reasonable interpretations of that statutory language: (1) that polygraph examinations were authorized to monitor controlled substance usage; (2) that polygraph examinations were permitted regarding compliance with any condition of probation; or (3) that polygraph examinations were

¹Like the current version, the version of NRS 176A.410 in effect at the time Mangarella was decided applied to individuals who received suspended sentences or probation. Identical requirements for parolees were contained in the version of NRS 213.1245 in effect at that time.

allowed on any subject, even into issues that had no reasonable relation to the probationer's offense. Id. at 133-34, 17 P.3d at 991. Recognizing that this court narrowly construes ambiguous penal statutes and that provisions negatively impacting a defendant must be strictly construed, the Mangarella court adopted the narrowest of these interpretations and held that the polygraph examinations authorized by NRS 176A.410(1)(e) were limited to questions regarding the defendant's use of controlled substances and thus rejected a challenge to its constitutionality. Id. at 134, 17 P.3d at 992.

Subsequent to this court's Mangarella decision, both NRS 176A.410 and NRS 213.1245 were amended to separate the periodic polygraph examination requirements from the requirement regarding periodic tests to determine whether the individual was using a controlled substance. See NRS 213.1245(1)(e)-(f); NRS 176A.410(1)(f)-(g). As they were prior to the amendment, these statutes are largely identical, with the exception that NRS 176A.410 applies to individuals with suspended sentences or probation and NRS 213.1245 applies to parolees.

Adams asserts that because of this amendment, parole and probation officers may now conduct polygraph examinations on any subject, even those not reasonably related to his conviction or the conditions of his parole. The Board, however, argues that the amended statute should be interpreted as only permitting polygraph examinations on issues related to compliance with the conditions of parole rather than on any issue, which it contends renders the statute constitutional. We find Adams' argument unpersuasive.

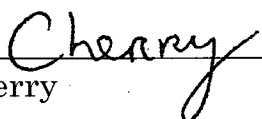
Although Mangarella addressed a challenge to NRS 176A.410, because NRS 213.1245 contains essentially identical language, we find Mangarella instructive on this issue. As set forth in Mangarella, both interpretations advanced by the parties to this appeal are reasonable. 117 Nev. 133-34, 17 P.3d at 991. Because we narrowly construe ambiguous penal statutes, however, and because penal statutes that negatively impact a defendant are strictly construed, we conclude that the scope of NRS 213.1245(1)(f) polygraph examinations must be limited to questions related to compliance with the conditions of parole. See id. at 134, 17 P.3d at 992. Thus, under this interpretation, NRS 213.1245(1)(f) is not unconstitutionally overbroad as Adams contends, as it does not permit a parole officer to conduct a polygraph examination on any issue. See Mangarella, 117 Nev. at 134, 17 P.3d at 992.


Adams further argues that NRS 213.1245(1)(f) is vague because it fails to provide sufficient guidelines for the Board regarding what subjects a parole officer may ask questions about, which he contends invites arbitrary and discriminatory enforcement. We conclude that this argument lacks merit. NRS 213.1245(1)(f) must not be read in a vacuum, but must instead be read in conjunction with the fact that the statute imposes restriction on individuals convicted of sexual offenses. See id. at 137, 17 P.3d at 993. Additionally, as previously noted, penal statutes negatively impacting a defendant are narrowly construed. Id. at 134, 17 P.3d at 992. Thus, the administration of the polygraph examination must reasonably relate to the purposes of the statute, to verify compliance with the terms of parole and assist in ensuring that circumstances do not exist that undermine the parolee's rehabilitation or endanger other potential


victims. Here, such an approach was followed, as the polygraph examiner's report makes clear that the only two questions asked during the administration of Adams' polygraph examination were regarding compliance with the terms of the conditions of Adams's parole. Accordingly, we reject Adams' argument that NRS 213.1245(1)(f) is unconstitutionally vague.

Thus, we conclude that the district court properly granted the Board's motion to dismiss, and we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Cherry


_____, J.
Doulgas


_____, J.
Gibbons

²Because Adams' arguments that NRS 213.1245(1)(f) is unconstitutional fail on their merits, we do not address whether Adams's complaint for declaratory relief is the proper vehicle for the remedies he seeks on appeal, immediate reinstatement of his parole and credit for additional time served. Cf. NRS 34.360.

cc: Chief Judge, Eighth Judicial District
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