

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT H. JENNINGS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34898

FILED

AUG 24 2001

BY *[Signature]*
DANIEL H. BLONK
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of burglary. The district adjudicated appellant a habitual criminal and sentenced him to serve life in prison without the possibility of parole.

Appellant first contends that his plea was constitutionally infirm because: (1) he was not advised that he was ineligible for probation; (2) he was not "accurately informed of the penalty of habitual criminal status"; and (3) a written plea agreement was never prepared or executed. We decline to consider this contention because it raises factual issues that should be addressed in the district court in the first instance.¹

Appellant next contends that the district court abused its discretion in adjudging him a habitual criminal without expressly finding that it was "just and proper" to do so. We conclude that this contention lacks merit.

In adjudicating a defendant a habitual criminal, the district court is not required to utter specific phrases or

¹See Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986).

findings.² Instead, Nevada law requires the district court to consider the arguments and evidence before determining habitual criminal status.³ In reviewing the district court's finding of habitual criminal status, "this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion."⁴

In the instant case, the record reveals that the district court properly weighed the appropriate factors in declaring appellant a habitual criminal. After hearing arguments from counsel and appellant's statement, the district court found that appellant was a "poster boy for the habitual criminal act" referencing the fact that the court had accepted his guilty plea to numerous crimes "time after time after time." After stating that it was not going "put a label on something that's meaningless," the district court found that declaring appellant a habitual criminal was "the right thing" and the "only thing" to do. Accordingly, we conclude that the district court did not abuse its discretion in declaring appellant a habitual criminal because the record reveals that it properly considered the arguments and the evidence before deciding to adjudicate appellant a habitual criminal.

Appellant next contends that the district court erred in declaring him a habitual criminal because some of appellant's prior convictions, which the district court took judicial notice of, were invalid. Specifically, appellant contends that the district court erred in taking judicial notice of his 1973 and 1975 Ohio convictions for grand

²Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

³Id.

⁴Id.

larceny,⁵ his 1985 California conviction for grand theft auto, his 1988 Clark County conviction for burglary, and his 1994 Washoe County convictions for felon in possession of a firearm and possession of stolen property. We disagree.

We first conclude that appellant waived his right to argue that he was ineligible for habitual offender treatment when counsel for appellant conceded this issue at sentencing.⁶ In fact, at the sentencing hearing, counsel for appellant stated: "[t]here's no doubt in the letter of the law [appellant] as he stands before you with his felony convictions qualifies for habitual criminal status." Later, counsel for appellant stated: "his prior felony convictions indicate he is a habitual criminal."⁷

Moreover, even excluding the convictions alleged to be invalid, counsel for appellant stipulated to the validity of numerous convictions sufficient to satisfy the requisite of NRS 207.010(1)(b), which requires three prior felony convictions. In fact, counsel for appellant stipulated to the following convictions: a Texas conviction for bail jumping, a 1988 Arizona burglary charge, and numerous 1999

⁵We note that that the district court did not actually take judicial notice of the 1973 Ohio conviction as defined in NRS 47.130, but rather expressly found that the conviction was constitutionally valid after reviewing the certified judgment of conviction, which the State admitted into to evidence prior to sentencing.

⁶See McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981); see also Powers v. Powers, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (holding that inconsistent theories different from that raised below will not be considered).

⁷At the sentencing hearing, counsel for appellant argued that although appellant qualified for habitual criminal status, appellant should not be adjudged a habitual criminal because the district court had already sentenced him on a previous case to "expire his natural life in prison." Accordingly, counsel for appellant argued that adjudging appellant a habitual criminal was "nothing more than flogging a dead horse."

Washoe County convictions including one count of burglary, one count of robbery against the elderly, one count of armed robbery against the elderly, and five counts of burglary against the elderly.⁸ Accordingly, the district court's finding of habitual criminal status was not erroneous because appellant had sufficient prior felony convictions to satisfy NRS 207.010.

Finally, appellant contends that the district court erred in adjudicating him a habitual criminal because it considered appellant's out-of-state convictions. Specifically, appellant contends that his 1973 Ohio conviction for grand larceny was equivalent to a misdemeanor in Nevada and, therefore, pursuant to this court's holding in Carter v. State,⁹ should not have been considered by the district court.

We conclude that appellant's contention lacks merit because our holding in Carter has been superseded by statute. Indeed, in 1965, two years after our decision in Carter, the legislature amended NRS 207.010 to provide that a crime that is treated as a felony where the crime was committed shall be treated as a felony for purposes of the habitual criminal act.¹⁰ Accordingly, the district court did not err in considering appellant's Ohio conviction prior to adjudicating him a habitual criminal.


⁸Although the 1999 convictions arose out of the same information, the convictions did not arise out of the same transaction because they involved multiple victims over a period of approximately thirty days. Accordingly, the district court did not err in considering the 1999 convictions separately and individually, rather than as a single, prior conviction. Cf. Rezin v. State, 95 Nev. 461, 596 P.2d 226 (1979).

⁹79 Nev. 89, 378 P.2d 876 (1963).

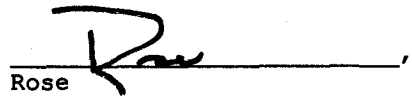
¹⁰1965 Nev. Stat., ch. 136, § 1, at 250 (amending habitual criminal statute to define prior convictions to include crimes treated as felonies under the laws "of the situs of the crime").

Having considered appellant's contentions, and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


Shearing J.


Agosti J.


Rose J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Calvert & Wilson
Washoe County Clerk