IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE SCOTT BUXTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61190

ORDER OF AFFIRMANCE

This is an appeal from an order denying a motion to set aside guilty plea and prior conviction.[1] Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On August 24, 2011, appellant Eddie Scott Buxton was convicted of a felony offense for attempted violation of the conditions of lifetime supervision (NRS 213.1243(8); NRS 193.330(1)(a)(3)). Following his conviction, Buxton filed a motion to set aside guilty plea and prior conviction. Buxton argued that an injunction entered in *ACLU of Nev. v. Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) (*Masto I*), enjoined the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision and that based upon his conduct he could only have been charged with and convicted of a misdemeanor offense. Prior to the district court's decision in this case, the Court of Appeals for the Ninth Circuit reversed the lower federal court's decision in *Masto I* regarding AB 579 and concluded that the litigation regarding SB 471, the bill at issue in this case, was likely moot but that the parties should

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

15-07570

fashion a consent decree. *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1052-66 (9th Cir. 2012) (*Masto II*). The district court denied Buxton's motion. After the district court denied the motion in this case, the federal district court entered a clarifying order in 2013 recognizing overly broad language in the original injunction in *Masto I* and clarifying that the injunction had only related to those provisions actually litigated by the parties.

Buxton argues that the district erred in denying his motion because the plain language in *Masto I* enjoined SB 471 in its entirety, the ACLU had requested the entire bill be enjoined, the State has previously conceded that the entire bill was enjoined, the federal district court judge had the authority to enjoin the entire bill, Nevada legal authorities recognized that the bill was enjoined in its entirety, the doctrine of severance should not apply to sever the provision eliminating the misdemeanor/minor violation from the rest of the bill, application of the federal court's 2013 clarifying order would be an ex post facto violation, and he did not receive fair notice of the potential felony penalty in violation of due process. We disagree that *Masto I* enjoined the amendment that eliminated the misdemeanor/minor violation of lifetime supervision.

Injunctions are to be narrowly tailored to the constitutional violation at issue and portions of challenged legislation that are constitutionally valid, capable of functioning independently, and consistent with the objectives of the legislation must be retained. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006); *United States v. Booker*, 543 U.S. 220, 258-59 (2005). Further, because the violation of an injunction is subject to punishment, an

injunction must provide "explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

The principles in drafting an injunction are informative in how to read an injunction. An injunction should be read "intelligently and in context." Dan B. Dobbs, *Law of Remedies* § 2.8(7), 220 (2d ed. 1993). To give effect to the intent of the court issuing the injunction, an injunction should be reasonably construed and read as a whole. *Norwest Mortgage, Inc. v. Ozuna*, 706 N.E.2d 984, 989 (Ill. App. Ct. 1998). And "'[t]o ascertain the meaning of any part of an injunction, the entire injunction must be looked to; and its language, like that of all other instruments, must have a reasonable construction with reference to the subject about which it is employed.'" *Old Homestead Bread Co. v. Marx Baking Co.*, 117 P.2d 1007, 1009-10 (Colo. 1941) (quoting 32 CJ 370, § 624). In discussing the narrow interpretation of a decree, the Massachusetts Supreme Court has stated that "[a] decree is always to be construed in reference to the facts stated in the bill and proved or admitted at the hearing. For its effect, it rests upon the averments of the bill, and it has no relation to matters not included in the litigation." *Att'y Gen. v. New York, New Haven and Hartford R.R. Co.*, 87 N.E. 621, 622 (Mass. 1909). Likewise, the Mississippi Supreme Court has stated that in determining whether an action falls within the scope of an injunction one must look to the "injunction itself, read in view of the relief sought and the issues made in the case before the court which rendered it, and the injunction will not be given a wider scope than is warranted by such construction." *Arbuckle v. Robinson*, 134 So. 2d 737, 741 (Miss. 1961). An injunction would not prohibit acts not within its terms as reasonably construed. *Citizens Against Range Expansion v. Idaho Fish and Game Dep't*, 289 P.3d 32, 37 (Idaho 2012). This court has

likewise looked to the record when an injunction failed to set forth the reasons for its issuance. *See Sowers v. Forest Hills Subdivision*, 129 Nev. ___, ___, 294 P.3d 427, 434 (2013).

Although the injunction in *Masto I* included broad language in the final sentence, and other legal authorities repeated this language when describing the injunction, the injunction read as a whole and in context made it clear that the only provisions of SB 471 challenged and enjoined related to residence and movement restrictions; provisions which are not at issue here.[2] Reviewing the litigation documents, there was never a cause of action based on the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision and none of the plaintiff Does alleged that they had been charged with any violation of lifetime supervision. Further, the federal court's order specifically stated that it was the retroactive application of the amendments in AB 579 and SB 471 that was at issue in the case. *Masto I*, 719 F. Supp. 2d at 1259-60. The amendment to NRS 213.1243 was not applied retroactively in this case: Buxton was placed on lifetime supervision in 2008 and charged with violations occurring in 2010, after the amendment took effect. And supporting a limited reading of the injunction is the opinion in *Masto II* which recognizes that the injunction was limited to the residence and movement restrictions set forth in SB 471. *Masto II*, 670 F.3d at 1051 n.3, 1061-66. The 2013 federal district order clarifying the injunction also supports this reading of the injunction

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[2]The injunction appeared to also refer to G.P.S. monitoring, but the decision in *Masto II* makes it clear that this provision was not part of the original litigation and thus was not before the federal court. 670 F.3d at 1051 n.3.

as the federal district court expressly recognized the limited scope of the injunction and stated that "[a]ll other sections or sub-sections contained in S.B. 471 (2007), other than those specified . . . are subject to the enacting provisions set forth in S.B. 471 . . . and were in full force and effect as of the effective date of the bill." Thus, the 2008 injunction did not enjoin the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision and Buxton was properly charged with and convicted of a felony violation.

In light of our conclusion that the 2008 injunction in *Masto I* did not include the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision, Buxton's argument that consideration of the 2013 clarifying order constitutes an ex post facto violation is without merit as the clarifying order did not change or alter the terms of the injunction as reasonably read.[3] *See Mikel v. Gourley*, 951 F.2d 166, 169 (8th Cir. 1991) ("The distinction between modification and clarification is that a clarification 'does not change the parties' original relationship, but merely restates that relationship in new terms.'" (quoting *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149, 1155 (7th Cir. 1984))); *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir. 1998) (recognizing that a modification of an injunction substantially alters the relationship of the parties); *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989) (recognizing that a modification of

[3]We deny the State's motion to strike portions of the reply brief and allow the supplement to the answer to be considered part of the pleadings before this court. We deny the motion for remand to further litigate the effect of the 2013 clarifying order.

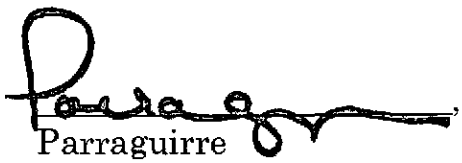
an injunction "substantially change[s] the terms and force of the injunction").

Buxton's argument that the weight of legal authority supports his reading of the injunction is likewise without merit. None of the cited authorities were asked to address whether the amendment that eliminated the misdemeanor/minor violation was enjoined by *Masto I* and the authorities appear to simply repeat the final line in the injunction. We are not convinced that repeating overly broad language gives effect to that language. We are further not persuaded that the State conceded that the provision eliminating the misdemeanor/minor violation was enjoined by *Masto I*. In light of our decision regarding the reading of the injunction in *Masto I*, we need not reach the argument relating to the doctrine of severance.

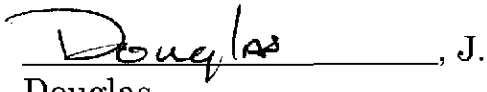
Finally, we conclude that Buxton's argument that he did not have fair notice that his conduct could be charged as a felony was without merit as he was provided notice of the severity of the penalty. *See Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010) (providing that due process requires that a defendant receive fair notice of the severity of the penalty that may be imposed). At the time Buxton was placed on lifetime supervision, violated the terms of lifetime supervision, entered a guilty plea to a felony offense for the attempted violation of lifetime supervision, and was convicted of the felony offense, NRS 213.1243(8) provided notice that a violation of the conditions of lifetime supervision

was a Category B felony offense,[4] and thus his due process rights were not violated. Accordingly, we

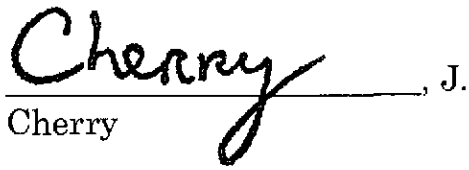
ORDER the judgment of the district court AFFIRMED.



Parraguirre, J.



Douglas, J.



Cherry, J.

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]The attempt to commit a Category B felony offense was punishable as a Category C felony pursuant to NRS 193.330(1)(a)(3).