IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES RAY MYERS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 63771
JAVIER MOTA A/K/A DIEGO JAVIER MOTA, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 63773
BARTY ANDREW SCOTT, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 63774
ELDEN FRANK DELP, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 63775

FILED

MAR 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket Nos. 63771 and 63774 are appeals from orders denying in part motions to set aside convictions and illegal sentences. Docket Nos. 63773 and 63775 are appeals from orders denying motions to set aside convictions and illegal sentences.[1] Eighth Judicial District Court, Clark County; Valorie J. Vega, Stefany Miley, Judges.

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

15-07571

In 2011, appellants James Ray Myers, Javier Mota, and Barty Andrew Scott, were each convicted of a felony offense for attempted violation of the conditions of lifetime supervision (NRS 213.1243(8); NRS 193.330(1)(a)(3)). On December 8, 2010, appellant Elden Frank Delp was convicted of a felony offense for violation of the conditions of lifetime supervision (NRS 213.1243(8)). Following their convictions, appellants filed motions to set aside their convictions and illegal sentences, arguing 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 their conduct they could only have been charged with and convicted of misdemeanor offenses. Prior to the district courts' decisions in these cases, the Court of Appeals for the Ninth Circuit reversed the 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 fashion a consent decree. *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1052-66 (9th Cir. 2012) (*Masto II*). 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 to that action. The district courts denied appellants' requests to set aside their convictions.

Appellants argue that the district courts erred in denying their motions to set aside their convictions 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 they 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 that 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 in these appeals.[2] Reviewing the litigation documents,

[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

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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 any of these cases: appellants were charged with violations occurring 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 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 appellants were properly charged with and convicted of felony violations.

In light of our conclusion that the 2008 injunction in *Masto I* did not include the amendment to NRS 213.1243 that eliminated the

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original litigation and thus was not before the federal court. 670 F.3d at 1051 n.3.

misdemeanor/minor violation of lifetime supervision, appellants' 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. *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 an injunction "substantially change[s] the terms and force of the injunction").

Appellants' argument that the weight of legal authority supported their 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 appellants' argument that they did not have fair notice that their conduct could be charged as a felony was

without merit as they were 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 appellants violated the terms of lifetime supervision and were charged and convicted, NRS 213.1243(8) provided notice that a violation of the conditions of lifetime supervision was a Category B felony offense, and thus their due process rights were not violated. Accordingly, we

ORDER the judgments AFFIRMED.

Parraguirre, J.

Douglas, J.

Cherry, J.

cc: Eighth Judicial District Court Department II
Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk