

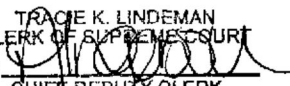
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
DONALD LOUIS WHITE,
Respondent.

No. 64294

FILED

MAR 11 2015

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

ORDER OF REVERSAL

This is a State's appeal from an order of the district court granting a motion to set aside illegal conviction and sentence.¹ Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

On September 14, 2011, respondent Donald White 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, White filed a motion to set aside illegal conviction and sentence. White 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. The district court granted the motion, set aside the felony, and reduced the conviction to a misdemeanor.

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

The State appealed. After the district court's oral decision to grant the motion, 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 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. Because these latter decisions occurred after the district court's order granting relief in this case, this court vacated that order and remanded for reconsideration in light of the federal court's 2013 clarifying order. *State v. White*, Docket No. 60579 (Order Vacating and Remanding, April 17, 2013). The district court was to consider the effect of the 2013 clarifying order, the effect of any uncertainty regarding the law concerning NRS 213.1243(8) at the time White was charged and convicted, White's liability under the prior version of NRS 213.1243 (allowing for a misdemeanor or felony offense depending upon the violations alleged), and any other issues the parties may raise.

Upon remand, White repeated his prior arguments and argued that consideration of the 2013 clarifying order amounted to an ex post facto violation. White further argued that he was not provided fair notice in violation of due process that his offense could be charged as a felony in light of the alleged uncertainty regarding the law after the injunction in *Masto I*. The district court again granted the motion and reduced his felony to a misdemeanor, concluding that (1) the effect of the clarifying order in 2013 was prospective only because the 2008 injunction enjoined

the entirety of SB 471, (2) there was substantial uncertainty regarding the law because of the language in the injunction in *Masto I* and the legal authority cited to by White, (3) applying the 2013 clarifying order retroactively would be an ex post facto violation, and (4) White could only be charged with and convicted of a misdemeanor offense. The State appeals.

The State argues that the district court erred in concluding that the 2008 injunction in *Masto I* enjoined the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision. We agree.

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).

In concluding that the 2008 injunction enjoined the entirety of SB 471, including the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision, the district court acknowledged that the injunction as drafted used overly broad language, but the district court felt constrained to give plain meaning to the final sentence in the injunction that enjoined SB 471. 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 federal 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: White was placed on lifetime supervision in 2010 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 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

²The 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.

bill.” Thus, the 2008 injunction did not enjoin the amendment to NRS 213.1243 that eliminated the misdemeanor/minor violation of lifetime supervision and White was properly charged with and convicted of a felony violation.³

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, White’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. 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”).

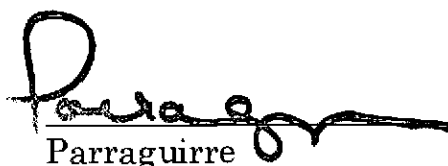
We further conclude that White’s argument that he did not have fair notice that his conduct could be charged as a felony was without


³White’s argument that the weight of legal authority supported his reading of the injunction is without merit. None of the authorities were asked to address whether the elimination of 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.

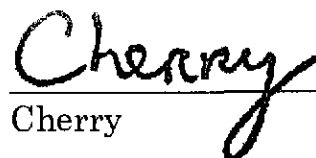
merit as he was provided notice of the severity of the penalty. See *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010) (providing that due process requires that a defendant receive fair notice of the severity of the penalty that may be imposed). At the time White was placed on lifetime supervision, 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.

For the reasons set forth in this order, we

ORDER the judgment of the district court REVERSED.


Parraguirre, J.


Douglas, J.


Cherry, J.

cc: Hon. Jessie Elizabeth Walsh, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

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