

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON ROBERT SPARKS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66266

**FILED**

OCT 29 2015

TRACEY S. LINDEMAN  
CLERK OF SUPREME COURT  
BY *William*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a sentence on a guilty plea for burglary. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In 2012, appellant Jason Sparks attempted to cash a forged check at the Boulder Station Casino. Sparks was arrested and charged by indictment with conspiracy to commit theft, burglary, forgery, and attempted theft. Sparks had previously been convicted of eight felonies for crimes committed between 1989 and 2004, including theft and burglary. Accordingly, the parties entered into a guilty plea agreement under NRS 207.010(1)(a), the small habitual criminal statute, and Sparks agreed to plead guilty to one count of burglary and stipulated to a sentence of 5 to 20 years under the small habitual criminal statute.

The district court set sentencing for November 18, 2013, but Sparks failed to appear. The district court then continued sentencing to December 4, but when Sparks failed to appear again, the court issued a warrant for his arrest. Sparks was later apprehended and placed in custody, appearing in court on April 30, 2014. However, Sparks' sentencing was further continued to amend various sections of the presentence investigation report. Despite delays and continuances, the

State never filed its notice of intent to seek punishment as a habitual criminal.

Finally, at formal sentencing on June 11, 2014, defense counsel noted the State had failed to file a notice of intent to seek punishment as a habitual criminal and requested the court move forward with sentencing. But, the State asked for a 15-day continuance pursuant to NRS 207.016(2) so that it could file the Notice of Intent to Seek Punishment as a Habitual Criminal. Defense counsel objected, arguing the State had unreasonably failed to timely file the notice, and the continuation of sentencing significantly prejudiced Sparks because allowing the State to file the notice, and subsequently seek sentencing under the small habitual criminal statute, would substantially increase the potential duration of his sentence. The State admitted to the district court it had no excuse for failing to timely file the notice.

The district court found the continuance would not prejudice Sparks because the parties had specifically agreed to apply the small habitual criminal statute at sentencing, and Sparks was aware of the State's intent to seek punishment under that statute.<sup>1</sup> The district court

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<sup>1</sup>The district court reasoned:

Given that the negotiation in this case is and has been for treatment under the small habitual statute it's clear to me that all parties knew and understood that there was an intent to proceed with seeking habitual treatment. The notice obviously should have been filed and wasn't and is a requirement. But having said that, this isn't a situation where a Defendant is surprised at this time to learn that the State is seeking habitual treatment. Under all the circumstances of the

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granted the continuance, and the State filed its notice that same day. On July 7, 2014, the district court sentenced Sparks under the small habitual criminal statute to 20 years with parole eligibility after 6 years.

On appeal, Sparks asserts the district court erred in granting the continuance because the State failed to timely file the necessary notice and this failure prejudiced Sparks. We disagree. “[We review] the district court’s decision regarding a motion for continuance for an abuse of discretion. Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010) (internal quotation omitted). Under the particular facts of this case, we hold the district court did not err in granting the continuance.

As relevant here, NRS 207.016(2) operates to ensure a defendant is on notice of the prosecution’s intent to seek habitual criminal treatment by requiring the prosecution to file notice of this intent prior to the trial or sentencing. See *LaChance v. State*, 130 Nev. \_\_\_, \_\_\_, 321 P.3d 919, 928 (2014). NRS 207.016(2) allows the prosecution to supplement or amend an information up to 15 days before sentencing.

NRS 207.016(6) suggests that when the parties agree to habitual criminal treatment, the district court may move forward with the sentencing even if the procedural requirements of subsection 2 are not met:

Nothing in the provisions of this section, NRS 207.010, 207.012 or 207.014 prohibits a court from

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*...continued*

case I do think that it is appropriate to grant the continuance to allow the State to file notice of habitual criminality which is required.

imposing an adjudication of habitual criminality, adjudication of habitual felon or adjudication of habitually fraudulent felon based upon an agreement of the parties.

In *Hodges v. State*, the Nevada Supreme Court examined this provision and explained that it was designed to allow the parties to stipulate to an adjudication of habitual criminality, thus bypassing the statute's procedural requirements. 119 Nev. 479, 483-84, 78 P.3d 67, 69-70 (2003). Therefore, although state action taken pursuant to this statute remains subject to the constitutional requirements of due process, the defendant may nevertheless waive certain procedural requirements by stipulating to the existence of past convictions. *Id.* at 483-85, 78 P.3d at 69-70.

Here, the requirements of due process were met. Sparks stipulated in his plea agreement with the State that the district court would adjudicate him as a habitual criminal and further agreed to be sentenced and incarcerated to the time prescribed by the small habitual criminal statute. Because Sparks agreed to a prison sentence and designation of habitual criminal status pursuant to the plea agreement, and because NRS 207.016(6) allows for such agreements between the parties, Sparks was on notice of the State's intent to punish him under the habitual criminal statute and, therefore, was not prejudiced by any continuance for either party.<sup>2</sup> Accordingly, under these facts, the district

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<sup>2</sup>Moreover, under these facts and pursuant to NRS 207.016(6), the district court could have sentenced Sparks as a habitual criminal without granting the State a continuance to file an amended information with notice of the State's intent to adjudicate him as a habitual criminal offender.

court did not abuse its discretion in granting the continuance despite the State's failure to timely file the notice.

Nevertheless, we would caution that under different facts, granting a continuance may be an abuse of discretion and possibly reversible error. Importantly, had the plea agreement here allowed both parties the right to argue at sentencing, including allowing the State to argue for sentencing treatment under the habitual criminal statute, the district court's granting of a continuance, over Sparks' objection, could have severely prejudiced Sparks. This case had been continued numerous times over the course of a year, Sparks was in custody, and Sparks moved the court to go forward with sentencing. The State, however, requested a continuance because it had inexplicably failed to file a notice of intent to seek habitual criminal adjudication, and it admitted to the district court it had no excuse for this failure.

Under these circumstances, had the district court granted the State's motion to continue sentencing despite the State's inexcusable delay in filing the notice, the continuance would have effectively rewarded the State for its lack of diligence. This is because as a habitual criminal offender Sparks faced a maximum prison term of 8 to 20 years. *See* NRS 207.010(1)(a) (a person sentenced as a small habitual criminal shall be punished by a minimum term of imprisonment of not less than 5 years and a maximum term of imprisonment of not more than 20 years); NRS 193.130(1) ("The minimum term of imprisonment that may be imposed must not exceed 40 percent of the maximum term imposed."). Conversely, if the district court denied the State's motion for a continuance, the State would have been unable to seek habitual criminal adjudication, and Sparks' maximum exposure on his burglary conviction would only have

been 4 to 10 years in prison. See NRS 193.130(1); NRS 205.060(2) (a person convicted of burglary shall be punished by a minimum term of imprisonment of not less than 1 year and a maximum term of imprisonment of not more than 10 years). Thus, under this scenario, the district court's granting of a continuance could have severely prejudiced Sparks.

In sum, the facts here do not evince an abuse of discretion. As the district court noted when granting the continuance, Sparks and the State stipulated to adjudication and sentencing under the small habitual criminal statute, and Sparks was on notice of the State's intent to seek treatment under that statute by virtue of the guilty plea agreement. Therefore, Sparks was not prejudiced by the court's decision to continue the case for 15 days. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Elissa F. Cadish, District Judge  
Wright Stanish & Winckler  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

TAO, J., concurring in part:

I concur in the judgment because, under the circumstances, Sparks has no basis to complain that the district court abused its discretion by granting 15-day continuance sought by the State after he caused his sentencing to drag on for months by repeatedly failing to show up for court until he was finally arrested and hauled into court pursuant to a bench warrant.

But the majority's disposition of this case includes an interpretation of a statute -- subsection 6 of NRS 207.016 -- which was not raised or argued by the parties, and whose meaning may be considerably more complex, and more in dispute, than the majority believes. NRS 207.016(6) was amended by the Legislature in 2013, and yet with no discussion of the scope, purpose, or effect of those very recent amendments, the majority reads the statute to represent a dramatic change -- or more precisely, a major exception -- to the habitual sentencing scheme that has existed in Nevada since 1997. It is possible that the majority's interpretation is correct, but I believe that question should have been left for resolution in a more appropriate case in which the parties, the district court, and this Court, have been given an opportunity to fully explore the meaning of the statute.

Nevada's habitual sentencing statutes (NRS 207.010, 207.012, 207.014, and 207.016) generally require the State to follow certain procedural requirements or else a habitual sentence cannot be imposed. These requirements include such things as the filing of written notice expressing the State's intention to seek to have the defendant treated as a habitual offender, as well as the presentation of proof, typically via certified copies of judgments of conviction (JOCs), that a defendant was

previously convicted of felonies that qualify him for treatment as a habitual offender.

Before 1997, these procedural requirements were absolute and unwaivable. *See Staley v. State*, 106 Nev. 75, 78, 787 P.2d 396, 397 (1990) (“A person cannot stipulate to a status [as a habitual offender]. The question of the validity of the prior convictions must be determined by the district court as a matter of law . . .”). In 1997, however, the Legislature enacted the previous (pre-2013) version of NRS 207.016(6), which permitted defendants to “stipulate” to the existence of prior felony convictions qualifying them to be adjudicated as habitual offenders notwithstanding the other statutory requirements of NRS 207.010, 207.012, 207.014, and 207.016. *See Hodges v. State*, 119 Nev. 479, 78 P.3d 67 (2003) (expressly overruling *Staley*). In *Hodges*, the Nevada Supreme Court held that under NRS 207.016(6) a defendant could indeed stipulate to the existence of qualifying prior felony convictions and thus relieve the State of its obligation to produce JOC’s at a sentencing hearing. However, the court concluded that due process concerns prohibited a stipulation to the status of habituality. *Id.* The basis for the court’s conclusion was the plain language of the 1997 amendments, which expressly contained the phrase “stipulation.”

The habitual sentencing statutes were amended by the 2013 Legislature via Assembly Bill 97 (A.B. 97). Prior to 2013, NRS 207.016(6) provided that:

Nothing in the provisions of this section, NRS 207.010, 207.012 or 207.014 prohibits a court from imposing an adjudication of habitual criminality, adjudication of habitual felon or adjudication of habitually fraudulent felon based upon a stipulation of the parties.



A.B. 97 amended this provision so that it now reads:

Nothing in the provisions of this section, NRS 207.010, 207.012 or 207.014 prohibits a court from imposing an adjudication of habitual criminality, adjudication of habitual felon or adjudication of habitually fraudulent felon based upon an agreement of the parties.

NRS 207.016(6) was thus amended to replace the phrase “a stipulation” with the new phrase “an agreement.” What makes the 2013 amendment interesting is that it changed only one word within NRS 207.016(6), and that single word was virtually the entire basis for the Supreme Court’s decision in *Hodges*, the point of which was that the 1997 amendments permitted a defendant to “stipulate” to the validity of his qualifying felony convictions.<sup>1</sup> Under NRS 207.016(6) as now written, a defendant need not “stipulate” to the validity of his prior convictions in order to bypass the procedural requirements of NRS 207.010 through 207.016; he merely needs to “agree” to their validity. The question then becomes what that means.

The majority reads NRS 207.016(6) to “suggest[] that when the parties agree to habitual criminal treatment, the district court may move forward with the sentencing even if the procedural requirements of subsection 2 are not met.” In other words, the majority assumes that an “agreement” exists for purposes of NRS 207.016(6) whenever a defendant enters into a plea bargain negotiation which contemplates, as its end result, his pleading guilty and being sentenced as a habitual offender. Thus, “[b]ecause Sparks agreed to a prison sentence and designation of

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<sup>1</sup>I do not know whether the Legislature intended to overrule *Hodges*, at least *sub silentio* if not explicitly, but that is certainly a plausible construction that is worth exploring in an appropriate case.

habitual criminal status pursuant to the plea agreement, and because NRS 207.016(6) allows for such agreements between the parties, Sparks was on notice of the State's intent to punish him under the habitual criminal statute."

But if the majority is correct and NRS 207.016(6) is triggered whenever a plea bargain agreement is reached in which a defendant "agrees" to eventually be adjudicated a habitual criminal, then the notice requirement of NRS 207.016(2) would not be the only statutory requirement that is waived. Under the plain terms of NRS 207.016(6), the defendant would also waive the State's obligation to prove the existence of qualifying convictions. This is so because NRS 207.016(6) provides that "nothing" in NRS 207.010, 207.012, 2017.014, or 207.016 prohibits a court from imposing an adjudication of habitual criminality based upon the defendant's prior "agreement." "Nothing" literally encompasses the requirement set forth in NRS 207.010, 207.012, 207.014, and 207.016(5) to prove that a defendant has been previously convicted of felonies that would qualify him for a habitual sentence.

In short, the majority suggests today that the mere act of signing a written Guilty Plea Memorandum in which the defendant agrees to be sentenced as a habitual felon relieves the State of any duty to comply with virtually any other requirement of the habitual sentencing statutes (except those requirements that are constitutionally mandated by due process), including provisions that require the State to independently prove to the sentencing court that the defendant actually qualifies to be sentenced in that manner.

This may, or may not, be what the Legislature intended when it amended NRS 207.016(6) in 2013. It is certainly a plausible

construction, albeit not the only possible one. Rather than assuming this construction to be correct in a case in which it is not necessary to do so, I believe that this question should be left for another case in which the parties have been given an opportunity to more fully explore the bounds of the 2013 legislative amendments.

*Tao*

\_\_\_\_\_, J.  
Tao