

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY EARL DOWNS A/K/A JIMMIE EARL
DOWNS,

No. 36503

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of forgery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two concurrent prison terms of life with the possibility of parole after ten years. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Appellant first contends that his guilty plea was not knowing because the district court failed to explain the possible penalty appellant faced if adjudicated as a habitual criminal. We decline to consider this contention because it raises factual issues that should be raised in the district court in the first instance.¹ Moreover, because this contention does not raise a clear error of law apparent from the face of the record, we further conclude that appellant's contention does not fall within the narrow purview of issues regarding the validity of a plea that we would consider on direct appeal.²

¹See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986).

²See Smith v. State, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994); Lyons v. Sate, 105 Nev. 317, 319, 775 P.2d 219, 220 (1989).

Appellant next contends that the district court abused its discretion in adjudicating appellant a habitual criminal, pursuant to NRS 207.010(1)(b), because two of his prior convictions were stale and two of his other out-of-state convictions were equivalent to gross misdemeanors in Nevada. Accordingly, appellant contends that because he had only two prior non-violent felony convictions, he was ineligible for habitual offender treatment.

Appellant's contention lacks merit. First, appellant waived his right to argue that he was ineligible for habitual offender treatment when counsel for appellant conceded this issue at sentencing.³ In fact, at the sentencing hearing, counsel for appellant stated: "We're not going to sit here and tell you he doesn't qualify [to be adjudicated as a habitual offender]. We know that he does qualify, your honor."

Second, even excluding the out-of-state convictions alleged to be gross misdemeanors, sufficient judgments of conviction were presented at sentencing including: (1) a May 1975 attempted theft conviction, (2) an October 1975 burglary conviction, (3) a 1978 possession of a controlled substance conviction, (4) a 1989 receiving stolen property conviction, and (5) a 1991 forgery conviction. Although some of these prior convictions were approximately twenty-five years old, "NRS 207.010 makes no special allowance for non-violent crimes or the remoteness of convictions; instead, these are considerations within the discretion of the district court."⁴

³See 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).

⁴Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

Because appellant was convicted of at least three prior felonies that satisfy the requirements of NRS 207.010(1)(b) and because the district court properly considered appellant's lengthy criminal history, the district court did not abuse its discretion in determining that habitual criminal adjudication was warranted.⁵

Appellant last contends that the district court was barred by the doctrine of res judicata and collateral estoppel from sentencing him as a habitual offender because the district court had previously declined to adjudge appellant a habitual offender on a conviction for an offense committed in 1998, subsequent to the instant offense. In other words, appellant contends that because his criminal history had not changed since he was last sentenced, the district court was prohibited from adjudicating appellant as a habitual offender since this was an "issue of ultimate fact" that could not be relitigated.

We disagree with appellant's contention. The mere fact that the district court showed mercy in refusing to adjudge appellant a habitual criminal on one judgment of conviction, does not prohibit the same court from thereafter adjudging the very same defendant a habitual offender in sentencing on another conviction.⁶ Indeed, provided the requisites of NRS 207.010(1)(b) are satisfied and that the district court considered whether the defendant's criminal history warranted punishment for his status as a recidivist

⁵See Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997).

⁶See id. ("[o]ne facing adjudication as a habitual criminal . . . is at the mercy of the court and is thus subject to the broadest kind of judicial discretion" (quoting Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993) (emphasis added))).

and exercised its discretion, the district court's ruling on this issue will not be disturbed.⁷

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

ORDER the judgment of conviction AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

⁷See Clark v. State, 109 Nev. 426, 429, 851 P.2d 426, 428 (1993) (recognizing that "being characterized and adjudicated by the trial court as a recidivist is a matter involving pure discretion").