IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MIGUEL OMAR OJEDA-ENRIQUEZ,
Appellant,
vs.
WARDEN, L.C.C.; AND THE STATE OF NEVADA,
Respondents.

No. 69963

ORDER OF AFFIRMANCE

Miguel Omar Ojeda-Enriquez appeals from orders of the district court denying a postconviction petition for a writ of habeas corpus filed on May 19. 2014, and various supplements filed on September 30, 2015, April 24, 2016, May 5, 2016, August 8, 2016, and December 13, 2016. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Ojeda-Enriquez contends the district court erred in denying his claim that his guilty plea was not entered into knowingly, voluntarily, and intelligently. Specifically, Ojeda-Enriquez argued he did not understand he could face a possible sentence of 70 years to life in prison, and counsel's words at the plea hearing confused him and thus coerced him into pleading guilty. Ojeda-Enriquez failed to carry his burden of proof that his guilty plea was invalid. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Ojeda-Enriquez acknowledged in his guilty plea memorandum, in his colloquy, and at the evidentiary hearing on the instant petition he understood he would be sentenced to 35 years to life in prison for each count and the sentences could be imposed consecutively. He further acknowledged in both the guilty plea memorandum and colloquy that

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sentencing was up to the district court and no one had promised him a particular sentence. Finally, Ojeda-Enriquez failed to identify any coercion. Because the totality of the circumstances revealed Ojeda-Enriquez understood the consequences of his guilty plea and was not coerced, *see State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000), we conclude the district court did not abuse its discretion in denying this claim, *see Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

Ojeda-Enriquez also contends the district court erred in denying his claim that a sentence of 35 years to life in prison was illegal. Ojeda-Enriquez noted that throughout the time he committed his crimes, S.B. 471—the 2007 bill that amended NRS 200.366 and raised the minimum sentence for sexual assault of a child under the age of 14 years from 20 years to 35 years—was the subject of an injunction by a federal district court. *See ACLU of Nev. v. Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) (*Masto I*), *reversed in part, appeal dismissed in part by ACLU of Nev. v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (*Masto II*). He contended, because the amendment had been enjoined, he was subject only to the lesser sentence as provided by the earlier version of the statute. Ojeda-Enriquez' claim lacked merit.

In 2013, the federal district court entered a clarifying order recognizing the overly broad language in its original injunction and clarifying the injunction had only related to those provisions actually litigated by the parties—provisions that did not touch on the amendments to NRS 200.366. We agree *Masto I* did not enjoin the amendment to NRS 200.366.

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, "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). The Nevada Supreme 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. 99, 108-09, 294 P.3d 427, 434 (2013).

Although the injunction in *Masto I* included broad language in the final sentence, the injunction read as a whole and in context made it clear the only provisions of S.B. 471 challenged and enjoined were those that amended various provisions of NRS chapters 176A and 213, provisions which were not at issue here. Ojeda-Enriquez has not alleged there was ever a cause of action based on the amendments to NRS 200.366. Further, the federal court's order specifically stated it was the retroactive application of the amendments in S.B. 471 that was at issue in the case. *Masto I*, 719 F. Supp. 2d at 1259-60. The amendment to NRS 200.366 was not applied retroactively in this case: Ojeda-Enriquez was convicted and sentenced for crimes that took place in 2009-2011, after the amendment took effect.

Supporting a limited reading of the injunction is the opinion in *Masto II* which recognized that the injunction was limited to the residence and movement restrictions set forth in S.B. 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, "All 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 200.366 raising the minimum sentence for sexual assault of a child under 14 years of age, and Ojeda-Enriquez was properly sentenced pursuant to the 2007 amendment.

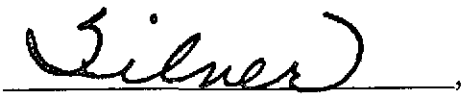
In light of our conclusion that the 2008 injunction in *Masto I* did not include the amendment to NRS 200.366, Ojeda-Enriquez' argument that consideration of the 2013 clarifying order constituted an ex post facto violation was without merit as the clarifying order did not change or alter the possible sentences. *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 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").

Finally, we conclude Ojeda-Enriquez' argument that he did not have fair notice he was subject to a sentence of 35 years to life 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 due process requires a defendant receive fair notice of the severity of the penalty that may be imposed). At the time Ojeda-Enriquez committed his crimes, NRS 200.366 provided notice his crime was a category A felony offense subject to a sentence of 35 years to life in prison. *See* NRS 200.366(3)(c). As discussed

above, the injunction did not alter this. Ojeda-Enriquez has cited to no authority—and we are aware of none—holding a poorly worded injunction trumps the notice given by the plain language of a statute. We therefore conclude Ojeda-Enriquez' due process rights were not violated.

Finally, Ojeda-Enriquez contends it was unconstitutional for the State to withdraw a plea offer just because he exercised his right to a preliminary hearing. Ojeda-Enriquez did not raise this claim below, and we decline to consider it on appeal in the first instance. *See Rimer v. State*, 131 Nev. ___, ___ n.3, 351 P.3d 697, 713 n.3 (2015). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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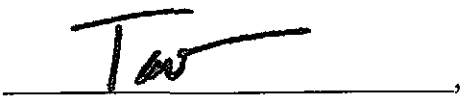

_____, J.
Tao

_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Second Judicial District, Dept. 7
Edward T. Reed
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Washoe District Court Clerk