

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRETT OLIVER BARNES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73878

**FILED**

OCT 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Brett Oliver Barnes appeals from a judgment of conviction, pursuant to a guilty plea, for establishing or possessing a financial forgery laboratory. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Barnes first contends the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). Looking beyond whether the plea was knowingly, voluntarily, and intelligently made, “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Id.* at 603, 354 P.3d at 1281.

Barnes claimed he pleaded guilty because he needed to be released on his own recognizance in order to pay off a debt to a Mexican

cartel that was threatening to kill his family. Barnes filed his motion to withdraw his guilty plea upon learning the State would be seeking large habitual criminal treatment rather than the stipulated sentence of 5 to 12.5 years because Barnes had failed to appear at his sentencing hearing. After an evidentiary hearing on Barnes' motion, the district court found former counsel's testimony to be credible and Barnes' testimony to be incredible; it then concluded Barnes thus failed to demonstrate a fair and just reason to withdraw his guilty plea. We defer to the district court's credibility findings "absent a clear showing that the court reached the wrong conclusion." *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000). Barnes has failed to demonstrate the district court reached the wrong conclusion. And because Barnes' only evidence in support of his claims was incredible, we conclude the district court did not abuse its discretion by denying Barnes' presentence motion to withdraw his guilty plea. *See Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 538 (2004) (reviewing denial of motion to withdraw guilty plea for abuse of discretion).


Barnes next contends NRS 207.010, the habitual criminal statute, is unconstitutional because it violates the Due Process Clause, the Double Jeopardy Clause, the Equal Protection Clause, and the prohibition against cruel and unusual punishment. First, Barnes has not demonstrated the State's decision to seek habitual criminal treatment was based on an impermissible standard such as race, religion, or some other arbitrary classification, and therefore, his equal-protection challenge fails. *See Hollander v. Warden*, 86 Nev. 369, 373-74, 468 P.2d 990, 992 (1970).


Second, Barnes' double-jeopardy challenge to the statute fails because NRS 207.010 allows for an increased sentence on the charged offense for recidivists, not an additional punishment for the prior offense. *See Carr v. State*, 96 Nev. 936, 940, 620 P.2d 869, 871 (1980) (explaining NRS 207.010 does not charge a substantive offense but allows averment of fact that goes to punishment for a charged offense); *Hollander*, 86 Nev. at 373, 468 P.2d at 992 (explaining defendant was not being punished for prior convictions but for the primary charged offense, with prior convictions being used under NRS 207.010 to enhance the punishment for the primary offense). Finally, NRS 207.010 does not violate the Cruel and Unusual Punishment and the Due Process Clauses by subjecting persons to criminal prosecution based upon their "status," because the statute does not charge a substantive offense. *Carr*, 96 Nev. at 940, 620 P.2d at 871; *see also Hollander*, 86 Nev. at 373-74, 468 P.2d at 992. We therefore conclude Barnes' claims lack merit.

Finally, Barnes contends the district court abused its discretion by adjudicating him a habitual criminal because all of his prior convictions are stale and for non-violent offenses. "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions." *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Rather, the district court has broad discretion to dismiss a count of habitual criminality. *See NRS 207.010(2); O'Neill v. State*, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007). And the record before this court reveals the district court understood its sentencing authority and properly exercised its discretion to adjudicate Barnes a habitual criminal. *See Hughes v. State*, 116 Nev. 327, 333, 996

P.2d 890, 893-94 (2000). We therefore conclude the district court did not abuse its discretion and Barnes' claim lacks merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.<sup>1</sup>

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

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

cc: Hon. Elissa F. Cadish, District Judge  
Law Offices of Martin Hart, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>1</sup>The Honorable Jerome T. Tao did not participate in the decision in this matter.