


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAUL GONZALES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66615

**FILED**

APR 14 2016

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

*ORDER VACATING JUDGMENT AND REMANDING*

This is an appeal from a judgment of conviction of robbery and conspiracy to commit robbery. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Raul Gonzales robbed multiple victims at gunpoint and repeatedly shot at the victims' vehicle. Gonzales, who has a history of gang membership and felony convictions, had recently been released from prison after serving time for voluntary manslaughter with gang enhancement.<sup>1</sup>

Gonzales and the State entered into a written plea agreement whereby the State retained the right to argue at sentencing. But, the document also contained an apparent boilerplate or stock paragraph stating that the State could argue for habitual treatment if "an independent magistrate, by affidavit review, confirms probable cause against [Gonzales] for new criminal charges." After both parties signed the written plea agreement, the district court verbally canvassed Gonzales

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<sup>1</sup>In Gonzales' prior case, the State originally charged Gonzales with murder with the use of a deadly weapon with gang enhancement, but eventually reduced that charge to voluntary manslaughter with a gang enhancement.



regarding his plea of guilty. During the district court's canvass of Gonzales, Gonzales' attorney acknowledged that the State retained the right to argue at sentencing, including arguing for habitual treatment. The district court, thereafter, discussed with Gonzales the consequences and penalties involved if the court sentenced him under the habitual criminal statute. The court also warned Gonzales that the State might seek habitual treatment at sentencing if Gonzales engaged in further misconduct or failed to cooperate with law enforcement upon his release from custody after his plea of guilty. Gonzales indicated that he understood habitual treatment was a possibility as a result of his guilty plea. In open court immediately after his plea, the district court ordered an own recognizance release of Gonzales pursuant to the terms of the guilty plea agreement. However, the Clark County Detention Center did not actually release Gonzales until sometime later for reasons that are not in the record.

A little less than a month after his release from custody, Gonzales was arrested for murder<sup>2</sup> and indicted by the Clark County Grand Jury. The State filed a notice of intent to seek punishment as a habitual criminal in the present case, alleging that Gonzales had four prior felony convictions that occurred from 1999 to 2002. Gonzales moved to strike the notice of intent to seek habitual criminal treatment, arguing the prior convictions were stale and the State could only seek habitual treatment if an independent magistrate, by affidavit review, confirmed probable cause against him for new criminal charges. Gonzales also

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<sup>2</sup>Gonzales allegedly shot through the front door of a home, hitting and killing the occupant.

moved to withdraw his guilty plea. Without conducting an evidentiary hearing, the district court denied both motions.<sup>3</sup> At sentencing, the district court adjudicated Gonzales a habitual criminal based upon his prior felony convictions and thereafter sentenced Gonzales pursuant to the habitual criminal statute to life without the possibility of parole.<sup>4</sup>

On appeal, Gonzales contends the district court erred by denying his motion to strike the notice of intent to seek habitual criminal adjudication. First, Gonzales argues his four prior felony convictions are stale and nonviolent and do not qualify him for habitual criminal treatment. The State counters that the felonies are not stale and qualified Gonzales for habitual criminal treatment. We agree with the State.

We accord district courts the broadest judicial discretion in adjudicating habitual criminal status. *LaChance v. State*, 130 Nev. \_\_\_, \_\_\_, 321 P.3d 919, 929 (2014). Under NRS 207.010, a district court may adjudicate a defendant who has previously been convicted of at least three felonies as a habitual criminal. The statute applies without regard to whether the prior felonies were violent, and the Nevada Supreme Court has upheld a criminal habitual designation based on violent and non-

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<sup>3</sup>We note that after the district court made its ruling, the Nevada Supreme Court issued *Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1281 (2015), clarifying the standards for determining whether a defendant is entitled to withdraw his guilty plea.

<sup>4</sup>The record reflects the district court did not rely on the pending murder charges in adjudicating Gonzales a habitual criminal. Further, the district court could consider evidence of the murder charges in crafting the sentence. See NRS 176.015(6) (the district court may consider “any reliable and relevant evidence at the time of sentencing”).

violent felonies that were between 7 and 20 years old. *See Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997).

At the time of sentencing, Gonzales had four prior felony convictions: possession of a stolen vehicle in 1999, grand larceny auto and burglary in 2001, and voluntary manslaughter with a gang enhancement in 2002. Under Nevada law, the district court could permissibly find that the convictions were not stale and brought Gonzales within the purview of NRS 207.010. We therefore conclude the district court did not abuse its discretion in denying Gonzales' motion to strike notice of intent to seek habitual criminal status as these convictions qualified Gonzales for habitual criminal treatment.<sup>5</sup>

In the alternative, however, Gonzales further argues the district court erred in not striking the notice of intent to seek punishment under the habitual criminal statute because permitting the State to argue for habitual criminal treatment at sentencing violated the terms of the plea agreement. Specifically, Gonzales argues that because an

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<sup>5</sup>Gonzales also argues the district court abused its discretion in considering evidence of gang association at sentencing. We disagree. Gonzales raised this issue by asserting in his presentence investigation report that he was not involved in gang activity. Thereafter, the district court requested testimony regarding this issue. We do not fault the district court for seeking to determine the truth of Gonzales' assertions, nor was it improper for the district court to consider evidence of Nevada gangs and Gonzales' gang affiliations given that this evidence was relevant for the district court's determination of Gonzales' criminal history and potential future dangerousness. *See* NRS 176.015(6) (the district court may consider "any reliable and relevant evidence at the time of sentencing"); *Witter v. State*, 112 Nev. 908, 921, 921 P.2d 886, 895 (1996) (noting gang evidence may be admissible to establish a defendant's future dangerousness) (abrogated on other grounds).

independent magistrate did not confirm probable cause against him for new criminal charges *by affidavit review*, the clause in the guilty plea agreement permitting the State to seek habitual criminal treatment based on new criminal charges never came into play.

In the proceedings below, Gonzales argued this to the district court and the State countered that the district court had the discretion to sentence Gonzales under the habitual criminal statute because of his prior felonies and also in considering the new criminal charges. The State failed to address Gonzales' argument as to breach of the plea agreement. The district court, relying on its discretion to adjudicate Gonzales under NRS 207.010, denied Gonzales' motion to strike without addressing Gonzales' objection that no independent magistrate found probable cause against him *by affidavit review*.

Guilty plea agreements are subject to general contract principles. *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994). Prosecutors are held to "meticulous standards of both promise and performance." *Kluttz v. Warden, Nevada State Prison*, 99 Nev. 681, 683, 669 P.2d 244, 245 (1983). If the prosecutor violates either the terms or the spirit of the plea bargain, reversal may be warranted. *See id.*, at 684, 669 P.2d at 245-46.

Although the district court never specifically addressed this argument, upon our review of the record in this case, we agree with Gonzales that based on the boilerplate language of the plea agreement, no independent magistrate found probable cause against him *by affidavit*

review.<sup>6</sup> However, we conclude that ultimately the State did not breach the plea agreement by arguing for habitual criminal treatment because the record clearly demonstrates that the State was free to seek habitual criminal treatment without having to rely on the challenged clause. Pursuant to the express terms of the plea agreement, the State retained the right to argue at sentencing. No limitation was placed on the State's right to argue at sentencing in the written plea agreement, and both parties clarified to the district court during the plea canvass that the State's right to argue at sentencing included the right to argue for large habitual criminal treatment.<sup>7</sup>

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<sup>6</sup>And, although the parties did not argue that the district court judge was a magistrate, *see* NRS 172.285, we note nothing in the record shows that the district court judge who considered the indictment upon presentment ever reviewed anything by affidavit or even by transcript. Moreover, this statute only requires a court to look at the form of the indictment as to whether the charge constitutes a public offense; the court does not examine the character or sufficiency of the evidence offered in support of the indictment to determine probable cause (which would not be possible until a transcript of proceedings was prepared).

<sup>7</sup>At the plea canvass, defense counsel stated Gonzales "is going to plead guilty" and noted "[t]he State has retained the right to argue at sentencing." The prosecutor immediately intervened, clarifying "Judge, that—that includes for a large habitual treatment as well," after which defense counsel acknowledged "[t]hat's what I was just going to say. And we were going to ask the Court to also canvass him as to his eligibility or possible [sic] that the fact—the State may possibly seek major habitual criminal treatment." (Emphasis added).

To the extent Gonzales implies he always understood the stock language in the written plea agreement as creating a contingency, this argument is without merit. *See Rouse v. State*, 91 Nev. 677, 678-79, 541 P.2d 643, 644 (1975) (holding where defendant enters a plea agreement in  
*continued on next page...*

Because the express terms of the plea agreement and the district court plea canvass evince that both parties clearly contemplated the State retained the right to argue at sentencing, including habitual criminal treatment, the provision in the boilerplate language never came into play. Accordingly, we conclude the district court did not err in denying Gonzales' motion to strike the State's notice to seek habitual criminal status.

Gonzales further contends the district court erred in failing to hold an evidentiary hearing on his motion to withdraw his guilty plea. We agree.

A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and the district court may, in its discretion, grant such a motion for any reason that is fair and just, *Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court has recently ruled "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," and it has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowing, voluntarily, and intelligently made. *Stevenson v. State*, 131 Nev. at \_\_\_, 354 P.3d at 1281. A defendant is entitled to an evidentiary hearing on his motion to withdraw a guilty plea if there are factual allegations not belied by the record that, if true, would entitle him

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open court, his subjective understanding of the likely sentence, where unsupported by the record, does not invalidate his plea).



to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

On appeal, Gonzales asserts that he should be allowed to withdraw his guilty plea because he was not immediately released from custody after the district court ordered his release after he pleaded guilty.<sup>8</sup> At the hearing on his motion to withdraw his guilty plea, the district court, instead of holding an evidentiary hearing, allowed Gonzales to address the court. Gonzales told the court he signed the plea agreement because he was promised he would be released the next day, which did not happen. The district court then denied Gonzales' motion, concluding Gonzales voluntarily and knowingly entered the plea. But, the record is unclear as to whether Gonzales' immediate release from custody was the basis of his guilty plea, as well as when Gonzales was actually released from custody.<sup>9</sup>

*Crawford v. State* is helpful in illuminating the present situation. In *Crawford*, the defendant pleaded guilty to first-degree

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<sup>8</sup>Gonzales asserts several other bases for withdrawal, but after careful consideration we conclude these bases are belied by the record.

<sup>9</sup>Our dissenting colleague mistakenly reads the record from the March 10, 2014 hearing, interpreting that Gonzales was in custody on other charges when he was ordered release in the current case on December 20, 2013, after his plea of guilty. To the contrary, the transcript from March 10, 2014, merely reflects that Gonzales' attorney requested that Gonzales be remanded back into custody on the present case due to his being arrested on the new murder charge and other criminal charges. Counsel made this request to insure Gonzales would gain credit while in custody on the present case. When Gonzales entered his plea on December 20, 2013, and was released by the district court, the record reflects Gonzales was only in custody on the charges pending in this case.

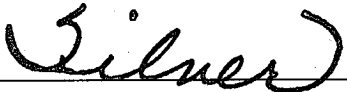


murder. 117 Nev. at 720, 30 P.3d at 1124. As a condition of the plea, the defendant was to remain free and out of custody on bail pending sentencing, which the parties agreed was to occur after Christmas. *Id.* The district court accepted the defendant's plea and set the sentencing date for January. But sometime after the defendant pled guilty, the district revoked bail sua sponte, and placed the defendant into custody prior to Christmas. *Id.* at 720, 30 P.3d at 1124-25. The Nevada Supreme Court concluded the district court erred and remanded the case with instructions for the district court to conduct an evidentiary hearing to determine whether the defendant's plea was conditioned upon Crawford's assertion that he only plead guilty to the charge so that he could remain out of custody through Christmas, as this was an express condition of his guilty plea. *Id.* at 722-25, 30 P.3d at 1126-27.

In the present case, the record indicates in open court, the district court judge ordered Gonzales' immediate own recognizance release after Gonzales pled guilty, yet Gonzales was not immediately released by the Clark County Detention Center. But, whether Gonzales' plea was conditioned upon the actual timing of his release, as well as when he was actually released is unclear from the record. As a result, we must vacate the judgment of conviction and remand this case for an evidentiary hearing for the district court to determine whether, under the standard recently articulated in *Stevenson*, and as in *Crawford*, circumstances exist such that it would be fair and just to allow Gonzales to withdraw his plea. *See Stevenson*, 131 Nev. at \_\_\_, 354 P.3d at 1281. If upon remand the district court determines Gonzales failed to demonstrate a fair and just

reason for withdrawing his guilty plea, the district court may reinstate the judgment of conviction.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

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

I concur:

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

cc: Hon. David B. Barker, District Judge  
Special Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>10</sup>We have carefully considered Gonzales' remaining arguments and conclude they are without merit.

However, we note Gonzales cites no relevant authority for his argument that the State, through its actions, "threatened" defense witness Gascon. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (we need not consider issues unsupported by relevant authority). And, this contention is belied by the record as Gascon was warned by *her own attorney* that her testimony could provide grounds for charges against her and she thereafter voluntarily invoked her right not to testify.

TAO, J., concurring in part and dissenting in part:

I depart from my colleagues on two points. After Gonzales entered his plea in this case, he was indicted for the crime of murder in a separate case, and the district judge found that this constituted a breach of certain conditions of the plea agreement. Gonzales argues that no breach occurred because, despite having been indicted, no “independent magistrate” found probable cause for the subsequent murder charge based upon an “affidavit review” as required by the plea agreement.

Gonzales’ argument is premised upon the contention that a grand jury is not a “magistrate” within the meaning of NRS 169.095, and its issuance of an indictment is not an “affidavit review.” Those two contentions are certainly true, but they miss the point. When a grand jury issues a true bill finding probable cause, the grand jury’s work does not merely float into the sky and magically land upon the defendant and fly him back to court. Instead, NRS 172.285 requires that after the grand jury issues any true bill, the merits of the true bill must be reviewed by two district judges (a district judge being a “magistrate” under NRS 169.095: “Magistrate” means . . . Judges of the district courts) before an arrest warrant may be issued and before the defendant may be held to answer the charges:

NRS 172.285 Warrant on presentment.

1. If the court deems that the facts stated in a presentment constitute a public offense triable:

(a) In the district court of the county, it shall direct the clerk to issue a warrant for the arrest of the defendant.

(b) In another court of the county, it shall forward the presentment to such court.

2. The clerk, or justice of the peace in a case forwarded to the justice of the peace, may accordingly at any time thereafter issue a warrant under the signature and seal of the court, if it has a seal.

3. The magistrate before whom the defendant is brought shall proceed to examine the charge contained in the presentment and hold the defendant to answer such charge, or discharge the defendant, in the same manner as upon a warrant of arrest on complaint.

Thus, the grand jury's work is reviewed by one magistrate before an arrest warrant issues, and then reviewed again by another magistrate before the defendant may be held to answer the charges. Accordingly, the proper analysis here is not that the grand jury constitutes a "magistrate," it's that the "magistrate" is one of the two district judges who review and approve the grand jury's findings before the defendant can be charged.

Furthermore, a grand jury may only base a true bill upon evidence that would be admissible in court, meaning in most instances the sworn testimony of live witnesses brought before the grand jury. NRS 172.135 ("The grand jury can receive none but legal evidence, and the best evidence in degree"). Since an "affidavit" is defined by Blacks' Law Dictionary simply as the statement of a witness made under oath, I'm having trouble seeing why a district judge's review of sworn grand jury testimony "in the same manner as upon a warrant of arrest on complaint" does not constitute an "affidavit review" within the meaning of the plea agreement. Consequently, I would agree with the district court that a breach of the express terms of the plea agreement occurred when Gonzales was indicted for murder, thereby freeing the State to seek a harsher sentence than it previously agreed to and permitting the district court to sentence Gonzales as a habitual offender.

My second area of concern in this case is in the ordering of a remand for an evidentiary hearing. This might be the result demanded by *Stevenson*, which is a new case whose contours have not been fleshed out yet, but if so, I'm not sure what's being accomplished here. In this case, the district judge conducted a hearing on Gonzales' motion to withdraw his plea and let Gonzales explain his motion, albeit not under oath. The defendant contended that the plea agreement was violated because he had not been immediately released from custody, and that his immediate release was an express term of the contract. But it wasn't; the written plea agreement says no such thing and Gonzales was thoroughly canvassed by the court before his plea was accepted and never contended that any such term existed. Thus his contention was belied by the record<sup>1</sup>. See *Hargrove v State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (no evidentiary hearing required when defendant's contentions are belied by the record). Furthermore, if a plea agreement is truly a contract subject to general principles of contract law, *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994), then under principles of contract law the interpretation of a contract's terms is a question of law for the court, not a question of fact. Therefore, the district court can determine on its own as a matter of law what the contract says or does not say without hearing

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<sup>1</sup>Even if immediate release had been an express term of the agreement, the record clearly indicates that the district judge did in fact order Gonzales released from custody when the plea was entered on December 20, 2013, but he continued to remain in custody on other unrelated pending criminal charges. See Transcript of March 10, 2014 hearing. So even if this had been an express term of the contract, there was no breach because the only reason Gonzales remained in custody was his own criminal conduct in other unresolved cases.

any evidence; indeed, under contract law, parol evidence would not even be admissible to explain the contract unless an ambiguity existed, and it could never be used to contradict the contract's plain meaning. *Road & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. \_\_\_, \_\_\_, 284 P.3d 377, 380 (2012). Here, Gonzales does not contend that any ambiguity exists but only that the plain words of the contract do not mean what they say, and if contract law governs then the district court should not need to hear any evidence before it can reject this argument as a matter of law. *See Galardi v. Naples Polaris, LLC*, 129 Nev. \_\_\_, \_\_\_, 301 P.3d 364, 366 (2013) ("ambiguity does not arise simply because the parties disagree on how to interpret their contract").

It may be that *Stevenson* was intended to abrogate these principles in the field of criminal law; one could certainly read the logic of the case that way. Moreover, sound policy reasons exist not to treat criminal guilty plea agreements, where life and liberty are at stake and constitutional rights are always implicated, under the sometimes strict and technical rules that we apply to commercial contracts, where most of the time only money is at stake and the constitution rarely comes into play. But if that's what was intended, then we shouldn't pretend to treat a plea agreement as a contract if we're not going to let courts interpret it under the principles of law that would apply to contracts, because then all we're doing is sowing confusion among district judges, the bar, and defendants as to what rules actually apply. As a practical matter, if we require district courts to hold evidentiary hearings with an eye toward potentially granting relief whenever a defendant says he believed the plain terms of his plea agreement to mean something completely different than what he signed and what he said in response to the court's oral

canvass, then we're reducing written guilty plea agreements and plea canvasses to – to paraphrase the words of the fictional character Jack Sparrow describing the “pirate’s code” in the Hollywood movie “Pirates of the Caribbean” (Disney 2003) – something more like mere guidelines than actual contracts.

For these reasons, I respectfully dissent and would simply affirm the district court’s order without remanding the matter for an evidentiary hearing.

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