IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF PUBLIC SAFETY, SEX OFFENDER REGISTRY,
Appellant,
vs.
WAYNE BRYAN SMITH,
Respondent.

No. 76122-COA

ORDER OF REVERSAL AND REMAND

The State of Nevada Department of Public Safety appeals from a district court order granting a petition for relief from the requirement to register as a sex offender. First Judicial District Court, Carson City; James Todd Russell, Judge.

Respondent Wayne Bryan Smith pleaded guilty to misdemeanor sexual battery in California in 1987. Smith was never required to register as a sex offender while he lived in California. Smith moved to Nevada in 2001 and has resided here ever since. In 2013, Smith applied to purchase a firearm in Nevada, and upon the denial of his application, the State informed him that he needed to register as a sex offender in Nevada. In 2014, a California superior court vacated Smith's conviction, and in 2017, Smith petitioned the Nevada district court for an order terminating his obligation to register as a sex offender in Nevada under NRS 179D.490 (2001).[1]

[1]When Smith petitioned the district court in 2017, Nevada was using the 2001 version of NRS 179D.490 and the corresponding definition of "sexual offense" in the 2001 version of NRS 179D.410. Although the Legislature has since amended both statutes, the amendments did not become effective until after Smith's petition was filed, *see Does 1-17 v.*

The district court heard Smith's motion, where the State argued that Smith was required to register as a sex offender because (1) California requires him to register as a sex offender, and (2) misdemeanor sexual battery is comparable to open or gross lewdness under NRS 201.210, an offense requiring registration in Nevada. *See* NRS 179D.410(11), (19), (20) (2001). In its written order, the district court granted Smith's requested relief, finding only that Smith was "caught in a 'catch-22' situation, which is both unfair and inappropriate to him" and "as a court of law and equity," good cause existed to grant relief. The district court did not make any findings as to applicability of NRS 179D.490 (2001) and NRS 179D.410 (2001).

On appeal, the State argues, as it did below, that Smith is not entitled to relief from registering as a sex offender because registration is mandated by statute. Further, the State argues that the district court improperly relied on equity and ignored the plain language of the statutory provisions requiring registration. Smith argues that the district court did not abuse its discretion in granting relief because he was never required to register as a sex offender in California since he was not a California resident at the time that state's registration requirement for his misdemeanor offense went into effect and he never returned to California; his California conviction was ultimately vacated; and sexual battery is not comparable to

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Eighth Judicial Dist. Court, Docket No. 70704 (July 1, 2016, Order), such that the 2001 versions apply to his petition, and the subsequent changes are not consequential to this appeal. Of note, Nevada's version of the Adam Walsh Act, which was intended to replace Megan's Law as to how sex offenders are classified, was subject to a number of lawsuits and last enjoined after only being in effect from January 22, 2016, to July 1, 2016, and therefore those amendments are not applicable here.

the Nevada offense of open or gross lewdness, thus the underlying elements required for registration as a sex offender in Nevada do not exist. Smith concludes that the district court, sitting in equity, properly relieved him of having to register pursuant to NRS 179D.490. We disagree.

As a preliminary matter, we recognize that Nevada district courts sit in both law and equity. *See* Nev. Const., art. 6, §§ 6, 14. Nevertheless, "equitable principles will not justify a court's disregard of statutory requirements." *Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001). Further, equitable remedies may be available "in the discretion of the court and only when legal remedies, such as statutory review, are not available or are inadequate." *Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev. 809, 812, 407 P.3d 327, 329 (2017) (internal citation omitted).

In this case, Smith admits that the district court did not "construe or interpret any statute." Therefore, Smith argues that the proper standard of review is abuse of discretion and not de novo. We agree and review the district court's decision for abuse of discretion.[2] "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Failure to consider controlling authority is an abuse of discretion. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

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[2]Because the district court failed to undertake the required statutory analysis of NRS 179D.410, de novo review is not applicable at this time. *See, e.g., Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 359, 212 P.3d 1068, 1075 (2009) ("This court reviews conclusions of law, such as those involving statutory construction, de novo.").

Here, the district court did not address whether Smith is required to register as a sex offender because he committed an offense addressed under NRS 179D.410 (2001). Specifically, the district court did not make findings or a determination as to whether (1) California requires Smith to register as a sex offender, thereby requiring Smith's registration in Nevada under NRS 179D.410(20), or (2) misdemeanor sexual battery is an offense that would constitute the offense of open or gross lewdness, if committed in Nevada, and thus require Smith to register under NRS 179D.410(19). We conclude that the district court abused its discretion in failing to analyze the relevant statutes, and we reverse and remand to the district court to determine whether Smith is required to register as a sex offender in Nevada under NRS 179D.410 (2001).[3]

Further, to the extent that the district court found that application of NRS 179D.410 was essentially unconstitutional as applied to Smith, or stated another way, that Smith was placed in an "unfair" or "catch 22" situation because he had no adequate and speedy remedy at law to be relieved from registration requirements (if applicable), the case is remanded "so that the parties are given an opportunity to develop a record in the district court regarding these issues, and for the district court to make findings on these issues." *State, Dep't of Pub. Safety v. Neary*, Docket No. 72578 (Order of Reversal and Remand, July 26, 2018); *see also Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013) ("This court will uphold the factual findings of the district court as long as these

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[3]Because the district court did not fully address the legal issues or make relevant findings, we decline to address them in the first instance. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (declining to address an argument that the district court did not address).

findings are not clearly erroneous and are supported by substantial evidence."). More recently, the retroactive application of Nevada's mandatory sex offender registration requirements have been upheld as constitutional, including for juvenile offenders. *See ACLU of Nev. v. Masto*, 670 F.3d 1046, 1061 (9th Cir. 2012); *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 523, 306 P. 3d 369, 390 (2013). Nevertheless, this does not prevent the district court from considering whether the registration requirements as applied to Smith withstand constitutional scrutiny on remand. *See Neary*, Docket No. 72578 at *3.

Finally, the retroactive application of the sex offender registration requirements have been upheld because they are civil and not criminal in nature. *See Masto*, 670 F.3d at 1055. ("We conclude that the intent of the Nevada legislature in passing AB 579 was to create a civil regulatory regime with the purpose of enhancing public safety."). Thus, the district court is not precluded from sitting in equity to resolve any remaining issues not addressed by the statutory scheme, if Smith can establish a basis for equitable relief after the available statutory remedies have been addressed. *See Samantha Inc.*, 133 Nev. at 816, 407 P.3d at 332.

Therefore, we reverse and remand for the district court to properly review and determine the applicability of the regulatory scheme pursuant to NRS 179D.410 based on the facts and circumstances presented here, consider any constitutional issues that are raised, and determine whether equity is appropriate and applicable to resolve any remaining issues regarding statutory enforcement after considering the "entirety of the circumstances that bear on the equities." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 63, 366 P.3d 1105, 1114 (2016). Accordingly, we

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

_____, C.J.
Gibbons

_____, J.
Bulla

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

My colleagues conclude that the district court "abused its discretion" by failing to make "findings" regarding whether Smith was required to register as a sex offender pursuant to NRS 179D.410 and 179D.490. But that question presents a pure question of law, so even if the district court had made any such "findings," we review this appeal de novo and we would give those findings no deference whatsoever, so I don't know why we need them. This isn't a case where the district court lazily dodged Smith's petition by denying it without any analysis or explanation—quite to the contrary, it granted the petition, which means that it concluded as a matter of law that the statutory registration requirements do not apply to Smith.

We can resolve whether the district court was correct or incorrect without the need for any findings. Smith was convicted in California of the crime of "sexual battery" as defined in Cal. Penal Code § 243.4. Had Smith lived in California, that conviction might or might not require him to register as a sex offender under California's registration law,

Cal. Penal Code § 290, but Smith moved to Nevada before § 290 became effective and lives here now. So the question before us is whether Smith must register under Nevada's registration statutes when the California crime of "sexual battery" appears to have no exact statutory counterpart in Nevada. There are actually two possible answers to this question.

Nevada's registration scheme requires anyone convicted of a "sexual offense" to register. "Sexual offense" is defined to include "[a]n offense committed in another jurisdiction that, if committed in this State, would be an offense listed in this [statute]." NRS 179D.410(18). So, broadly stated, the question is whether Smith's California conviction would also constitute a registrable crime under Nevada's criminal code. But that statute can actually be understood to mean two very different things: on one hand, it might be read to ask whether the California crime had the same legal elements as a registrable crime in Nevada regardless of the facts underlying the particular conviction; or, on the other hand, it could be read to ask whether the California conviction was based upon proven (or at least charged) facts that would constitute a registrable crime in Nevada had the exact same conduct occurred in Nevada. Those are two very different questions that could lead to two very different answers, and they depend upon very different things: to answer the first question we need only compare the criminal statute from the other state with the criminal statutes of Nevada, but to answer the second question we would need to dive at least somewhat into the record of the out-of-state conviction to determine whether the conduct at issue would factually constitute a crime in Nevada.

Because Nevada's sex offender registration law was stayed for a number of years and only recently became effective, the Nevada Supreme Court has not yet been presented with the opportunity to analyze and

explain which alternative interpretation is correct. Unfortunately, the parties to this appeal do not argue the point very well and cite no support for either interpretation (the State's brief simply assumes that the statute asks whether the California crime contains the same legal elements as a registrable Nevada crime). So we have little to work with to help us find the answer. Fortunately, in the case at hand we need not dive too deeply into the meaning of NRS 179D.410(18) because Smith's petition fails under either interpretation.

If NRS 179D.410(18) is understood to ask whether the California crime was based upon facts that would constitute a registrable crime in Nevada, then Smith's petition must be denied because he failed to give the district court those facts. His petition failed to include either the charging documents or judgment of conviction (or, for that matter, any other documents) associated with his California conviction, so we do not know what facts he was proven to have committed in California that supported his conviction. If that is the proper way to read NRS 179D.410(18), then without those facts we have no legal basis to grant his petition because Smith has not given us enough information to determine whether he meets Nevada's registration requirements or not. Because his petition was incomplete and failed to meet his initial burden of presenting a prima facie case for relief, it should have been denied.

Alternatively, if NRS 179D.410(18) is understood to ask simply whether the California crime for which Smith was convicted has the same legal elements as a registrable crime in Nevada, then Smith's petition must also be denied. This is a pure question of law that simply involves comparing the elements of the California crime with the elements of a similar registrable crime in Nevada. Cal. Penal Code § 243.4 defines

"sexual battery" as occurring when the defendant "touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice" and the touching is "against the will of the person touched and is for the purpose of sexual arousal, gratification, or abuse." These elements overlap with the elements of multiple registrable crimes in Nevada, including kidnapping (restraint of movement for the purpose of committing lewd act) as defined in NRS 200.310; "sexually motivated coercion" under NRS 207.190 and 207.193 (use of force to hinder a person's ability to resist for sexually motivated purpose); "open and gross lewdness" (committing lewd acts in view of others) as defined in NRS 201.210; and potentially (though perhaps less clearly) "battery with intent to commit sexual assault" as defined in NRS 220.400(4) and, if the victim is a minor, "lewdness with a child" as defined in NRS 201.230. Accordingly, if this is the proper way to read NRS 179D.410(18), then I would conclude that the California crime of which Smith was convicted meets the statutory definition of a "sexual offense" in Nevada for which Smith must register.

Either way, Smith must register. Smith nonetheless argues that he should not have to because his California conviction was "vacated" pursuant to Cal. Penal Code § 1203.4(a)(1). It's true that his conviction was "vacated" pursuant to that section, but under California law "dismissal under section 1203.4 is not understood to erase a defendant's conviction." *People v. Chavez*, 415 P.3d 707, 709 (Cal. 2018). "Penal Code section 1203.4 was never intended to obliterate the fact that [a] defendant has been finally adjudged guilty of a crime." *Danser v. Pub. Employees' Ret. Sys.*, 193 Cal.Rptr.3d 117, 124 (Ct. App. 2015). Rather, in California, "vacating" a conviction is a ministerial act that automatically occurs every time a defendant completes probation, and California courts have held that

convictions "vacated" under that statute remain valid and do not become legal nullities; it only means that the defendant no longer has to comply with certain conditions of probation including self-reporting his conviction in certain employment contexts. *See People v. Vasquez*, 25 P.3d 1090, 1093 (Cal. 2001); *People v. Tidwell*, 200 Cal.Rptr.3d 567, 570 (Ct. App. 2016); *Danser*, 193 Cal.Rptr.3d at 124. Indeed, "vacated" criminal convictions remain matters of public record and are publicly accessible. *See People v. Field*, 37 Cal.Rptr.2d 803 (Ct. App. 1995).

For all of these reasons, I would conclude that Smith's petition should have simply been denied and I would therefore reverse the judgment of the district court, with no need for any additional "findings" on remand.

Tao, J.

Tao

cc: Hon. James Todd Russell, District Judge
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