

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH TOBIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82647-COA

FILED

OCT 07 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER REVERSING, VACATING AND REMANDING

Keith Tobin appeals from an order of the district court denying a motion to modify and/or correct an illegal sentence filed on January 13, 2021. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

In his motion, Tobin claimed his sentence of 15 years to life in prison was improper because it exceeds the permissible sentence for sexual assault. Tobin notes his sentence would have been appropriate for sexual assault resulting in substantial bodily harm, but he neither was charged with nor pleaded guilty to sexual assault resulting in substantial bodily harm. A sentence “at variance with the controlling sentencing statute” is illegal. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (quotation marks omitted). “[T]he proper penalty is the penalty in effect at the time of the commission of the offense . . .” *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). At the time of Tobin’s offenses,¹ a defendant convicted of sexual assault resulting

¹Tobin committed the offenses on March 20, 2000. He pleaded guilty to burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, and sexual assault with the use of a deadly weapon. Tobin challenged only the sentence imposed for the underlying sexual assault conviction. Any amendment to this sentence would necessarily result in an

in substantial bodily harm was subject to imprisonment for a term of 15 to 40 years, 15 years to life, or for life without the possibility of parole. See 1999 Nev. Stat., ch. 105, § 23, at 431 (former NRS 200.366(2)(a)). A violation that did not result in substantial bodily harm was subject to imprisonment for a term of 10 to 25 years or 10 years to life. See *id.* (former NRS 200.366(2)(b)).

Tobin's charging document, his guilty plea agreement, and his judgment of conviction all refer only to NRS 200.366 without reference to any subsection of that statute. And neither any of those documents nor Tobin's guilty plea canvass referred to the sexual assault having resulted in substantial bodily harm. In light of these facts, Tobin was convicted of sexual assault that did not result in substantial bodily harm. Accordingly, his sentence is at variance with the controlling sentencing statute.

In response to an order of this court, the State argues that Tobin's sentence is not illegal because it is consistent with the sentence he bargained for. The State cites *Breault v. State*, 116 Nev. 311, 996 P.2d 888 (2000), in support of its argument. In *Breault*, the Nevada Supreme Court held that a defendant may knowingly and voluntarily agree to a sentence at variance with the 40 percent rule when the defendant expressly waives the defect impacting only parole eligibility. *Id.* at 314, 996 P.2d at 889. However, *Breault* is distinguishable because Tobin never expressly waived the defect. Therefore, we conclude the State's reliance on *Breault* is misplaced.

amendment to the attendant enhancement for use of a deadly weapon. See 1995 Nev. Stat., ch. 455, § 1, at 1431 (former NRS 193.165(1)) (providing for a sentence "equal to and in addition to the term of imprisonment prescribed by statute" for the substantive crime).

Because, the sentence imposed for Tobin's sexual assault conviction is facially illegal, we conclude the district court erred by denying Tobin's motion. We therefore vacate the judgment of conviction and remand for resentencing in accordance with 1999 Nev. Stat., ch. 105, § 23, at 431 (former NRS 200.366(2)(b)) and 1995 Nev. Stat., ch. 455, § 1, at 1431 (former NRS 193.165(1)). Accordingly, we

ORDER the judgment of the district court REVERSED, Vasquez's sentence for sexual assault with the use of a deadly weapon VACATED, and this matter REMANDED to the district court for a new sentencing hearing.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Erika D. Ballou, District Judge
Keith Tobin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk