IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE APPLICATION OF HUNG PHUC DUONG FOR AN ORDER TO SEAL RECORDS. HUNG PHUC DUONG, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39684 FILED AUG 20 2003 JANETTE M. BLOOM CLERK OF SUPREME COURT DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Hung Phuc Duong's petition to seal his criminal record pursuant to NRS 179.245.

The underlying conviction in this case is not disputed by the parties.[1] Appellant Duong was arrested in March 1985 for two counts of lewdness with a minor under the age of fourteen years (i.e., NRS 201.230).[2] On October 15, 1985, Duong waived his right to a jury trial and

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[1]Duong also argues the bench trial constituted pro forma negotiated pleadings. He contends that, had he known he would not be able to seal his criminal record based on amendments made to NRS 179.245, he would not have waived his right to a jury trial or his right to appeal the underlying conviction. In support of these contentions, Duong argues, if convicted for the same crime today, he would not be eligible for probation as NRS 201.230 now requires a mandatory term of confinement. We conclude Duong's arguments regarding these collateral matters are not relevant to his arguments pertaining to NRS 179.245 where he voluntarily waived certain rights during trial.

[2]At the time of Duong's conviction, violation of NRS 201.230 was a probational offense. Under the current version of NRS 201.230, a conviction for lewdness with a child under 14 years is a category A felony

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requested a bench trial. During trial, testimony was presented, including presentation of the five-year old victim.[3] On October 22, 1985, the district court found Duong guilty of one count of lewdness with a minor and not guilty of the second count. In exchange for the State's agreement to recommend probation, Duong waived his right to appeal.

On December 16, 1985, Duong was sentenced to a term of three years. The district court suspended the sentence and placed Duong on probation for a period not to exceed five years. Duong was honorably discharged from probation on November 30, 1990.

Fifteen years following the date of his conviction, Duong sought a stipulation from the district attorney's office to seal his criminal records pursuant to his understanding of NRS 179.245. Following unsuccessful attempts to obtain a stipulation, Duong became aware of amendments made to NRS 179.245 during the preceding fifteen years, particularly those made in 1997. Thereafter, Duong filed a petition to seal his criminal record. The State opposed the petition.

On March 11, 2002, without conducting a hearing, the district court summarily denied Duong's petition. On April 2, 2002, Duong filed a motion for reconsideration. The State opposed the motion. On April 29, 2002, again without a hearing, the district court denied the motion for reconsideration. This appeal followed.

. . . continued
punishable by imprisonment in the state prison for life with the possibility of parole after a minimum term of ten years. See NRS 201.230 (2002 R2).

[3]Based on the victim's age and the language barrier (i.e., the child was of Asian descent), the district court concluded the child would not be sworn.

First, Duong argues amendments made to NRS 179.245, particularly those made in 1997, were intended to be applied prospectively. Specifically, Duong argues there is no evidence suggesting the legislature intended 1997 amendments made to NRS 179.245 to apply retroactively.[4] Duong contends that, at the time of his 1985 conviction, he had the right and privilege to have his criminal record sealed.[5] In support of this argument, Duong notes the legislature, in amending other statutes, has included language, applying statutes retroactively, which it did not do with respect to NRS 179.245.

The State argues the district court did not err in refusing to seal Duong's criminal record where the legislature amended NRS 179.245 based on a compelling public interest in knowing the location and status of convicted sex offenders.

At the time of Duong's conviction, NRS 179.245 (1983) read:

> 1. A person who has been convicted of:
>
> (a) Any felony may, after 15 years from the date of his conviction or, if he is imprisoned, from the date of his release from actual custody;
>
> . . . .
>
> [P]etition the court in which the conviction was obtained for the sealing of all records relating to the conviction.

In 1997, the legislature significantly amended the language of NRS 179.245:

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[4]Citing Milliken v. Sloat, 1 Nev. 573 (1865); Prescott v. U.S., 523 F. Supp. 918 (D. Nev. 1981).

[5]Citing Baliotis v. Clark County, 102 Nev. 568, 729 P.2d 1338 (1986).

> 1. Except as otherwise provided in subsection 5 of NRS 453.3365, a person who has been convicted of:
>
> (a) Any felony may, after 15 years from the date of his conviction or, if he is imprisoned, from the date of his release from actual custody;
>
> . . . .
>
> [P]etition the court in which the conviction was obtained for the sealing of all records relating to the conviction.
>
> . . . .
>
> 5. A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense.
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> 6. As used in this section:
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> (a) "Crime against a child" has the meaning ascribed to it in NRS 179D.210.
>
> (b) "Sexual offense" has the meaning ascribed to it in NRS 179D.410.

Generally, statutory construction is a question of law which this court reviews de novo."[6] Statutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality.[7]

"A statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to

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[6]See Associated Bldrs. v. So. Nev. Water Auth., 115 Nev. 151, 156, 979 P.2d 224, 227 (1999); see also United States v. State Engineer, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

[7]Sheriff v. Vlasak, 111 Nev. 59, 61-62, 888 P.2d 441, 443 (1995) (quoting Wilmeth v. State, 96 Nev. 403, 405, 610 P.2d 735, 737 (1980) (citations omitted)).

transactions or considerations already past.""[8] Retroactive statutes raise special concerns because the "responsivity to political pressures poses a risk that [the legislature] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[9] Moreover, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[10] However, it is beyond dispute that, within constitutional limits, the legislature is free to enact laws with retrospective effect.[11]

"The general rule is that statutes are prospective only, unless it clearly, strongly, and imperatively appears from the act itself that the legislature intended the statute to be retrospective in its operation."[12] The first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether the legislature has directed with the requisite clarity that the law be applied retrospectively.[13] If the intent of the legislature to apply the statute retroactively is not clearly

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[8]I.N.S. v. St. Cyr, 533 U.S. 289, 321 (2001) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 269 (1994) (internal quotation omitted)). Accord Toia v. Fasano, ___ F.3d ___, ___, 2003 WL 21488264 at *3 (9th Cir. 2003).

[9]St. Cyr, 533 U.S. at 315 (citing Landgraf, 511 U.S. at 266).

[10]Id. at 316.

[11]Id.

[12]Matter of Estate of Thomas, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000) (citation omitted); see also St. Cyr, 533 U.S. at 316; McKellar v. McKellar, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994).

[13]St. Cyr, 533 U.S. at 316; see also Toia, 2003 WL 21488264 at *3.

expressed, the next consideration is whether application of the statute produces an impermissible retroactive effect.[14]

The U.S. Supreme Court has concluded that "the standard for finding [an] unambiguous direction [that a statute may be applied retroactively] is a demanding one."[15] Specifically, in order to be upheld, the statutory language providing for retroactive effect must be "'so clear that it could sustain only one interpretation.'"[16] Therefore, the Court has concluded that neither the comprehensiveness of an enactment, the promulgation of an effective date for a statute nor a savings provision, standing alone, can meet unambiguous and demanding standard for retroactive application.[17]

In the present case, Duong pleaded guilty to one count of lewdness with a child under the age of fourteen years pursuant to NRS 201.230. In 1997, pursuant to its authority to do so, the legislature enacted broad amendments to the sexual offender notification and registration statutes.[18] These amendments included NRS 179D.400, defining a sexual offender (emphasis added):

> 1. "Sex offender" means a person who, after July 1, 1956, is or has been:
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> (a) Convicted of a sexual offense listed in NRS 179D.410 . . .

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[14]St. Cyr, 533 U.S. at 320; Toia 2003 WL 21488264 at *3.

[15]St. Cyr, 533 U.S. at 316.

[16]Id. at 316-17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).

[17]Id. at 317-19.

[18]See NRS Chapter 179D et seq.

NRS 179D.410 defined a sexual offense to include the offense of lewdness with a child pursuant to NRS 201.230.[19] Therefore, we conclude the language of NRS 179D.400 "clearly, strongly, and imperatively"[20] provides for retroactive application precluding Duong from sealing his criminal record pursuant to NRS 179.245.[21] Because we conclude the language of the statute clearly provides for retroactive application, we need not consider whether the statute produces an impermissible retroactive effect.[22]

Lastly, Duong argues that, if retroactively applied, NRS 179.245, as amended, amounts to ex post facto legislation in violation of the United States and Nevada Constitutions.[23] In support of his argument, Duong states he maintained a clean criminal record for a period of fifteen years with the expectation of having the stigma associated with his conviction removed via sealing of his criminal record. In particular, Duong contends he has been unable to obtain work in certain industries and more secure employment as a result of his criminal record and asserts he has oftentimes had to take multiple jobs in order to meet his financial obligations. Thus, Duong argues application of the current version of NRS

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[19]See NRS 179D.410(13).

[20]Matter of Estate of Thomas, 116 Nev. at 495-96, 998 P.2d at 562.

[21]See NRS 179.245(5) and (7) (precluding the seal of a criminal record where the defendant has been convicted of a sexual offense as defined in NRS 179D.410).

[22]See St. Cyr, 533 U.S. at 320.

[23]U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art. 1, § 15 (Ex Post Facto Clause); Nev. Const. art. 1, § 8, cl. 5 (Due Process Clause).

179.245, which would extend those difficulties beyond the fifteen year period contemplated at the time of his conviction, is sufficiently punitive to render it ex post facto.

The United States Supreme Court has held that the ex post facto clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts."[24] A penal statute "is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited."[25] To determine whether a law is punitive or regulatory, courts look at the purpose of the statute.[26] Because we conclude the sealing provision encompassed in NRS 179.245 is civil in nature and designated to benefit, not punish, convicted offenders,

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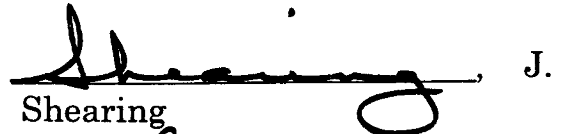
[24]Miller v. Warden, 112 Nev. 930, 933, 921 P.2d 882, 883 (1996) (internal citations omitted); see also Lynce v. Mathis, 519 U.S. 433, 441 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

[25]Ex parte Davis, 33 Nev. 309, 315, 110 P. 1131, 1134 (1910).

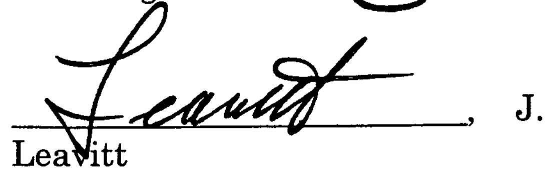
[26]Russell v. Gregoire, 124 F.3d 1079, 1083 (9th Cir. 1997) (in a case involving a § 1983 challenge against Kansas's community notification statute for violations of the ex post facto clause and due process).

retroactive application of the amended provisions of NRS 179.245 does not amount to ex post facto legislation.[27] Accordingly, we

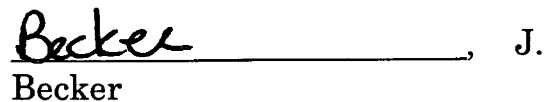
ORDER the judgment of the district court AFFIRMED.



Shearing, J.



Leavitt, J.



Becker, J.

cc: Hon. Ronald D. Parraguirre, District Judge
Alan R. Johns
Clark County District Attorney David J. Roger
Clark County Clerk

[27]Duong also conceded at oral argument that NRS 179.245 is not a penal statute.