IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS HENRY BLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41978

FILED

MAR 0 7 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

Appeal from a judgment of conviction, upon a jury verdict, of three counts of annoyance or molestation of a minor in violation of NRS 207.260(1)(a) (2001) Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Douglas Black appeals from a judgment of conviction of three counts of annoyance or molestation of a minor. The State charged appellant Douglas Black with three counts of open or gross lewdness, when he dropped his shorts to his ankles while standing on a sidewalk, exposing himself to three minors. The district court instructed the jury that annoyance or molestation of a minor is a lesser-included offense of open or gross lewdness. The jury found Black guilty of three counts of annoyance or molestation of a minor.

Black appeals, arguing that NRS 207.260 (2001) is unconstitutionally vague and that the district court abused its discretion when it instructed the jury concerning NRS 207.260 (1995), and when it instructed the jury that annoyance or molestation of a minor is a lesser-included offense of open or gross lewdness. We conclude that NRS 207.260 (2001) is unconstitutionally vague and reverse Black's convictions.

05-04391

DISCUSSION

Black argues that NRS 207.260, as amended in 2001, was unconstitutionally vague and, therefore, his conviction violated his due process rights. Black points to the recent legislative changes to NRS 207.260 and to this court's decision in City of Las Vegas v. Dist. Ct.[1]

In City of Las Vegas, we concluded that the 1995 version of NRS 207.260 was facially void for vagueness.[2] NRS 207.260 (1995) provided, in part, that "[a] person who annoys or molests a minor is guilty of a misdemeanor." A statute is subject to a facial attack when it "is so unclear that vagueness pervades the law's content . . . ."[3] Therefore, a statute is facially invalid where it is "'impermissibly vague in all of its applications.'"[4] In City of Las Vegas, this court stated:

> The language of [NRS 207.260 (1995)] does not specify what type of annoying behavior is prohibited, nor does it define the term "molest." By its terms, the statute is not limited only to annoyances of a sexual nature, and it provides no indication of whether the perpetrator must subjectively intend to annoy the minor, or if mere unintentional, bothersome conduct, in and of itself, is sufficient to subject an individual to criminal sanctions.

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[1]118 Nev. 859, 59 P.3d 477 (2002).

[2]Id. at 867, 59 P.3d at 483.

[3]Matter of T.R., 119 Nev. 646, 652, 80 P.3d 1276, 1280 (2003) (citing City of Las Vegas, 118 Nev. at 862, 59 P.3d at 479)).

[4]Id. (quoting Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982)).

> The plain meaning of the terms of NRS 207.260 [(1995)] provide little additional guidance. The term "annoy" is commonly defined as "to disturb or irritate [especially] by repeated acts." The term "molest" is a synonym for the term "annoy" and literally means "to annoy, disturb, or persecute [especially] with hostile intent or injurious effect."[5]

In City of Las Vegas, we also examined the United States Supreme Court case of Coates v. City of Cincinnati,[6] which considered the use of the term "annoying" in a statute making it "unlawful for three or more people to assemble on a sidewalk and 'conduct themselves in a manner annoying to persons passing by.'"[7] In concluding that the term "annoying" was unconstitutionally vague, we followed Coates' reasoning:

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'"[8]

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[5]City of Las Vegas, 118 Nev. at 865, 59 P.3d at 481 (quoting Merriam Webster's Collegiate Dictionary 47, 749 (10th ed. 1997)).

[6]402 U.S. 611 (1971).

[7]City of Las Vegas, 118 Nev. at 865, 59 P.3d at 481 (quoting Coates, 402 U.S. at 611 n.1).

[8]Id. at 865, 59 P.3d at 482 (quoting Coates, 402 U.S. at 614 (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926))).

We therefore concluded that the term "annoying" in NRS 207.260 (1995) "does not provide fair notice because the citizens of Nevada must guess when conduct that bothers, disturbs, irritates or harasses a minor rises to the level of criminal conduct."[9] Accordingly, we concluded that NRS 207.260 (1995) was facially void for vagueness[10] because it "(1) failed to provide the citizens of our state with fair notice of the prohibited conduct; and (2) authorized and encouraged arbitrary enforcement."[11]

Black was charged under the 2001 version of NRS 207.260, which this court has not yet examined. In 2001,[12] the Legislature amended NRS 207.260 to provide:

> 1 Unless a greater penalty is provided by specific statute, a person who annoys or molests or attempts to annoy or molest a minor, including, without limitation, soliciting a minor to engage in unlawful sexual conduct, is guilty of:
>
> (a) For the first offense, a misdemeanor. (emphasis added).[13]

Black highlights that the only change in the NRS 207.260 from 1995 to 2001 was the Legislature's inclusion of one example of annoyance or molestation of a minor, i.e., "soliciting a minor to engage in

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[9]Id.

[10]Id. at 867, 59 P.3d at 483.

[11]Id. at 864, 59 P.3d at 481.

[12]While this court decided City of Las Vegas after the Legislature amended NRS 207.260 in 2001, because the City charged the defendant in 2000, the 1995 version of the statute was controlling.

[13]2001 Nev. Stat., ch. 560, § 10, at 2789 (amended 2003).

unlawful sexual conduct."[14] The State did not allege that Black solicited a minor to engage in unlawful sexual conduct.

Black contends that the Legislature's amendment of NRS 207.260 in 2001 did not cure the vagueness problem that this court addressed in City of Las Vegas, and that his conviction under the amended statute violated his due process rights. [15]

"The Due Process Clauses of the United States and Nevada Constitutions guarantee that every citizen shall receive fair notice of conduct that is forbidden."[16] This court previously recognized that fair notice guarantees "that citizens will not have to speculate about the meaning of a particular law, and will therefore have the ability to conform their conduct to that law."[17] The citizenry must know the "boundaries of unlawful conduct" and what behavior is permissible.[18]

We conclude that the Legislature's amendment in 2001 did not cure the general vagueness problem we identified with respect to NRS 207.260 (1995). Indeed, NRS 207.260 (2001) suffered from the same flaw

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[14]Id.

[15]In 2003, after this court's decision in City of Las Vegas, the Legislature again amended NRS 207.260, this time eliminating the "annoys or molests" language. 2003 Nev. Stat., ch. 261, § 3, at 1377; NRS 207.260(1) & (2).

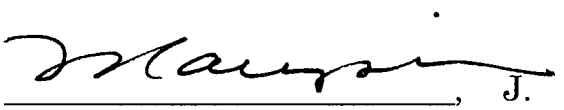
[16]City of Las Vegas, 118 Nev. at 864, 59 P.3d at 481; see U.S. Const. amend XIV; Nev. Const. art. 1, § 8.

[17]Id. (citing Chicago v. Morales, 527 U.S. 41, 58-59 (1999) (plurality opinion)).

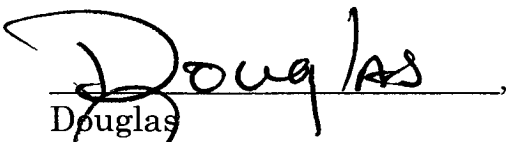
[18]Id.

as the unconstitutionally vague 1995 version of NRS 207.260. This flaw was the inclusion of the term "annoying." In City of Las Vegas, we were explicit in our conclusion that the term "annoying" failed to provide fair notice. Although the Legislature amended NRS 207.260 in 2001 to enumerate one circumstance in which a person could be found guilty of annoying or molesting a minor, we conclude that this addition did not clarify the term "annoying" as it relates to actions other than solicitation of a minor to engage in unlawful sexual conduct. As such, the term still fails to provide fair notice of what behavior was permitted. Therefore, we hold that NRS 207.260 (2001) was void for vagueness as it relates to conduct beyond that added to the statute in 2001. Accordingly, Black's convictions under the statute were unconstitutional, and we

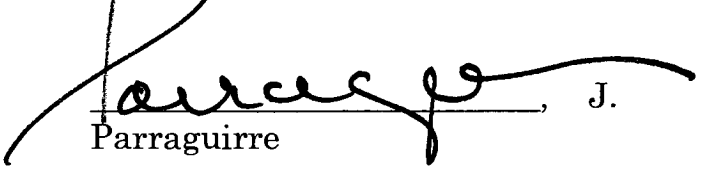
ORDER the judgment of the district court REVERSED.[19]



_____, J.
Maupin



_____, J.
Douglas



_____, J.
Parraguirre

[19]Because we reverse Black's convictions and conclude that NRS 207.260 (2001) is unconstitutionally vague, Black's remaining claims on appeal are moot.

cc: Hon. Robert W. Lane, District Judge
Michael P. Printy
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk