

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE W. CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42317

FILED

APR 20 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Joe W. Cunningham's motion to "request to clarify/impose conditions of lifetime supervision applicable at the time of commission of defendant's crime." Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On April 30, 1997, the district court convicted Cunningham, pursuant to a guilty plea, of open or gross lewdness (count I), attempted sexual assault (count II), and child abuse resulting in substantial mental injury (count III). The acts charged in count I were committed between July and August 1993, and the acts charged in counts II and III were committed between September 1995 and April 1996. Cunningham was sentenced to 12 months in the Nevada State Prison for count I and two terms of 24 to 120 months for counts II and III. The district court further ordered count II to run consecutively to count I and count III to run consecutively to count II. Finally, the district court suspended the

sentences in counts II and III and imposed lifetime supervision under certain specified conditions.

The district court subsequently amended the judgment of conviction twice. In the second amended judgment of conviction, the district court placed Cunningham on probation for a period not to exceed five years, after which he would be subject to lifetime supervision. After Cunningham's discharge from probation, he signed an agreement on May 13, 2003, listing the conditions of his lifetime supervision. Subsequently, he filed a motion to "request to clarify/impose conditions of lifetime supervision applicable at the time of commission of defendant's crime." The district court denied Cunningham's motion. This appeal followed.

During a hearing on his motion, Cunningham conceded that he was subject to lifetime supervision but argued that four conditions violated the ex post facto clause because they were enacted into law after he committed his crimes. In his motion, Cunningham further conceded that seventeen of the twenty-one conditions listed in his lifetime supervision agreement were appropriate. On appeal he appears to expand his claim by arguing that all of the conditions in the lifetime supervision agreement implicate the ex post facto clause. However, Cunningham's appeal is limited to those matters he presented to the district court.¹

¹See Gibbons v. Martin, 91 Nev. 269, 270, 534 P.2d 915, 915 (1975) ("Points not urged in the trial court will not be entertained for the first time on appeal.").

Cunningham asserts that the following conditions of his lifetime supervision agreement violate the ex post facto clause: that he submit to periodic polygraph examinations, as required by his supervising officer (condition 14); that he have no contact with persons under 18 years of age in a secluded environment unless an adult who has not been convicted of a sexual offense is present (condition 18); that he not be in or near playgrounds, schools, movie theaters, or businesses that primarily cater to children (condition 19); and that he comply with the conditions listed in NRS 176A.410 (condition 21).

Ex post facto laws are those that "inflict greater punishment than that affixed when the offense was committed."² Therefore, a legislative act that increases the sentence to be given to an offender for a crime committed before the law was passed would be ex post facto and constitutionally prohibited.³

Lifetime supervision is a mandatory special sentence imposed on offenders who committed sexual offenses on or after October 1, 1995.⁴ Here, Cunningham committed an attempted sexual assault between December 1995 and April 1996. Attempted sexual assault falls within the

²See Goldsworthy v. Hannifin, 86 Nev. 252, 255, 468 P.2d 350, 352 (1970).

³Id.

⁴See 1995 Nev. Stat., ch. 256, § 4, at 414; 1995 Nev. Stat., ch. 256, § 14, at 418.

definition of sexual offenses requiring lifetime supervision.⁵ Therefore, Cunningham was subject to lifetime supervision, and in fact he did not dispute below that he was subject to lifetime supervision. Furthermore, he conceded that conditions 1 through 13, 15 through 17, and 20 of the agreement were appropriate.

Cunningham does not explain what law or statute "enacted" conditions 14, 18, and 19 after the commission of his offenses. Moreover, he provides no authority that prohibited the imposition of these conditions when he committed his crimes.⁶ Accordingly, we conclude that Cunningham's claim in this regard is without merit.

Cunningham's challenge to condition 21, however, appears to involve NRS 176A.410. This statute became effective on July 1, 1997, and imposes mandatory terms and conditions for offenders convicted of sexual offenses to whom the district court granted probation or imposed a suspended sentence.⁷ However, NRS 176A.410 merely made the enumerated conditions mandatory for offenses committed after the effective date. Cunningham has cited no authority precluding the imposition of these conditions on offenders prior to the effective date of

⁵See NRS 176.0931(5)(b)(2).


⁶Some of the acts alleged in the attempted sexual assault charge (count II) were committed after NRS 176.0931 became effective. Attempted sexual assault is an offense for which lifetime supervision must be imposed.

⁷See 1997 Nev. Stat., ch. 451, § 83, at 1667-68.

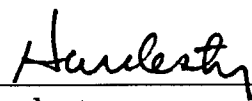
NRS 176A.410, who committed their crimes prior to July 1, 1997. Moreover, many of the supervision conditions to which Cunningham did not object in the district court are substantially similar to most of the conditions set forth in NRS 176A.410. Consequently, we conclude that Cunningham's argument in this regard is without merit.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Lee A. Gates, District Judge
Patricia Erickson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk