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SENATE COMMITTEE ON JUDICIARY



WORK SESSION DOCUMENT

FEBRUARY 21, 2003

EXHIBIT C Senate Committee on Judiciary

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WORK SESSION DOCUMENT

SENATE COMMITTEE ON JUDICIARY

FEBRUARY 21, 2003

The following measures may be considered for action during the work session:

- SENATE BILL 43 (BDR 4-378 was requested by Senator Care).

This bill adopts the Uniform Child Witness Testimony by Alternative Methods Act.

Committee Action: The bill was heard in Committee on February 11, 2003, and no action was taken.

Proponents: Frank Daykin; Bob Teuton, Clark County DA; Victoria Riley, Nevada Trial Lawyers Association; and, Maddie Shipman Washoe County DA.

Opponents: None.

Discussion: This bill enacts the Uniform Child Witness Testimony by Alternative Methods Act as recommended by the Uniform Law Commissioners, National Conference of Commissioners on Uniform State Laws. The Act establishes procedures in taking the testimony of children in criminal or civil proceedings and permits a child, for good cause, to testify outside the courtroom and the presence of a defendant.

At the hearing, Maddie Shipman requested one week to review the bill with the public defender to address any possible concerns. Howard Brooks did not testify, but stated he would work with the sponsors on any concerns.

Proposed Amendments: None.

- SENATE BILL 73 (BDR 1-934 was requested by the Senate Committee on Judiciary).

This bill makes various changes regarding service on juries and compensation received for jury duty.

Committee Action: The bill was heard in Committee on February 14, 2003, and no action was taken.

Proponents: Justice Gibbons and Justice Rose, Nevada Supreme Court; Dan Musgrove, Clark County.

Opponents: None.

Discussion: Testimony indicated that this bill attempts to make jury service easier, and eliminates some of the administrative impact on the courts of having to issue small checks for mileage. The bill instead proposes to raise the jury service fee for those who travel greater distances, and attempts to make the bill's fiscal impact neutral. At the hearing, some concern was raised as to the impact on those serving on juries in the rural counties.

Proposed Amendments:

1. The Senate Committee on Judiciary may wish to consider language to amend page 3 line 29 of the bill to read "or serving as a juror is ~~65~~ _____ miles or more from the place of trial."

Note: If the Committee adopts the above amendment, the Committee may also wish to amend page 3 line 31 to revert back to the previous language "is 60 ~~65~~ miles or more..."

2. Legal Counsel also suggested amendatory language concerning the unfunded mandate. NRS 354.599 attempts to address the issue of unfunded mandates to local governments by requiring the Legislature to identify a source of revenue when a bill requires a local governmental entity to establish, provide or increase a program or service such that the entity will incur an expense of \$5,000 or more. Unless the Legislature specifically identifies such a source of revenue, in each bill draft that requires a local government to incur a definite and identifiable expense of \$5,000 or more to establish a program or provide a service, or to increase a program or service, the "unfunded mandate clause" must be included in the bill to indicate that NRS 354.599 does not apply. This amendment proposes to add:

Sec. 4. The provisions of subsection 1 of NRS 354.599 do not apply to any additional expenses of a local government that are related to the provisions of this act.

- **SENATE BILL 91** (BDR 15-319 was requested by the Senate Committee on Judiciary on behalf of the Nevada Sheriff's and Chief's Association).

This bill removes the element of knowledge from the crime of selling, giving or furnishing alcoholic beverage to a person under 21 years of age.

Committee Action: The bill was heard in Committee on February 19, 2003, and no action was taken.

Proponents: Stan Olsen, Las Vegas Metropolitan Police, Nevada Sheriff's and Chief's Association; Sergeant Roshak, Las Vegas Metro; Jeffery Krump, Legislative Intern, Kathy Bartone, Juvenile Justice; Laurel Stadler, MADD.

Opponents/Neutral: Alfredo Alonso, Nevada Resort Association; Mary Lau, Retail Association; Lucille Lusk, Nevada Concerned Citizens.

Additional concerns submitted to staff: Rocky Finseth, Nevada Hotel and Lodging Association, sent staff an E-mail voicing concern and opposition to the bill.

Discussion: Testimony indicated that this case was brought forward as a result of a Nevada Supreme Court case (Garcia v. District Court) (copy attached as **TAB A**) where the court ruled that because NRS 202.055 includes knowledge as an element of the crime for a person to be convicted under the statute there must be proof that the person charged had actual or constructive knowledge of the person's age.

Those testifying with concerns on the bill were troubled by the potential for strict liability. The Chairman directed those with concerns to work with staff for a potential amendment.

Proposed Amendments:

1. Stan Olsen submitted the amendment attached as **TAB B**, which provides a defense to the action if the person charged was shown an identification showing the person was of the age of majority.
2. Lucille Lusk suggested amendatory language of "known or should have known."

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Supreme Court of Nevada.

Brandee GARCIA, Misty Noel Herrera, Pam Munk,
Donald Stephens, and
Darrell R. Carden, Petitioners,

v.

The SIXTH JUDICIAL DISTRICT COURT of the
State of Nevada, In and For the COUNTY
OF PERSHING, and the Honorable Jerry V.

Sullivan, District Judge, Respondents,
and

The State of Nevada, Real Party in Interest.

No. 37472.

Sept. 12, 2001.

Defendant was convicted in the Township Justice Court of knowingly selling alcohol to person under 21. The other defendants were convicted in the Municipal Court of the same offense. All of the defendants appealed. The District Court affirmed, and defendants petitioned for writ of certiorari. The Supreme Court held that actual or constructive knowledge of purchaser's age is required element of the statute prohibiting person from knowingly selling alcohol to purchaser under the age of 21.

Petition for writ of certiorari granted.

West Headnotes

[1] Intoxicating Liquors ⇨159(2)
223k159(2) Most Cited Cases

Actual or constructive knowledge of purchaser's age is required element of the statute prohibiting person from knowingly selling alcohol to purchaser under the age of 21. N.R.S. 202.055

[2] Criminal Law ⇨1011
110k1011 Most Cited Cases

Writ of certiorari is extraordinary remedy that lies entirely within discretion of Supreme Court.

[3] Criminal Law ⇨1011
110k1011 Most Cited Cases

Certiorari is appropriate only when inferior tribunal

has exceeded its jurisdiction and there is no plain, speedy, and adequate remedy at law.

[4] Courts ⇨207.1
106k207.1 Most Cited Cases

Because violation of statute prohibiting sale of alcohol to person under 21 was a misdemeanor, judgments of conviction of the justice and municipal courts were only appealable to District Court and the District Court's decision in these matters was final, and accordingly, the only manner by which Supreme Court could review challenges to constitutionality of, or clarify the elements of, statute was by a writ of certiorari petition, and because mental state required under statute was of sufficient statewide interest, Supreme Court would elect to exercise its extraordinary writ powers. N.R.S. 202.055

[5] Criminal Law ⇨20
110k20 Most Cited Cases

When the intent requirement is supplied in statute, in order to sustain conviction, that intent must be proven as to each element of the crime.

[6] Intoxicating Liquors ⇨159(2)
223k159(2) Most Cited Cases

Unlike other age specific statutes, such as those proscribing sale of tobacco to persons under 18, defendant's state of mind (knowingly) was expressly included in statute prohibiting person from knowingly selling alcohol to purchaser under 21, thus requiring defendant's knowledge of each element to be proven, and as a result, state must prove that defendant had actual or constructive knowledge of all elements of the statute, including purchaser's age, in order to sustain conviction. N.R.S. 193.017, 202.055

[7] Intoxicating Liquors ⇨159(2)
223k159(2) Most Cited Cases

Statute prohibiting person from knowingly selling alcohol to purchaser under 21 is not strict liability offense. N.R.S. 202.055

[8] Intoxicating Liquors ⇨236(15)
223k236(15) Most Cited Cases

Circumstances did not support conclusion that

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defendants either knew or had reason to know that purchaser was under 21 years old, and thus, evidence was not sufficient to support defendants' convictions for knowingly selling alcohol to person under 21; purchaser looked substantially older than 21 years of age, had full beard, wore hat, and perhaps even sunglasses when he bought alcohol, purchaser was expressly selected for sting operation because he appeared older than 21, and all of defendants testified that purchaser looked 24 to 27 years old. N.R.S. 202.055

*1111 Steve E. Evenson, Lovelock, for Petitioners.

Frankie Sue Del Papa, Attorney General, Carson City; Belinda B. Quilici, District Attorney, and Jim C. Shirley, Deputy District Attorney, Pershing County, for Real Party in Interest.

Before the Court En Banc.

OPINION

PER CURIAM:

[1] We are asked today to interpret NRS 202.055, which proscribes the sale of alcohol to those who are under twenty-one years of age, to determine whether the phrase "knowingly ... [s]ells ... an alcoholic beverage to any person under 21 years of age" requires proof of either actual or constructive knowledge of the purchaser's age. We conclude that actual or constructive knowledge of the purchaser's age is a required element of the statute; hence, because there is insufficient evidence of petitioners' knowledge of the purchaser's age, we grant the petition for a writ of certiorari and order the district court to vacate petitioners' convictions.

FACTS

In May 2000, the Pershing County Sheriff's Department conducted a sting operation at various establishments in the Lovelock area in order to crack down on the sale of alcohol to persons under the age of twenty-one and to ensure establishments were checking for identification before selling alcohol. John Casey Christensen, who was twenty years and six months old at the time, contacted the Sheriff's Department to act as the decoy in the sting operation and went into various establishments and bought alcohol from petitioners. In all cases,

petitioners did not ask Christensen for identification, and each stated that Christensen appeared to be between twenty-four and twenty-seven years old. Petitioners were each charged with violation of NRS 202.055. Petitioners Brandee Garcia, Misty Noel Herrera, Pam Munk and Donald Stephens were tried in the Lovelock Municipal Court, while petitioner Darrell R. Carden was tried in the Lake Township Justice Court.

Christensen testified at each of the proceedings that he was wearing a hat and had a goatee, resembling a full beard, when he purchased the alcohol, [FN1] and that many people told him he looked older than twenty-one years with his goatee. He also testified that on previous occasions he had spoken with members of the Sheriff's Department about the fact that he looked older than twenty-one years old, which indicated to them that it was unlikely persons selling alcohol would ask for his identification. At the trial, however, Christensen was clean-shaven.

FN1. There was also testimony that Christensen may have been wearing sunglasses when he bought alcohol from some of the petitioners.

Officer Kelsey testified at each of the proceedings that he had assumed that under NRS 202.055 checking identification was required before a person sold alcohol to another. Kelsey further stated that under the facts, there was no evidence that any of the petitioners knew Christensen was under twenty-one, only that, in his opinion, they may have been negligent in failing to check for identification.

The Lake Township Justice Court, in Carden's trial, concluded that because Carden failed to check Christensen's identification, he had violated NRS 202.055. That court further concluded:

[There is n]o excuse for the licensee, employee, dealer or other person to plead that he believed the person to be twenty-one years or over and I think I'm gonna tell you particularly in this particular instance ... it's incumbent upon the proprietor ... to make sure that the people that are in the establishment are at least twenty-one years old.

The Lovelock Municipal Court, at the other

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petitioners' trial, also concluded that petitioners had violated NRS 202.055 by failing to check identification and suggested that selling alcohol to a person under twenty-one years was a strict liability offense. The court concluded:

You do not have to know the individual you are selling to, [the statute] doesn't say *1112 anything about that, *you don't have to know what their age is*, if there is any question in your mind, you have to check them. It just doesn't sound realistic to me, like I said before, that you have to know the individual and that you have to know the age and then if you sell to them, you are guilty. It doesn't make sense to me You got careless, as many of us do, and you didn't check an individual. (Emphasis added.)

Petitioners then appealed to the district court, alleging that because the State failed to produce sufficient evidence that they knowingly sold alcohol to a person under twenty-one years, their convictions should be reversed. The district court issued an order affirming the judgment of the justice and municipal courts, concluding that "the word 'knowingly' is an indication that this is not a strict liability statute." The district court also concluded that "[w]hat a Defendant does or fails to do may indicate knowledge/intent or lack thereof to commit the offense charged." Despite this, the district court affirmed the judgments of conviction, stating that "the triers of fact ... are the judges of whether there was knowledge/intent. It would be wrong for this Court to substitute its decision regarding knowledge and/or intent in this case." Petitioners filed a petition for a writ of certiorari in this court, challenging their convictions.

DISCUSSION

[2][3][4] A writ of certiorari is an extraordinary remedy that lies entirely within the discretion of this court. [FN2] Certiorari is appropriate only when an inferior tribunal has exceeded its jurisdiction and there is no plain, speedy and adequate remedy at law. [FN3] Because violation of NRS 202.055 is a misdemeanor, the judgments of conviction of the justice and municipal courts are only appealable to the district court, and the district court's decision in that matter is final. [FN4] Accordingly, the only manner by which this court could review challenges to the constitutionality of or clarify the elements of NRS 202.055 is by a writ petition. [FN5] Because the determination of the elements of NRS 202.055

and the mental state required is of sufficient statewide interest, we elect to exercise our extraordinary writ powers in this case. [FN6]

FN2. NRS 34.020; *see Zamarripa v. District Court*, 103 Nev. 638, 640, 747 P.2d 1386, 1387 (1987).

FN3. NRS 34.020(2).

FN4. Nev. Const. art. 6, § 6; *see also Braham v. District Court*, 103 Nev. 644, 645-46, 747 P.2d 1390, 1391 (1987).

FN5. *See Zamarripa*, 103 Nev. at 640, 747 P.2d at 1387.

FN6. *See State of Nevada v. Dist. Ct.*, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000).

[5] NRS 202.055 criminalizes the sale of alcohol to a person under the age of twenty-one years, stating:

1. Every person who knowingly:

- (a) Sells, gives or otherwise furnishes an alcoholic beverage to any person under 21 years of age;
- (b) Leaves or deposits any alcoholic beverage in any place with the intent that it will be procured by any person under 21 years of age; or
- (c) Furnishes, gives, or causes to be given any money or thing of value to any person under 21 years of age with the knowledge that the money or thing of value is to be used by the person under 21 years of age to purchase or procure any alcoholic beverage, is guilty of a misdemeanor.

When an intent requirement is supplied in the statute, in order to sustain a conviction, that intent must be proven as to each element of the crime. [FN7]

FN7. *See State of Nevada v. District Court*, 108 Nev. 1030, 1032- 33, 842 P.2d 733, 735 (1992); *see also Harris v. State*, 83 Nev. 404, 407, 432 P.2d 929, 931 (1967); *see State v. Valdez*, 933 P.2d 400, 401- 02 (Utah Ct.App.1997).

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NRS 193.017 defines knowingly as "knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness." NRS 193.017 also states that this knowledge "may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry"--otherwise known *1113 as constructive knowledge. Moreover, in *State v. Rhodig*, we stated that constructive knowledge fulfills a statutory requirement that an act be done "knowingly," stating that "[s]tate of mind need not be proved by positive or direct evidence, but may be inferred from conduct and the facts and circumstances disclosed by the evidence." [FN8]

FN8. 101 Nev. 608, 611, 707 P.2d 549, 551 (1985).

[6][7] Unlike other age-specific statutes, such as those proscribing the sale of tobacco to persons under eighteen years of age, [FN9] a defendant's state of mind ("knowingly") has expressly been included in NRS 202.055, thus requiring a defendant's knowledge of each element to be proven. As a result, under the definition of "knowingly" in NRS 193.017, the State must prove that the defendant had actual or constructive knowledge of all elements of the statute--including the purchaser's age--in order to sustain a conviction. [FN10] NRS 202.055 is not a strict liability offense, and the municipal and justice courts applied an incorrect standard in so concluding.

FN9. NRS 202.2493(2) (sale of tobacco to persons under eighteen); NRS 200.366-.368 (statutory sexual seduction); NRS 463.350 (presence of persons under twenty-one years in gaming institutions).

FN10. See *Valdez*, 933 P.2d at 401-02; but see *Com. v. Montalvo*, 50 Mass.App.Ct. 85, 735 N.E.2d 391, 393-94 (2000).

Other state statutes with similar language as that in NRS 202.055 have been interpreted to mean that the age of the purchaser is an element of the

offense; thus, because "knowingly" was included in the statute, the defendant must have actual or constructive knowledge of the purchaser's age in order to sustain a conviction. [FN11] In *State v. Lelchook*, the Iowa Supreme Court stated that because the statute contained the word "knowingly," the State must prove the defendant knew or had reason to believe the purchaser was under twenty-one years of age. [FN12] Thus, the issue becomes a jury question of the sufficiency of the evidence where "[t]he jury is then free to consider its own perception as to the minor's appearance or to believe the defendant's testimony as to why defendant thought the purchaser was not a minor." [FN13]

FN11. Ark.Code Ann. § 3-3-202(a) (Michie 1996); Ga.Code Ann. § 3-3-23(a)(1) (Harrison 1998); Iowa Code Ann. § 123.47 (West 1997 & Supp.2001); Me.Rev.Stat. Ann. tit. 28-A, § 2081 (West 1988 & Supp.2000); Mich. Comp. Laws Ann. § 436.1701(1) (West Supp.2001); N.M. Stat. Ann. § 60-7B-1 (Michie 1998); N.D. Cent.Code § 5-01-09 (1999); Okla. Stat. Ann. tit. 37, § 537(A) (West 1999); 18 Pa. Cons.Stat. Ann. § 6310.1(a) (West 2000); Tenn.Code Ann. § 57-3-406(d), 57-3-301(a)(1) (1989 & Supp.2000); Utah Code Ann. § 32A-12-203 (1999); Va.Code Ann. § 4.1-304 (Michie 1999).

FN12. 186 N.W.2d 655, 656-57 (Iowa 1971).

FN13. *Id.* at 657 (citing *State v. Straw*, 185 N.W.2d 812 (Iowa 1971)); see, e.g., *State v. Jarvis*, 244 Ark. 753, 427 S.W.2d 531 (1968); *State v. De Villiers*, 633 P.2d 756 (Okla.Crim.App.1981); *Commonwealth v. Sheibley*, 13 Pa. D. & C.4th 309 (1992); *Dinh v. State*, 695 S.W.2d 797 (Tex.Cr.App.1985).

Having determined that NRS 202.055 requires proof that petitioners knew or had reason to know the purchaser was under twenty-one years of age, we must then look to whether sufficient evidence

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was adduced at trial to indicate such knowledge. [FN14] In light of the municipal and justice courts' express statements that they based petitioners' convictions on their belief that NRS 202.055 did not require knowledge of age and that checking identification was required, we conclude that the incorrect standard was used and sufficient evidence does not support the convictions.

FN14. *Slobodian v. State*, 107 Nev. 145, 147-48, 808 P.2d 2, 3-4 (1991) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *Azbill v. State*, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972).

[8] The record reveals that Christensen looked substantially older than twenty-one years of age, had a full beard, wore a hat and perhaps even sunglasses when he bought the alcohol. In fact, testimony indicates that he was expressly selected because he appeared older than twenty-one, and all of the petitioners testified that he looked twenty-four to twenty-seven years old. Thus, because NRS 202.055 does not require asking for identification before selling alcohol, [FN15] we conclude that the surrounding circumstances do not support the conclusion that petitioners either *1114 knew or had reason to know Christensen was under twenty-one years of age. We therefore grant the petition for a writ of certiorari and order the district court to vacate its orders affirming petitioners' convictions and to enter orders reversing those convictions.

FN15. *Cf.* NRS 202.2493.

CONCLUSION

In light of the inclusion of the word "knowingly" in the statute, we conclude that the State must prove that the defendant had actual or constructive knowledge of a purchaser's age in order to sustain a conviction under NRS 202.055 for selling alcohol to a person under twenty-one. Accordingly, we grant the petition for a writ of certiorari. The clerk of this court shall issue the writ, directing the district court to vacate its orders affirming petitioners' convictions and to enter orders reversing

the convictions. [FN16]

FN16. The Honorable Cliff Young, Justice, voluntarily recused himself from participation in the decision of this matter.

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END OF DOCUMENT

Bill # S.B. 91

Committee on Judiciary

Requested amendment submitted by Stan Olsen and Bob Roshak on behalf of the Nevada Sheriffs and Chiefs Association.

Change Section 1, Subsection 3 to read as follows:

In any criminal prosecution or proceeding for the violation of sale of alcohol to minors or for the suspension or revocation of any license based on the sale of alcohol to minors, proof that the defendant licensee or his agent or employee demanded and was shown immediately prior to furnishing an alcoholic liquor to a person under the age of twenty-one a document of majority and identity of such person issued by a federal, state, county or municipal government is a defense to the criminal prosecution of the agent or employee or proceeding for the suspension or revocation of any license.

Change current Section 1, Subsection 3 to subsection 4.