

***Johnson v. State*, 123 Nev. Adv. Op. No. 17 (June 14, 2007)<sup>1</sup>**

**CRIMINAL – ATTEMPTS TO UNLAWFULLY COMMUNICATE WITH A CHILD UNDER AGE 16**

**Summary**

Appellant Jeffrey Lee Johnson communicated via the Internet with several undercover law enforcement officers who he thought were 14-year-old girls. Based on the nature of the conversations, Johnson was charged under the attempt provision of NRS 201.560.<sup>2</sup> Johnson pleaded guilty to one count of violating NRS 201.560 and failed to file a direct appeal.

Johnson filed a post-conviction petition for a writ of habeas corpus in the district court, claiming ineffective assistance of counsel. Johnson argued that his counsel was ineffective for not arguing that it was impossible for Johnson to violate the attempt provision of NRS 201.560 because no actual child was ever involved in the communications. Johnson also claimed ineffective assistance of counsel for allowing him to plead guilty with the availability of the aforementioned argument and that his counsel inadequately advised him regarding the consequences of lifetime supervision. The district court denied Johnson's post-conviction habeas corpus petition, holding that an individual can violate the attempt provision of NRS 201.560 without the involvement of an actual child.

Johnson appealed and the Supreme Court of Nevada affirmed the district court's dismissal ruling that a violation of the attempt provision of NRS 201.560 occurs when the individual intends to communicate with a child. The Nevada Supreme Court also ruled that Johnson's counsel properly advised him regarding his guilty plea because the specific conditions of lifetime supervision are not determined at the time of sentencing.

**Issue and Disposition**

**Issues**

1. Under NRS 201.560, does an individual violate the attempt provision when he or she intends to communicate with a child, but does not actually communicate with a child?
2. Must an attorney advise a client regarding the specific consequences of lifetime supervision prior to the client's guilty plea?

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<sup>2</sup> NRS 201.560 provides, in pertinent part:

Except as otherwise provided in subsection 3, a person shall not knowingly contact or communicate with or attempt to contact or communicate with a child who is less than 16 years of age and who is at least 5 years younger than the person with the intent to persuade, lure or transport the child away from his home or from any location known to his parent or guardian or other person legally responsible for the child to a place other than where the child is located[.]

## **Disposition**

1. Yes. A violation of the attempt provision of NRS 201.560 does not require communication with an actual child when the individual intends to communicate with a child.
2. No. An attorney does not need to advise a client about the specific consequences of lifetime supervision prior to the client's guilty plea because the conditions are not set until just before the conclusion of the client's term of imprisonment, parole, or probation.

## **Commentary**

### **State of the Law Before *Johnson***

Prior to *Johnson*, the Supreme Court of Nevada specifically reserved the question of whether an actual child was required for a conviction of attempting to unlawfully communicate with a child under NRS 201.560.<sup>3</sup>

In *Colosimo*, the court held that a conviction for unlawful conduct with a child under NRS 201.560 required communication with an actual child and could not stand when the defendant actually communicated with an undercover law enforcement officer pretending to be a child.<sup>4</sup> *Colosimo* had been charged with a completed violation of unlawfully contacting a child, thus, the court reserved the determination of the requirements for violating the attempt provision of NRS 201.560.<sup>5</sup>

In *Sharma*,<sup>6</sup> the court reaffirmed the statutory definition of attempt, NRS 193.330(1), by explaining that “[a]n attempt crime is a specific intent crime; thus, the act constituting [the] attempt must be done with the intent to commit that crime.”<sup>7</sup> The court previously upheld attempt convictions when the defendants intended to commit crimes but failed to succeed due to circumstances unknown to him. In *Darnell*,<sup>8</sup> the court upheld a conviction for attempted possession of stolen property when the defendant intended to possess stolen property, but actually possessed property which had not been stolen. Similarly, in *Bell*,<sup>9</sup> the court affirmed an attempt conviction when the defendant contacted an undercover law enforcement officer to procure a minor for sexual purposes even though no actual minor was ever at risk.

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<sup>3</sup> State v. Colosimo, 142 P.3d 352, 359 n.39 (Nev. 2006).

<sup>4</sup> *Id.* at 358-59.

<sup>5</sup> *Id.* at 359 n.39.

<sup>6</sup> Sharma v. State, 56 P.3d 868 (2002).

<sup>7</sup> *Id.* at 871 (quoting Tanksley v. State, 944 P.2d 240, 243 (Nev. 1997)).

<sup>8</sup> Darnell v. State, 558 P.2d 624 (Nev. 1976).

<sup>9</sup> Bell v. State, 775 P.2d 1273, 1274 (Nev. 1989).

## **Other Jurisdictions**

The court's determination is consistent with holdings in other jurisdictions which have similarly held that an attempt conviction for communication with a child only requires intent to commit the underlying offense and does not require an actual child.<sup>10</sup> For example, in *Meek*,<sup>11</sup> the Ninth Circuit Court of Appeals interpreted a Federal attempt provision, 18 U.S.C. § 2422(b), which is similar to NRS 201.560, concluding that an attempt conviction was proper as long as the defendant believed he was communicating with a minor.<sup>12</sup>

## **Effect of *Johnson* on Current Law**

In *Johnson*, the court applied the attempt definitions from *Darnell* and *Bell* to the question of attempted communication with a child under NRS 201.560 which the court expressly reserved in *Colosimo*. The court rejected Johnson's appeal because *Darnell* and *Bell* clearly state that attempt convictions only require that the defendant intended to commit the crime. Therefore, Johnson's conviction was proper because he pleaded guilty to attempting to contact children for the purpose of sexual conduct.

## **Conclusion**

To sustain a conviction for attempting to communicate with children for the purpose of sexual conduct, the State must only prove that the defendant intended to contact a person whom he believed was a child. The fact that the defendant actually communicated with an adult, undercover law enforcement officer, does not preclude an attempt conviction under NRS 201.560.

Johnson's admission of attempting to communicate with a child for sexual purposes also prohibits any showing of ineffective assistance of counsel because his attorney's actions were not deficient and did not prejudice Johnson. Moreover, Johnson's counsel properly advised him regarding the ramifications of lifetime supervision.

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<sup>10</sup> *People v. Cervi*, 717 N.W.2d 356, 365 (Mich. App. 2006); *Karwoski v. State*, 867 So.2d 486, 489 (Fla. App. 2004).

<sup>11</sup> *U.S. v. Meek*, 366 F.3d 705 (9th Cir. 2004).

<sup>12</sup> *Id.* at 718-19.