

Effects of the Separation of Powers Doctrine on Criminal Law

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“The accumulation of powers, legislative, executive and judicial in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”

— James Madison, Federalist No. 51, 1788

The framers of the U.S. Constitution adapted Madison’s thoughts and those of other philosophers, going back to Aristotle, to create a separated and tripartite system of government. The result was a Constitution that established three branches of government, with law-making found in Article I, law-enforcing found in Article II and law interpretation found in Article III. However, the courts have interpreted the separation of powers as not absolute, allowing for some overlap of functions among the three branches. It is disagreement over the extent of this overlap that produces cases in controversy.

In Nevada, the state government’s structure is created in Article 3, Sec. 1, which states in pertinent part:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

In criminal law, we are generally dealing with cases revolving around the Fourth, Fifth and Sixth Amendments to the U.S. Constitution, but we also must be alert for the rights of criminal defendants who are caught in a dispute of power between branches. Such a dispute arose in *Stromberg v. Second Judicial Dist. Court*, 200 P.3d 509 (Nev. 2009), in which the court addressed the issue of whether NRS 484.37941¹ was unconstitutional, because it violates the separation of powers doctrine by giving the district court powers reserved to the prosecutor.

In *Stromberg*, the state argued that NRS 484.37941 was unconstitutional, because it “violates the separation-of-powers doctrine by giving the district court the power to determine how to charge a DUI offender, a decision that is exclusively within the province of the executive branch of government represented by the prosecutor.” *Id.* at 512. The court agreed with the state’s argument that *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) solidified the state’s position as the governmental entity to charge a criminal case. However, the court rejected the state’s argument that *Bordenkircher* was applicable to NRS 484.37941, instead concluding that a judge assigning a defendant to an alcohol-abuse program and then reducing the charge to a misdemeanor upon successful completion is not a charging decision, but a judicial decision regarding the disposition of the case. *Stromberg*, 200 P.3d at 512.

The court relied on *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal.3d 119, 95 Cal.Rptr. 524, 485 P.2d 1140 (1971), in which the California Supreme Court held that a statute allowing a charged offense to be treated as a misdemeanor, but only with the permission of the prosecutor, violated the separation of powers doctrine in that, “judicial power is compromised when a magistrate, who in the interests of justice and in strict compliance with statutory requirements is of the opinion that an offense should be determined to be a misdemeanor, wishes to exercise his power to hold the defendant



to answer in the municipal court but finds that before he may do so he must bargain with the prosecutor.” *Id.* at 485 P.2d 1144.

In addition, the court in *Stromberg* relied upon *People v. Superior Court of San Mateo County (On Tai Ho)*, 11 Cal.3d 59, 113 Cal.Rptr. 21, 520 P.2d 405 (1974), in which the California Supreme Court upheld the trial court’s exercise of judicial power in ruling that a statute granting the district attorney a veto power over the trial court’s decision to place a defendant in a drug diversion program was unconstitutional as a violation of the separation of powers doctrine. The California Supreme Court summarized its prior holdings that explained the differences between judicial power and

that power relegated to the state through the prosecutor. In doing so, the court rejected the state’s argument that drug diversion was merely an extension of its charging power and as such, remained at the prosecutor’s discretion. In fact, the court analogized diversion to a form of probation and held that the trial court was well within the exercise of its judicial power.

In a 2015 Nevada Second Judicial District Court case, the constitutionality of NRS 176A.290 was questioned, based upon a separation of powers violation. NRS 176A.290 establishes a specialty court for military veterans. However, NRS 176A.290(2) also authorizes a prosecutor’s veto power over a defendant’s entry into that specialty court, as stated:

If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted in this State or in any other jurisdiction of a felony that involved the use or threatened use of force or violence, *the court may not assign the defendant to the program unless the prosecuting attorney stipulates to the assignment....* (emphasis added)

One defendant who plead guilty to assault with a deadly weapon argued at sentencing for placement in Veteran’s Court as diversion. The state invoked NRS 176A.290(2) and refused to stipulate because of the violent nature of the offense. Defendant requested continuance of the sentencing to file a motion attacking the constitutionality of the Veteran’s Court statute.

In his motion, Defendant argued that providing the prosecutor with a veto power over a defendant’s entry into Veteran’s Court was unconstitutional, because it allowed the prosecutor to interfere with the disposition of the case, which is clearly exclusive to the judicial stage of the proceeding. In addition, Defendant argued that severing out the offending language retained the legislative intent of establishing a specialty court for veterans; after all, ran the argument, the Legislature did not ban a veteran guilty of committing a crime of violence from Veteran’s Court. The Legislature, however, appeared to want those with a violent criminal history to be examined more closely, but not automatically excepted out. The Legislature just picked the wrong government authority to do the looking.

In holding that the NRS 176A.290(2) prosecutorial veto power was unconstitutional, the district court, like the Nevada Supreme Court in *Stromberg*, relied on California Supreme Court precedent. The district court discussed *Davis v. Municipal Court*,

46 Cal.3d 64, 249 Cal.Rptr. 300, 311, 757 P. 2d 11 (1988), which distinguishes the holdings in *People v. Superior Court of San Mateo County (On Tai Ho)*, 11 Cal.3d 59, 113 Cal.Rptr. 21, 520 P.2d 405 (1974) and *Sledge v. Superior Court*, 113 Cal.Rptr. 28, 11 Cal.3d 70, 520 P.2d 412 (1974). In *Davis* at 46 Cal.3d 64, 249 Cal.Rptr. 300, 311, 757 P. 2d 11, the court concluded that in *On Tai Ho*, “the defendant challenged the district attorney’s role in the last stage of the diversion process, where he was given the power to disapprove a trial court’s decision, after a hearing, to grant diversion.”

While in *Sledge*, “the defendant’s constitutional challenge was directed at the role which the statute assigned to the district attorney at an earlier stage in the process to review the file of a defendant charged with a divertible offense to determine whether any of the legislatively prescribed disqualifying factors was present and rendered the defendant ineligible for diversion.”

The *Davis* court stated, “Taken together, *On Tai Ho* and *Sledge* establish that when a district attorney is given a role during the ‘judicial phase’ of a criminal proceeding, such role will violate the separation-of-powers doctrine if it accords the district attorney broad, discretionary decision-making authority to countermand a judicial determination, but not if it only assigns the district attorney a more limited, quasi-ministerial function. Neither case, however, contains any suggestion whatsoever that a district attorney improperly exercises ‘judicial authority’ in violation of the separation-of-powers doctrine when he exercises his traditional broad discretion, before charges are filed, to decide what charges ought to be prosecuted, even when that charging decision affects the defendant’s eligibility for diversion.”

The district court held that the veto power in NRS 176A.290(2) was unconstitutional, because it allowed the prosecutor to disapprove the court’s sentencing decision and was not merely ministerial in determining defendant’s eligibility for the specialty court. The court also held that the offending language could be removed without changing the Legislature’s intent to establish a specialty court for veterans.

The district court’s holding was not appealed by the state; however, a subsequent decision by the district court to allow a similarly situated defendant to enter Veteran’s Court as a diversion, using the same reasoning as the prior district court decision, has been appealed and is currently pending a decision by the Nevada Supreme Court. **NL**

1. NRS 484.37941 allows a district court to accept a plea of guilty to a third-offense DUI and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program.



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