IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL FEWKES,
Appellant,
vs.
HUMBOLDT COUNTY SHERIFF'S OFFICE; AND SHERIFF MIKE ALLEN,
Respondents.

No. 85293

FILED

DEC 29 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a petition for judicial review. Sixth Judicial District Court, Humboldt County; Steven R. Kosach, Judge.

Respondents Sheriff Mike Allen and the Humboldt County Sheriff's Office (hereinafter collectively referred to as "the Sheriff") revoked appellant Daniel Fewkes' concealed carry weapon ("CCW") permit after his first DUI conviction in 2021. Fewkes applied for a new CCW permit about a year later. It was denied. The Sheriff cited NRS 202.3657 as the basis for both the revocation and the denial.

Fewkes then filed a petition for judicial review challenging the revocation and subsequent denial under NRS 202.3657(4).[1] The Sheriff moved to dismiss the petition, addressing various technical defects in the petition. It did not address the merits of the petition until a hearing on the motion to dismiss. At this hearing, the Sheriff made an oral motion for summary judgment and primarily argued that revocation and denial were

[1]While Fewkes' brief in support of the petition for judicial review and opening brief on appeal discuss both the revocation and denial, the petition filed February 16, 2022, appropriately challenges only the denial issued January 18, 2022. *See* NRS 233B.130(2)(d) (requiring that petitions be "filed within 30 days after service of the final decision of the agency"). We likewise limit our review to the denial.

mandatory under NRS 202.3657(4). Sheriff Mike Allen also testified at the hearing. Without any objection to these procedural oddities, the district court granted the summary judgment motion and dismissed the petition as a result. Fewkes now appeals.

Standard of review

"We review an administrative agency's factual findings 'for clear error or an arbitrary abuse of discretion' and will only overturn those findings if they are not supported by substantial evidence." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (quoting *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011)); *see also* NRS 202.3663. Statutory interpretation, however, raises legal questions subject to de novo review. *See Elizondo*, 129 Nev. at 784, 312 P.3d at 482. This review is confined to the record before the agency, *Fathers & Sons & A Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 259, 182 P.3d 100, 103 (2008), and mirrors that of the district court, *Elizondo*, 129 Nev. at 784, 312 P.3d at 482 (quoting *Warburton*, 127 Nev. at 686, 262 P.3d at 718) (explaining that "[t]he standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court").[2]

NRS 202.3657(4) creates a rebuttable presumption

NRS 202.3657 outlines the process for obtaining a CCW permit. Subsection 4(d) provides that a sheriff "shall deny an application or revoke a permit if the sheriff determines that applicant or permittee . . . [h]as habitually used intoxicating liquor or a controlled substance to the extent that his or her normal faculties are impaired." "For the purposes of this

[2]We decline Fewkes' invitation to review the entire dismissal de novo. Though the dismissal followed the Sheriff's oral summary judgment motion, our review on a petition for judicial review is as stated in the text.

paragraph," this subsection adds that, "it is presumed that a person has so used intoxicating liquor or a controlled substance if, during the immediately preceding 5 years, the person has . . . [b]een convicted of violating the provisions of NRS 484C.110." NRS 484C.110 prohibits driving "a vehicle on a highway or on premises to which the public has access" with a blood-alcohol level of 0.08 or more.

On appeal, Fewkes challenges the reach of NRS 202.3657(4)'s presumption. He argues that it does not establish that those convicted of a DUI are presumed to have *habitually* used intoxicating liquor to the extent their normal faculties are impaired. Instead, he argues, the presumption establishes only that those convicted of a DUI are presumed to have used intoxicating liquor to the extent his or her normal faculties are impaired on the occasion giving rise to the conviction.

The statute's plain language defeats Fewkes' argument. The use of the word "so" within the sentence establishing the presumption—that "it is presumed a person has so used intoxicating liquor"—functions as an adverb describing the use of the intoxicating liquor. *See The Chicago Manual of Style* ¶ 5.156 (2017) (explaining that an "adverb is a word . . . that qualifies, limits, describes, or modifies a verb"). And "so" is defined as "in a manner or way indicated or suggested," noting that it is "often used as a substitute for a preceding clause." *So*, *Merriam-Webster's Collegiate Dictionary* 1182 (11th ed. 2020). The preceding clause here identifying a "manner or way indicated" of alcohol use is "habitual[ ] use[ ] . . . to the extent that his or her normal faculties are impaired." NRS 202.3657(4)(d). "So," therefore, acts in place of that preceding clause to describe the manner of use. *Cf. Huetteman v. Bd. of Educ. of Rochester Cmty. Unit Sch. Dist. No. 3A.*, 372 N.E.2d 716, 717-18 (Ill. App. 1978) (explaining that, based on a statute governing dismissal and removal of

tenured teachers, the word "so" within "the teachers so removed or dismissed" referenced tenured teachers). Read together, this plain language establishes that someone is presumed to be a habitual drinker to the extent that their normal faculties are impaired if that individual has been convicted of driving under the influence within the past five years. NRS 202.3657(4)(d)'s opening phrase "[f]or the purposes of this paragraph" confirms that the presumption is intended to apply to such disqualifying use defined in the entire paragraph, contrary to Fewkes' interpretation. We further note that, unless otherwise stated, such statutory presumptions are rebuttable. *See* NRS 47.240(6).

Fewkes' reliance on NRS 207.010, which defines "habitual" for purposes of determining who qualifies as a habitual criminal, cannot overcome this reading. That statute's habitual definition informs sentencing of a defendant with multiple prior felony convictions. *See* NRS 207.010(1)(a) (2020) ("[A] person convicted in this State of . . . [a]ny felony, who has previously been five times convicted . . . shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years."). Consequently, we are not persuaded that the technical meaning ascribed to "habitual" in NRS Chapter 207 for the purposes of sentencing felons should also inform "habitually" in NRS Chapter 202 for the purposes of liquor use, particularly where the Legislature has established the presumption based on a DUI conviction in the very statute we are dealing with.

The Sheriff's decision in applying NRS 202.3657(4) to these facts does not reveal clear error, an arbitrary abuse of discretion, or a lack of substantial evidence

Applying this reading here, it is undisputed that Fewkes was convicted of a DUI within the past five years. This fact invokes NRS 202.3657(4)'s presumption. Thus, the remaining question becomes whether

Fewkes rebutted this presumption. But we cannot discern anything in the record indicating that he has done so. Beyond Fewkes' uncited representations about his firearm and alcohol use, the only pertinent, verifiable evidence in the sparse record before us is the DUI offense from 2021.[3] Indeed, Fewkes summarily asserts that there is "[u]ndoubtedly . . . nothing in the investigation records retained by [the Sheriff] that could prove that [he] is a habitual user of intoxicating liquor, to the extent his normal facilities are generally impaired." This is not enough to rebut the presumption of habitual use that his DUI conviction establishes. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (explaining that an opposing party can try "to rebut the presumption by adducing evidence, independent of the basic facts, that tends to disprove the presumed fact"). Therefore, without evidence showing that Fewkes has rebutted this presumption, we cannot say that the Sheriff's decision to deny the application demonstrates clear error, an arbitrary abuse of discretion, or a lack of substantial evidence. *See Elizondo*, 129 Nev. at 784, 312 P.3d at 482; *see also Cuzze v. Univ. and Comm'n. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that "this court has made it clear that appellants are responsible for making an adequate appellate record" and will presume missing portions of the record supported the decision below).

Fewkes' remaining arguments challenging this decision lack merit. He points to data offered for the first time in district court on recent DUIs and CCW revocations and denials in Humboldt County as proof of that Sheriff indiscriminately targeted him, though appellate review of the

[3]For reasons discussed below, we are not persuaded by Fewkes' reliance on the DUI arrest and CCW permit data from Humboldt County.

Sheriff's decision "is confined to the record before the [Sheriff]." *See Milko*, 124 Nev. at 362, 184 P.3d at 384. He also raises various constitutional challenges with perfunctory legal analysis and minimal authority. In district court, Fewkes confined his constitutional argument to the proposition that a person who sustains a single DUI conviction is not a habitual user of intoxicants and thus retains his Second Amendment and state constitutional protections because he is neither "a felon nor mentally ill." *See District of Columbia v. Heller*, 554 U.S. 570, 634 (2008); *Pohlabel v. State,* 128 Nev. 1, 268 P.3d 1264 (2012). But Fewkes does not explain how these decisions change our textual analysis of NRS 202.3657(4) and its habitual user presumption. On appeal, Fewkes cites *New York State Rifle & Pistol Ass'n, v. Bruen,* 597 U.S. 1 (2022), and argues for the first time that we should review the Sheriff's decision with strict scrutiny even though *Bruen* explicitly rejected a means-end scrutiny approach for Second Amendment violations. *See* 597 U.S. at 19; *see also Heller*, 554 U.S. at 634 (declining to use a "a judge-empowering interest-balancing inquiry" to evaluate an alleged violation of the Second Amendment (internal quotation marks omitted)). Although we can address constitutional issues neither raised nor resolved in the district court, it would be inappropriate to do so where, as here, the briefing on appeal does not adequately analyze the issue. *See* Thomas v. Hardwick, 126 Nev. 142, 158, 231 P.3d 1111, 1121 (2010); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). In fact, Fewkes failed to file a reply brief after the Sheriff highlighted the rejection of strict scrutiny for Second Amendment analysis in answer, such that we will treat it as a confession of error. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (electing to treat a party's failure to respond to an argument as a confession of error).

Similar defects plague his notice and due process argument, where citation to any supporting authority is entirely absent. These cursory references to legal issues fall far below the analysis these subjects demand, showcasing a lack of cogent argument that we need not consider. *Edwards*, 122 Nev. at330 n.38, 130 P.3d at 1288 n.38 (requiring that a party "cogently argue[ ] and present relevant authority, in support of his appellate concerns"). For these reasons, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Bell

cc: Chief Judge, The Sixth Judicial District Court
Hon. Steven R. Kosach, Senior Judge
Lansford W. Levitt, Settlement Judge
Miller Law, Inc.
Humboldt County District Attorney
Humboldt County Clerk

[4]To the extent the parties raise other arguments, such as Fewkes' argument that the DUI Admonishment of Rights form reveals the meaning of habitual as used in the statute, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given this disposition.