

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TODD BOTELHO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 43247

FILED

DEC 10 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

**Appeal from A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Jerome Polaha, District Judge**

APPELLANT'S OPENING BRIEF

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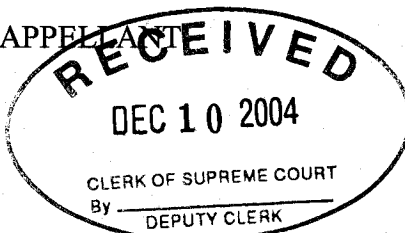
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2 **LEGAL ISSUE PRESENTED**

3 **WHETHER THIS COURT SHOULD REVIEW THE SENTENCES IMPOSED IN THIS**
4 **CASE AND REMAND FOR A NEW SENTENCING HEARING WITH**
5 **INSTRUCTIONS.**

6 **STATEMENT OF THE CASE**

7 This is an appeal from a judgment of conviction following guilty pleas to one (1) count
8 of kidnapping in the first degree, a violation of NRS 200.310-1 and NRS 200.320, a felony;
9 and three (3) counts of sexual assault on a child, each a violation of NRS 200.366. Appellant,
10 Michael Todd Botelho (hereinafter "Mr. Botelho") was sentenced to a term of life in the
11 Nevada State Prison with the possibility of parole after serving a minimum of five (5) years on
12 the kidnapping count with credit for 197 days time served. On each of the sexual assault
13 counts Mr. Botelho was sentenced to a term of life in the Nevada State Prison with the
14 possibility of parole after serving a minimum of twenty (20) years, each consecutive to the
15 kidnapping count with one sexual assault count running concurrent with the first sexual assault
16 count and the other sexual assault count running consecutive to the first sexual assault count.
17 APP. at 61-62 (Judgment).¹ Mr. Botelho was also ordered to pay a \$25.00 administrative
18 assessment, a \$150.00 DNA analysis fee, restitution in the amount of \$632.00 and attorney
19 fees in the amount of \$500.00. Id. It was further ordered that a special sentence of lifetime
20 supervision commence after any period of probation, or any term of imprisonment or after any
21 period of release on parole. Id. This appeal followed. APP. at 63-64 (Notice of Appeal).

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STATEMENT OF THE FACTS

In an Indictment filed on October 8, 2003, Mr. Botelho was charged with one count of kidnapping in the first degree, one count of battery with intent to commit sexual assault on a child and three counts of sexual assault on a child. APP. at 1-5. On December 11, 2003, Mr. Botelho entered his guilty plea to one count of kidnapping and three counts of sexual assault on a child. APP. at 14-34 (Transcript of Proceedings: Change of Plea). The negotiations in this case required the State to dismiss the battery count at the time of sentencing (which was done) and otherwise left the parties free to argue for an appropriate sentence. Id at 11 (Guilty Plea Memorandum [paragraph 7]).

As alleged in the Indictment Mr. Botelho managed to entice and carry away a fourteen year old girl into the foothills of Washoe Valley, Nevada, where he then sexually assaulted her in that he forced her to perform fellatio on him, he performed cunnilingus on her as well vaginal intercourse with his penis. Id at 1-5; and Id at 22-25 (Transcript of Proceedings: Change of Plea). Mr. Botelho admitted to these counts stating: "I had been – I had been drinking and I ended up going out and – picking up a girl whom I called several times and took her out to the Washoe Lake area and – ... I did all three counts" on her. Id at 29-30. Judge Polaha accepted the guilty pleas finding them to entered "freely, knowingly, voluntarily and intelligently with the advice of counsel." Id at 32. Sentencing was set for February 11, 2004, [Id at 33], but was actually held on April 7, 2004. APP. Vol. 2.

On February 3, 2004, the State filed notice of intent present other bad acts at the sentencing hearing. APP. at 35-43. Specifically, the State indicated that it would present

¹ "APP" stands for the Joint Appendix which consists of two volumes.

1 evidence that Mr. Botelho had admitted to a police officer after his arrest that he had
2 “fantasized about wanting to rape a women or girl and even about tying the victim up.” Id at
3 36. More tellingly, the State also wanted to present the testimony of Mr. Botelho’s ex-wife to
4 the effect that he had told of his sexual fantasies “of raping and dismembering a young girl.”
5 Id.²

7 On February 13, 2004, Mr. Botelho’s counsel filed his opposition informing the court
8 that any statements that Mr. Botelho was alleged to have made to his ex-wife during the course
9 of their marriage was privileged pursuant to the provisions of NRS 49.295. Id at 44-51. At a
10 hearing held on March 11, 2004, Judge Polaha agreed with defense counsel. See Transcript of
11 Proceedings: Hearing on Motion at 47.³ Judge Polaha however indicated that if the State had
12 another way of putting on the evidence – through perhaps the ex-wife’s comments to a
13 detective the evidence may be admissible. Id at 39 (“THE COURT: How come they can’t
14 come in that way, through the officer’s testimony at a sentencing hearing?”). And, in fact, an
15 officer did just that. See APP. Vol. 2 at 25-39 (direct testimony of Washoe County Sheriff
16 Detective Greg Herrera).

18
19 Following a lengthy sentencing hearing where several individuals addressed the court
20 both on behalf of Mr. Botelho and against him, Judge Polaha told Mr. Botelho:

21 In listening to your family and in looking at your past record,
22 somebody presented to me one time that we are not the sum total
23 of the worst things that we ever did. And, in looking at your
24 background and looking at what your attorney presented to the
25 court, your present an enigma in as much as I can say without
26 too much hesitation that basically you are not a bad person.

² These fantasies eventually destroyed their marriage. APP. at 36.

³ This Transcript was ordered and a copy has previously been supplied to the Court and thus is not part of the Joint Appendix. NRAP 30(b)(1). Page references are to those supplied by the court reporter.

1 But you did a very bad thing.

2 APP. Vol. 2 at 80-81. Judge Polaha went on to note that "the only saving fact in this particular
3 case is that you did not mutilate or kill her and she was returned to her family." Id at 82.

4 Whereupon Judge Polaha sentenced Mr. Botelho to life in the Nevada State Prison and in such
5 a fashion as to make him eligible for parole only after having served a minimum of forty-five
6 years. Id at 83-84.⁴ This appealed followed at Mr. Botelho's request.

7
8 **ARGUMENT**

9
10 **THIS COURT SHOULD REVIEW THE SENTENCE IMPOSED IN THIS CASE AND
11 REMAND FOR A NEW SENTENCING HEARING WITH INSTRUCTIONS.**

12 Historically, this Court has expressed the view that absent a district court's reliance on
13 impalpable or highly suspect evidence at sentencing it would not interfere with a district
14 court's imposition of sentence. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); and see
15 *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992)(presumptively improper for Court to
16 superimpose its views on sentences of incarceration lawfully imposed by sentencing judges).
17 Recently, however, there has been indication that at least some members of the Court may
18 wish to engage in appellate review of sentences imposed to determine if the sentence imposed
19 constitutes an abuse of discretion given the facts and the nature of the defendant. See *Tanksley*
20 *v. State*, 113 Nev. 844, 944 P.2d 240 (1997)(Rose, J. Dissenting). Appellant, Michael Todd
21 Botelho applauds Justice Rose's suggested change for precisely the reasons he expressed in his
22 dissent: (1) *it is disheartening* "that the part of the criminal process that has the greatest
23 ultimate effect on the defendant -- the imposition of his or her sentence -- is the part [the
24 Court] decline[s] to review." Id. at 852 (internal quotation omitted) quoting *Sims v. State*, 107
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1 Nev. 438, 422, 814 P.2d 63 (1991)(Rose, J. dissenting); *it is odd* that the Court will “review
2 every discretionary act performed by a district court but refuse to scrutinize the sentence
3 imposed in felony crimes.” *Id.*; and (3) failure to conduct meaningful appellate review of the
4 sentencing process *is* an abdication of the Court's authority to ensure that justice is achieved.
5 *Id.* Moreover, this case presents a compelling reason for this Court's appellate review of the
6 sentence imposed.
7

8 As Mr. Botelho's counsel noted at the sentencing hearing:

9 Your Honor, another point that my client would like to
10 impress upon the Court is that the sexual assault, the numerous
11 counts of sexual assault arose out of the same transaction and
12 occurrence, meaning it happened within a matter of minutes. He
13 didn't – kidnap this young lady and sexually assault her over a
14 period of days or weeks or months. It happened within – on the
15 same date within a matter of minutes.

16 Albeit, he feels horrible it happened at all; but he would like
17 the Court to know that it was a continuous act and it was over
18 within a matter of minutes.

19 APP. Vol. 2 at 15.

20 This Court has held that the facts of a case may support convictions on separate charges
21 “even though the acts were the result of a single encounter and all occurred within a
22 relatively short time[.]” *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548 (1990)(where the
23 accused attempted to sexually assault the victim but stopped when a car passed by and then
24 resumed his assault after the car passed, Court affirmed both convictions); but see *Crowley v.*
25 *State*, 120 Nev. ____, 83 P.3d 282 (2004)(reversing one conviction where Crowley never
26

⁴ At the time of sentencing Mr. Botelho was forty-two years old. APP. Vol. 2 at 6.

1 interrupted his action in rubbing male victim's penis first outside the clothes, and inside his
2 underwear as a prelude to fellatio).

3 Although under this Court's decisions each of Mr. Botelho's convictions are sustainable,
4 the sentences imposed should be reconsidered in like of the uninterrupted nature of the assault.
5 At the time of sentencing Mr. Botelho was 42 years old. Under the district court's sentencing
6 scheme Mr. Botelho will not be eligible for parole until after he is 87 years old. Essentially his
7 sentence is a sentence of life without the possibility of parole.
8

9 To be sure Mr. Botelho must be punished for these serious crimes. But had the district
10 court each sentence concurrently that would have made Mr. Botelho eligible for probation –
11 the key word here is "eligible" which is not a guarantee by any means – after having served
12 twenty years; and at a time when he would be over 60 years old. But he would have some
13 hope of being released from prison during his lifetime.
14

15 CONCLUSION

16 As noted above, Justice Rose believes that this Court should review sentences that
17 claimed, as here, to be excessive since sentencing is that aspect of the criminal justice system
18 that has the greatest ultimate effect on a defendant. In sum, this Court should assume
19 responsibility in criminal cases to ensure that the punishment fits the crime.
20

21 In the instant case although Judge Polaha found that Mr. Botelho was not a bad person,
22 the sentence imposed more suitable for a murderer than for Mr. Botelho.

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25 ///

1 Accordingly, this Court should remand this matter back to the district court with
2 instructions vacate the present judgment and enter one requiring that the sentences imposed be
3 ordered to be served concurrently.
4

5 DATED this 8th day of December, 2004.

6 Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of December, 2004.



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CERTIFICATE OF SERVICE

I hereby certify that on DECEMBER 9, 2004 I served a copy of the foregoing by mailing it by first class mail with sufficient postage prepaid to the following addresses:

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And served a copy by inter-office mail to:
RICHARD GAMMICK
Washoe County District Attorney
Attention: GARY HATLESTAD, Chief Appellate Deputy

DATED this 9th of DECEMBER 2004


Charlene Gaskins