

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 Electronically Filed
4 Mar 22 2010 03:12 p.m.
5 Tracie K. Lindeman

6 WILLIAM JOSEPH MACCAFFREY,)
7 Appellant,)
8 vs.)
9 THE STATE OF NEVADA,)
10 Respondent.)
11 _____)

12 **Appeal from a Judgment of Conviction in case number CR09-1325**
13 **Second Judicial District Court of the State of Nevada**
14 **The Honorable Steven R. Kosach, District Judge**

15 **APPELLANT'S OPENING BRIEF**

16
17
18
19
20 JEREMY T. BOLSER
21 Washoe County Public Defender

22 JOHN REESE PETTY
23 Chief Deputy Public Defender

24 ONE CALIFORNIA AVENUE
25 Reno, Nevada 89509

26 ATTORNEYS FOR APPELLANT

RICHARD A. GAMMICK
Washoe County District Attorney

GARY H. HATLESTAD
Chief Deputy District Attorney

P.O. Box 30083
Reno, Nevada 89520

ATTORNEYS FOR RESPONDENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF JURISDICTION 2

II. STATEMENT OF THE LEGAL ISSUES PRESENTED 2

III. STATEMENT OF THE CASE 2

IV. STATEMENT OF THE FACTS 3

V. ARGUMENT 4

 APPELLANT QUALIFIED FOR PROBATION. BECAUSE
 IT IS UNCLEAR WHY PROBATION WAS DENIED THIS
 COURT SHOULD NOT AFFORD THE DEFERENCE
 TRADITIONALLY AFFORDED DISTRICT COURT
 SENTENCING DECISIONS. RATHER, THIS COURT
 SHOULD FIND AN ABUSE OF DISCRETION AND
 REMAND FOR A NEW SENTENCING HEARING 4

CONCLUSION 6

CERTIFICATE OF COMPLIANCE 7

CERTIFICATE OF SERVICE end

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

TABLE OF AUTHORITIES

CASES

Denson v. State, 112 Nev. 489, 915 P.2d 284 (1996)	4
Parrish v. State, 116 Nev. 982, 12 P.3d 953 (2000)	4
Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993)	4
Renard v. State, 94 Nev. 368, 580 P.2d 470 (1978)	4
Silks v. State, 92 Nev. 91, 545 P.2d 1149 (1992)	4

1
2
3
4
5
6
7
8
9
10
11

I. STATEMENT OF JURISDICTION

On October 7, 2009, the Honorable Steven R. Kosach, district judge, imposed a criminal sentence on Appellant, William Joseph McCaffrey. The written judgment of conviction was filed on October 9, 2009. JA at 45-46 (Judgment).¹ On November 2, 2009, Mr. McCaffrey, by and through the Washoe County Public Defender's Office, filed a timely notice of appeal from the judgment of conviction. JA at 47-48 (Notice of Appeal). This Court possesses appellate jurisdiction pursuant to Rule 4(b) of the Nevada Rules of Appellate Procedure and NRS 177.015(3).

12
13
14

II. STATEMENT OF THE LEGAL ISSUES PRESENTED

Did Judge Kosach abuse his discretion in sentencing Appellant to a period of incarceration for the offense to which he pleaded guilty, when probation was also available?

15
16
17
18
19
20
21
22
23
24
25
26

III. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. Appellant, William Joseph McCaffrey (hereinafter "Mr. McCaffrey"), was convicted by his guilty plea of one count of promotion of sexual performance of a minor, a violation of NRS 200.720 and NRS 200.750, a felony. Mr. McCaffrey was sentenced to a term of life in the Nevada State Prison with the possibility of parole beginning after five (5) years has been served. He was given credit for 120 days time served in custody. Mr. McCaffrey was ordered to pay a statutory \$25.00 administrative assessment, a \$150.00 DNA testing fee and a \$950.00 psychosexual evaluation fee and was ordered to reimburse Washoe County the sum of \$2,500.00 for legal representation. A special sentence of lifetime supervision was ordered to commence "after any period of probation, or

¹ "JA" stands for Joint Appendix. Page references conform to NRAP 30(c)(1).

1 after any term of imprisonment or after any period of release on parole.” JA at 45-46
2 (Judgment).

3 4 **IV. STATEMENT OF THE FACTS**

5 The State charged Mr. McCaffrey with one count of promotion of sexual performance of
6 a minor. JA at 1-3 (Amended Information). Mr. McCaffrey entered a negotiated guilty plea to
7 this charge. See JA at 4-9 (Guilty Plea Memorandum) and *Id.* at 10-21 (Transcript of
8 Proceedings: Arraignment). In exchange for Mr. McCaffrey’s plea the State was “free to argue
9 for an appropriate sentence” but would not “file additional criminal charges resulting from the
10 arrest in this case as to Possession of Child Pornography in violation of NRS 200.730.” JA at
11 6 (Guilty Plea Memorandum [Paragraph 7]). The Guilty Plea Memorandum also provided that
12 Mr. McCaffrey would be eligible for probation if “a psychosexual evaluation ... certifies that I
13 do not represent a high risk to reoffend” *Id.* at 6 (Paragraph 6).

14
15 Mr. McCaffrey was eligible for probation, JA at 29, and his counsel argued for
16 probation. In support, counsel discussed the lack of any criminal history, the nature of the
17 offense, his client’s character and employment history and the strong family support system
18 that was in place and would be in place over a period of probation as well as over the lifetime
19 supervision that the court had to impose in this case. *Id.* at 23-33, 35-36. At sentencing Mr.
20 McCaffrey’s brother Kevin spoke in favor of his brother and in support of a grant of probation
21 noting that he was prepared to help his brother and keep an eye on him. *Id.* at 33-34. The
22 court had also received some letters in support of Mr. McCaffrey. *Id.* at 23.

23
24 The State argued for a sentence of life with the possibility of parole noting that although
25 probation was available it was not appropriate in this case. *Id.* at 36-38. Probation was not
26

1 “warranted and appropriate in this case” because “sometimes when people do the things that
2 they do, it is so offensive, it is so heinous, that it deserves prison.” *Id.* at 38-39.

3
4 Judge Kosach, after hearing from Mr. McCaffrey, but without commenting on probation
5 as a sentencing option or making any other comment simply sentenced Mr. McCaffrey to
6 prison and lifetime supervision. *Id.* at 42-43.

7 V. ARGUMENT

8 **APPELLANT QUALIFIED FOR PROBATION. BECAUSE IT IS UNCLEAR WHY**
9 **JUDGE KOSACH DENIED PROBATION IN THIS CASE THIS COURT SHOULD**
10 **NOT AFFORD HIM THE DEFERENCE TRADITIONALLY AFFORDED DISTRICT**
11 **COURT SENTENCING DECISIONS. RATHER, THIS COURT SHOULD FIND AN**
12 **ABUSE OF DISCRETION AND REMAND FOR A NEW SENTENCING HEARING.**

13 This Court has expressed the view that absent a district court’s reliance on impalpable or
14 highly suspect evidence at sentencing it will not interfere with a district court’s sentence. *Silks*
15 *v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978).
16 “A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of
17 discretion, the district court’s determination will not be disturbed on appeal.” *Randell v. State*,
18 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Sentencing discretion is not limitless and, when
19 imposing a sentence, “a district court may not abuse its discretion.” *Parrish v. State*, 116 Nev.
20 982, 989, 12 P.3d 953 (2000)(citation omitted). In sentencing a defendant, the trial court must
21 look to the nature and circumstances of the offense and to “information ... concerning a
22 defendant’s life and characteristics” *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284
23 (1996).

24 At sentencing Judge Kosach acknowledged the positive arguments counsel had made in
25 support of Mr. McCaffrey, and even engaged Mr. McCaffrey’s brother Kevin, in a positive
26

1 dialogue -- quoting from a letter written by Mr. McCaffrey's mother. In sum, Judge Kosach
2 acknowledged all the good and positive things that Mr. McCaffrey had going for him that
3 would ensure compliance with a period of probation (and ultimately lifetime supervision). The
4 State's argument -- "sometimes when people do the things that they do, it is so offensive, it is
5 so heinous, that it deserves prison" -- is an argument not readily applicable here, here's why:
6 (1) the legislature has determined that probation is available for this offense if certain
7 predicates are met (which, in this case they were), and (2) this offense involved internet
8 possession and transmission of, but not the creation of (either actual or virtual), pornographic
9 material. Additionally, this offense carries with it a condition of lifetime supervision. Had Mr.
10 McCaffrey received probation that would have been the start of his lifetime supervision
11 outside of actual custody. Finally, unlike many other defendants Mr. McCaffrey had a support
12 system in place to ensure compliance and public safety.

13 Aside from the fact that the Division of Parole and Probation was recommending against
14 probation -- apparently on the mistaken impression that Mr. McCaffrey believed this was a
15 victimless offense (JA at 40-41)² -- and that the State opposed probation, there was no
16 indication from Judge Kosach why probation was not appropriate in this case. Because it is
17 unclear what he rested his decision on it makes it difficult for this Court to give it proper
18
19
20
21
22

23 ² Mr. McCaffrey corrected this impression when he addressed the court: "Your, Honor, in the
24 P and P questionnaire from Mrs. Poe's department, when I initially wrote that there was no
25 victim, I misunderstood what the question was. I thought it pertained to a physical victim,
26 somebody that I would have had physical contact with. After my evaluation with Mr. Ing, I
reflected back on it, and I now understand that there were definitely victims involved in this in
those photos, the kids that were in the images or videos. I completely and sincerely apologize
to those victims." JA at 42.

1 deference. Thus, this Court should find an abuse of discretion and remand for a new
2 sentencing hearing.
3

4 CONCLUSION

5 For the reasons stated above, it is respectfully submitted that Mr. McCaffrey is entitled
6 to a new sentencing hearing. Accordingly, this Court should reverse the district court's
7 sentence and remand this case for a new sentencing hearing where probation is considered a
8 serious sentencing option or where, if it is not, reasons demonstrating that fact are articulated
9 by the sentencing judge.

10 DATED this 22nd day of March, 2010
11

12 JEREMY T. BOSLER
13 WASHOE COUNTY PUBLIC DEFENDER

14 By: 

15 JOHN REESE PETTY
16 Chief Deputy
17 Nevada Bar No. 00010
18 Washoe County Public Defender
19 One California Avenue
20 Reno, Nevada 89509

21 (775) 337-4827
22
23
24
25
26

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 22nd day of March, 2010.



JOHN REESE PETTY
Chief Deputy
Nevada State Bar No. 00010

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of March, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Gary H. Hatlestad, Chief Appellate Deputy,
Washoe County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

William Joseph McCaffrey (#1042292)
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

John Reese Petty
Washoe County Public Defender's Office