IN THE SUPREME COURT OF THE STATE OF NEVADA

LERON TERRELL BLANKENSHIP,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 66118

FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Terrence P. McCarthy, Chief Appellate Deputy, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issue: None.

5. Procedural history:

This is an appeal from a judgment of conviction for Destruction of Property, a felony prohibited by NRS 206.310 and 193.330.

At sentencing, the district court allowed the defense to discover the work-sheets of the department of probation, and to call and examine witnesses from the department. However, the district court still imposed a sentence that happened to be the sentence recommended by the department and by the prosecutor.

6. Factual background:

The underlying facts have not been explored in detail. It appears that appellant Blankenship tore up an apartment. *See* Pre-Sentence Report, page 4.

7. Issues on appeal:

When the defense shows that there are subjective elements to a presentence report and recommendation, does that lead to the conclusion that the court may not consider the recommendation and may not impose the sentence that has been recommended?

8. Legal argument:

This case is different from some others that are percolating through the system. There are other cases that involve the question of whether the defense should have the opportunity to question the basis of the

recommendation of the department.[1] In the instant case, the defense got that opportunity, and demonstrated that there is some degree of subjectivity that goes into the recommendation, but the argument goes further and suggests that because there is some subjectivity behind the recommendation, the district court is prohibited from knowing of the recommendation and from imposing the recommended sentence. The State disagrees.

First is the basic premise that there can be nothing subjective. The putative source of that law is not clear. Certainly there is no constitutional rule that precludes a court from considering the thoughts of others when imposing sentence. Instead, it is generally recognized that the sentence should be based on, *inter alia*, the character and the moral culpability of the defendant. *See Naovarath v. State*, 105 Nev. 525, 532, 779 P.2d 944, 948 (1989)(sentencing based on "humanitarian instincts" is mandatory). Indeed, a ruling that some rule of constitutional law provides that sentencing may not be based on subjective factors would fly in the face of the many decisions that require that a sentencing jury be allowed to

[1]Those cases may turn on NRS 176.153, which requires disclosure of the *report* but makes no mention of the work-product of those who prepare the report.

consider all sorts of subjective information in the guise of mitigating evidence. *See Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400 (2004). So, as there is no constitutional rule that applies, we turn to the statutes. NRS 176.145(1)(b) not only does not prohibit any element of subjectivity, it seems to demand it. NRS 176.145(2) allows the division to include in the pre-sentence report any information that it believes the court may find helpful. So, it seems that the legislature has not prohibited subjective factors, but has demanded it.

One supposes that the legislature could have put together a list of objective criteria, akin to the federal sentencing guidelines, and prohibited the division from considering anything else in forming its recommendation. However, to date, the legislature has not done so. Instead, the legislature has expressly required the division to include subjective elements in making its recommendation. That would seem to indicate that there is no requirement that the report be limited to objective factors.

As to the notion that the court may not consider the recommendation, that would seem to be contrary to the holding of *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972) indicating that the purpose of the report is not to limit the court in any way. Certainly the court is not bound by the

recommendation, and may disregard it. *Etcheverry v. State*, 107 Nev. 782, 821 P.2d 350 (1991). It is a long way from that to the proposition that the court *must* impose some sentence other than the one that is recommended by the division. If it were so, that the court must impose some sentence other than what is recommended, then one wonders if a deviation upward would also be allowed.

As no rule of law requires the district court to disregard the recommendation of the Division, the relief sought should not be available and the judgment should be affirmed.

9. Preservation of issues: Whether the issues have been preserved depends on how one defines the issues. The defendant did not seek a ruling in the district court similar to the ruling he now seeks.

DATED: September 24, 2014.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

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response is true and complete to the best of my knowledge, information and belief.

DATED: September 24, 2014.

TERRENCE P. McCARTHY
Chief Appellate Deputy
Nevada Bar No. 2745
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 24, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Appellate Deputy
Washoe County Public Defender's Office

Shelly Muckel
Washoe County District Attorney's Office