

IN THE SUPREME COURT OF THE STATE OF NEVADA

LERON TERRELL BLANKENSHIP,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Appeal from a Judgment of Conviction in Case Number CR14-0461
The Second Judicial District Court of the State of Nevada
Honorable Patrick Flanagan, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on June 19, 2014. Appellant, Leron Terrell Blankenship (Mr. Blankenship), filed a notice of appeal from that judgment on July 17, 2014. This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. STATEMENT OF THE LEGAL ISSUES PRESENTED

1. Whether Judge Flanagan erred in following the Division's sentencing recommendation where, as here, that recommendation rested on impalpable and highly suspect evidence; namely, an outdated and highly subjective scoring instrument?
2. Whether Judge Flanagan erred in not making a determination of the issues raised concerning the validity of PSI score and resulting recommendation, which he followed?

III. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Blankenship with committing the crime of destroy or injure real or personal property of another, having a value of \$5000 or greater, a violation of NRS 206.310 and NRS 193.155, a felony. JA 1-3

(Information).¹ Pursuant to negotiations, Mr. Blankenship pleaded guilty to this charge. JA 17 (Transcript of Proceedings: Arraignment). The negotiations provided that in exchange for Mr. Blankenship's guilty plea the State would concur with the sentencing recommendation of the Division of Parole and Probation (Division). *Id.* at 12 and JA 6 (Guilty Plea Memorandum (Paragraph 7)). At the sentencing hearing, the State concurred with the Division's recommendation of 12 to 32 months of incarceration. Judge Flanagan agreed and sentenced Mr. Blankenship to a term of 12 to 32 months in the Nevada Department of Corrections, with credit for one-day of pre-sentence confinement. Judge Flanagan also ordered Mr. Blankenship to pay required fees and assessments and to pay restitution in the amount of \$3,150.00. JA 83-84 (Judgment of Conviction).

IV. STATEMENT OF THE FACTS

The facts underlying the offense are these: Before Mr. Blankenship and his wife moved from an apartment owned by the victim, Douglas Carling, Mr. Blankenship damaged the interior of the apartment. For example, Mr. Blankenship wrote graffiti on the walls of

¹ "JA" stands for the Joint Appendix previously filed with the Court. Pagination conforms to NRAP 30(c).

the apartment with a permanent marker, he put holes into the sheet rock, the cabinet doors were torn off the cabinets and a ceiling fan was broken off of the ceiling. (These examples are not exclusive.) JA 14 (Transcript of Proceedings: Arraignment) (prosecutor's description of the offense); JA 71-72 (Transcript of Proceedings: Sentencing) (victim's statement); and Presentence Investigation Report (PSI) at 4 (Offense Synopsis).

Prior to the sentencing hearing, a notice was filed in the district court that Mr. Blankenship had been rejected for placement in the district court's Mental Health Court Program. The reason ostensibly given was that he did not have a "qualifying diagnosis." JA 21 (Rejection Letter: Mental Health Court). Nonetheless, Mr. Blankenship's counsel filed a motion to have the court place him in Mental Health Court as a condition of probation arguing that he did, in fact, qualify for the program pursuant to NRS 176A.260. JA 23 (Memorandum Re: Sentencing[,] Motion to Divert to Mental Health Court and Request for Hearing) (noting that Mr. Blankenship "has been on social security disability for many years for a qualifying mental health condition."). In her motion counsel also noted that when his

actual eligibility information for that program was provided to the Mental Health Court staff, they “then suggested he would be rejected due to his dangerousness.” However, no specific information supporting a claim of dangerousness has ever been provided to counsel or the court. *Id.*² In this same motion counsel also requested any documentation from the Division of Parole and Probation that it had relied upon to recommend incarceration of 12 to 32 months, and not probation. JA 25-26. Subsequently, in a supplemental sentencing memorandum, JA 32-39 (Supplemental Memorandum Re: Sentencing[,]³ Motion to Divert to Mental Health Court and Request for Hearing³), Mr. Blankenship’s counsel argued that the PSI was either inaccurate or contained suspect information or was highly subjective and that proper scoring would have confirmed probation for Mr. Blankenship. JA 33-38.

² Exhibit 1 to the motion was a copy of an e-mail stream concluding with Specialty Court Officer Ms. Rene Biondo’s statement that she would “generate a corrected denial letter.” JA 30. To date, no “corrected” denial letter has been filed in district court case number CR14-0461. (district court’s eflex file in CR14-0461 last checked on November 18, 2014.)

³ Attached as Exhibit 1 to the supplemental motion was a copy of the Division’s scoring documents. This exhibit—containing Mr. Blankenship’s Probation Success Probability Scale and Sentence Recommendation Scale—has been transmitted to the Court pursuant to this Court’s Order filed on September 19, 2014.

Specifically, Ms. Pusich wrote: “The eligibility scale used by Parole and Probation ought to be based upon objective and accurate information. In the present case there are scores used in determining that Mr. Blankenship is merely a ‘borderline’ candidate for supervision that are not accurate.” JA 33. For example, she noted the Division scored Mr. Blankenship with a “history of violence” on the Probation Success Probability Scale (PSP), based upon a single prior misdemeanor conviction in San Francisco, California in 2002. This score increased his score by four points. JA 33-34.⁴ Counsel was particularly critical of the score given to Mr. Blankenship under the category family situation: “disruptive.” She noted that Mr. Blankenship “live[d] with his wife, who is fully supportive of him.” JA 34-35. She also noted that the Division rated Mr. Blankenship “less eligible for probation because he is disabled. And, [the Division chose] to make him less eligible based on his disability twice” (being unemployed and “unemployable”). JA 35. Ms. Pusich argued that the Division’s borderline score of 60 for Mr. Blankenship was wrong because had they “not illegally penalized Mr.

⁴ The PSI lists two other misdemeanor convictions at pages 3-4 (and no felony convictions) (listing a 1991 misdemeanor conviction and a 1999 misdemeanor conviction).

Blankenship for his disabled status, he would have scored six additional points, placing him in the rating scale for which probation is recommended, scores of 65-100.” JA 36 (also noting that this change in rating “would apply even if the Court did not consider the other unsupported scores in the report”).

The subjectivity of the Division’s scoring system was made clear at sentencing. At the sentencing hearing the State called Laura Pappas, a parole and probation supervisor who was “currently assigned to supervise several presentence investigators.” JA 43 (Transcript of Proceedings: Sentencing). Notably, Ms. Pappas did not author the presentence investigation report in this case, nor did she approve or sign-off on the report. *Id.* at 51, 52. See PSI at 7 (noting that the report was prepared by Michael C. Gregg and approved by Thomas Wilson).

Ms. Pappas testified that the Division uses “a variety of tools to help us come to a recommendation,” and that they try to be “as objective as possible.” *Id.* at 44. One tool is a “PSP score,” which is an assessment tool. *Id.* The PSP score covers “some social history, some criminal history, facts about the particular case, et. cetera.” *Id.* at 45. Ms. Pappas did not know who had created the form, but said that the Division has

been using it “since at least the 1980s.” *Id.* at 49. Ms. Pappas characterized the PSP as a “guideline,” noting the Division is “not bound by making a recommendation based solely on that tool.” *Id.* Ms. Pappas testified that there were no written materials on how to use the guideline for grading, just on-the-job training was available. *Id.* at 50. She added, “[w]e talk about [removing subjectivity in scoring] in training sessions, because we do find that, because as all the parties are aware, some of those items can be subjective rather than objective.” *Id.* at 51. Later, Ms. Pappas returned to this topic noting that the selection scales do have “some areas of subjectivity.” She continued, “[w]hen reviewing these cases, anybody can go back, four of us can go back and independently score that and come out with a little bit [sic] score.” *Id.* at 60.

Another tool is the interview. *Id.* Ms. Pappas testified that the interviewer, Mr. Gregg, characterized Mr. Blankenship as “hostile during the interview.” *Id.* at 46. Because he was not present and because defense counsel had not been provided a copy of his notes, Judge Flanagan sustained defense counsel’s objection to Ms. Pappas’ elaborating on Mr. Gregg’s notes. *Id.* at 61.

Ms. Pappas testified that Mr. Blankenship scored a 60 on the eligibility for probation scale—a “borderline” score. *Id.*⁵ According to Ms. Pappas this means that “statistically speaking, the case probably could have gone either way. He could have probably been easily appropriate for incarceration or easily appropriate for probation.” *Id.* Ms. Pappas said that Mr. Blankenship’s criminal history—“[a]lthough dated and sporadic and some may consider stale in nature”—is “what it is” and is a factor. *Id.* at 46. Additionally, the offense itself is a factor. Here, Ms. Pappas said that Mr. Blankenship’s actions appeared to be “deliberate and repetitive” by someone with “perhaps ... some anger issues.” *Id.* at 47.

Ms. Pappas testified that the Division has to weigh “the protection of the community versus any therapeutic needs that the defendant might have.” *Id.* Asked if there is a bias toward safety of the community, Ms. Pappas testified that the decision for or against probation is “a case-by-case” decision. *Id.* at 47-48. Ms. Pappas testified that Mr. Blankenship’s conduct and history indicated he was a “danger

⁵ On the Sentence Recommendation Selection Scale used by the Division, a score of 0-54 is a denial; a score of 55 to 64 is borderline; and a score of 65 to 100 is probation.

to society.” She also testified that Mr. Blankenship’s mental health diagnosis did not “enter into the scoring.” *Id.* at 48. Notably Ms. Pappas also testified that she could not speak to the Division’s position on Mr. Blankenship’s request for placement into Mental Health Court. *Id.* at 48-49.

Ms. Pappas testified that she did not believe there was any procedure within the Division for a defendant to challenge their score if they believe it to be inaccurate. *Id.* at 58.

Following Ms. Pappas’ testimony, Mr. Blankenship’s counsel presented argument challenging the subjectivity and reliability of the selection score, particularly as applied to Mr. Blankenship. *Id.* at 62-69. Mr. Blankenship’s counsel first noted that the part of the scoring sheet that addressed employment did not account for, or give consideration of, persons, such as Mr. Blankenship, with disabilities. *Id.* at 62-63.⁶ She added that had his disability been considered, “he would have gotten six more points. And with six more points on their scale, he would not have been borderline, he would have been someone who was recommended for probation.” *Id.* at 63. Mr. Blankenship’s counsel argued that the

⁶ Ms. Pappas testified that the scale did not account for disabilities. JA 56-57.

scale was not complete, and because of its age, it did not comply with the Americans with Disabilities Act. *Id.* She said it was of questionable validity. Mr. Blankenship's counsel also noted the highly subjective nature of the scoring scale. *Id.* For example, the scale put Mr. Blankenship's family situation as "disruptive," but Ms. Pappas could not explain why. See JA 55-56.

In sum, counsel argued "the information provided ...shows that this grading scale ... is something [a court] shouldn't be relying upon, particularly with respect to a disabled individual." *Id.* at 64.⁷ Counsel requested that Mr. Blankenship be placed on a period of probation and be placed in Mental Health Court. *Id.* at 67.

The prosecutor argued in favor of the Division's recommendation and presented victim testimony. *Id.* at 69-71 (argument) and *Id.* at 71-75 (testimony). Thereafter, Judge Flanagan—without commenting on Ms. Pappas' testimony—followed the Division's recommendation, see PSI at 6, and sentenced Mr. Blankenship to a term of 12 to 32 months

⁷ Mr. Blankenship's counsel also noted that this grading score was also used to keep Mr. Blankenship disqualified from Mental Health Court. JA 65.

in the Nevada Department of Corrections. *Id.* at 80-81; JA 83-84 (Judgment of Conviction). Mr. Blankenship appeals his sentence.

V. SUMMARY OF ARGUMENT

The Division of Parole and Probation is mandated by statute to prepare a PSI to be used at felony sentencing hearings. The PSI must not include information based on “impalpable or highly suspect evidence.” Moreover, because any significant inaccuracy in the PSI follows a defendant into the prison system—where it used for purposes of classification, placement into certain programs and eligibility for parole—the PSI must be as objectively accurate as possible. Indeed, NRS 213.10988(1) requires the Chief Parole and Probation Officer to adopt standards to assist in formulating a recommendation regarding the granting of probation, and these standards must be “based upon objective criteria.” Although the Division uses a Probation Success Probability Scale and a Sentence Recommendation Selection Scale in making this determination, that instrument appears to be over three decades old and is subject to highly subjective use—any four people in the Division could consider the same information and reach four different conclusions.

Here, based on the use of these scales Mr. Blankenship received a score of 60, placing him in a borderline category. As such, Mr. Blankenship was as eligible for probation as he was for incarceration. However, if the Division had properly considered his disability (as it affected his ability to be employed), he would have scored 6 more points which would have placed him squarely in the probation-eligible category, illustrating the highly subjective basis of the Division's recommendation notwithstanding its purported use of objective instruments.

This error was coupled by Judge Flanagan's failure to make a determination of the validity of the PSI score and the resulting recommendation for incarceration, which he followed completely. Consequently, this Court should reverse the sentence imposed below and remand for a new sentencing hearing.

VI. ARGUMENT

Standard of Review

This Court reviews a district court's sentencing decision for abuse of discretion. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); and see *Parrish v. State*, 116

Nev. 982, 989, 12 P.3d 953, 957 (2000) (noting that a district court's sentencing discretion is not limitless) (citation omitted). An abuse of discretion occurs when the sentencing court relies on impalpable or highly suspect evidence at sentencing. *Silks v. State*, 92 Nev. at 94, 545 P.2d at 1161. A PSI must not include information based on impalpable or highly suspect evidence. *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982). And, if objected to, a sentencing court must make a determination on the PSI information. *Sasser v. State*, 130 Nev. ___, ___, 324 P.3d 1221, 1223 (2014).

Discussion

1. Judge Flanagan erred in following the Division's sentencing recommendation where, as here, that recommendation rested on impalpable and highly suspect evidence; namely, an outdated and highly subjective scoring instrument.

As relevant here, the Division "is mandated by statute to prepare a PSI to be used at sentencing for any defendant who pleads guilty to ... a felony. NRS 176.135(1)." *Stockmeier v. State, Bd. Of Parole Comm'rs*, 127 Nev. ___, ___, 255 P.3d 209, 212 (2011). And, because sentencing courts rely on a defendant's PSI, "the PSI must not include information based on 'impalpable or highly suspect evidence.' *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982)." *Id.* at ___, 255 P.3d at

213. Moreover, because “any significant inaccuracy [in the PSI] could follow a defendant into the prison system and be used to determine his classification, placement in certain programs, and eligibility for parole,” *Id.* at ___, 255 P.3d at 214, the PSI must be as objectively accurate as possible. See *Stockmeier*, 127 Nev. at ___, 255 P.3d at 213 (noting requirement that Division disclose “to the prosecuting attorney, defense counsel, and the defendant” the PSI’s factual content in order to give them “the opportunity to object to any of the PSI’s factual allegations”); and cf. *Goodson v. State*, 98 Nev. at 496, 654 P.2d at 1007 (information contained in PSI that defendant was a drug dealer not objectively accurate).

Pursuant to NRS 213.10988(1) the Chief Parole and Probation Officer of the Division is required to adopt standards to assist in “formulating a recommendation regarding the granting of probation ... to a convicted person who is otherwise eligible for ... probation[.]” These “standards must be based upon objective criteria for determining the person’s probability of success on ... probation.” *Id.* The forthcoming recommendation is more than a mere suggestion to the sentencing court. The sentencing court must consider these standards and the

Division's recommendation in determining whether to grant probation. See NRS 176A.100(3) ("The court shall consider the standards adopted pursuant to NRS 213.10988 and the recommendation of the Chief Parole and Probation Officer, if any, in determining whether to grant probation to a person.").⁸

Consistent with its mandate in NRS 213.10988, the Division uses scoring instruments⁹ to assist in "formulating a recommendation" purportedly based on "objective criteria." But as we shall see, that "objectivity" is in the eye of the beholder.

As previously noted, Ms. Pappas testified that the Division tries to be "as objective as possible," but also testified that the scoring

⁸ Contrary to the suggestion in the State's Fast Track Response at 4—that Mr. Blankenship thinks that the district court should not consider the recommendation—we think the district court must consider the recommendation but recognize that that recommendation may be based on highly suspect reasoning or other impalpable evidence, rendering the recommendation unreliable. Judge Flanagan did not have that realization here.

⁹ The Division determines whether probation will be recommended using a scoring system—a Probation Success Probability form—that considers many different factors and assigns numeric values to come up with a total score. NAC 213.590. Pursuant to NAC 216.600, the recommended term of incarceration is derived using the Sentence Recommendation Selection Scale, which utilizes the score from the Probation Success Probability form to determine a recommended sentence range.

instrument the Division uses is approximately three decades old, and contains "some areas of subjectivity." Ms. Pappas also acknowledged that no formal written materials exist on how to use the instrument for grading; instead, the Division relies on internal job training. Ms. Pappas testified that during training sessions, Division personnel "talk about" how to remove subjectivity in scoring. Nonetheless, Ms. Pappas testified that four different people in the Division could score the same information differently. Significantly, Ms. Pappas considered the scoring instrument to be only a "guideline," with a resulting score not necessarily binding the Division to any particular recommendation. Thus, the first obstacle to objectivity is the scoring instrument itself. The second obstacle to objectivity is the subjective conclusions of the scorer. As noted, the scorer, Mr. Gregg, was not present at the sentencing hearing and thus his actual reasoning process as it related to Mr. Blankenship is unknown. Query, did Mr. Gregg's view of Mr. Blankenship as "hostile during the interview" influence his decision to recommend incarceration instead of probation in this "borderline" case? If so, where is this "factor" noted?

So here we have a borderline score—one that could have resulted—in Ms. Pappas’ opinion—in probation. Apparently however, based on a “dated and sporadic” [read “stale”] criminal history, an unsupported characterization of Mr. Blankenship’s family situation as “disruptive,” and no accounting for Mr. Blankenship’s disabilities or their effect in the area of employment (which if accounted for would have placed Mr. Blankenship squarely in the probation-eligible category), or any consideration of Mr. Blankenship’s mental health diagnosis as it might pertain to his “therapeutic needs,” the Division recommended incarceration for 12 to 32 months in the Nevada Department of Corrections. This recommendation does not rest on objective factors and is instead based on impalpable or highly suspect evidence; namely, subjective factors coupled with an outdated and suspect scoring instrument.

This Court should vacate the sentence imposed below and remand for a new sentencing hearing.

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2. Judge Flanagan erred in not making a determination of the issues raised concerning the validity of the PSI score and resulting recommendation, which he followed.

“[A] defendant has a right to object to his PSI and the district will make a determination on the PSI information, so long as the defendant objects to it at the time of sentencing.” *Sasser v. State*, 130 Nev. ____, ____, 324 P.3d 1221, 1223 (2014). Here Mr. Blankenship objected to the information (and scoring) used to construct the PSI and the resulting sentencing recommendation by the Division. However, Judge Flanagan followed the Division’s sentencing recommendation without “mak[ing] a determination on the PSI information.” See JA 76-80 (Judge Flanagan’s listing of things he considered, but nowhere listing Mr. Blankenship’s many challenges to the PSI or to the Division’s resulting recommendation—which Judge Flanagan simply followed). This was error. This Court should vacate the sentence and remand for a new sentencing hearing.

VII. CONCLUSION

Because the Division’s sentencing recommendation was not based on objectively accurate information, but on impalpable or highly suspect evidence, and because Judge Flanagan did not specifically address Mr.

Blankenship's objections and make a determination of the validity of the PSI, this Court should vacate the sentence imposed below and remand for a new sentencing hearing before a different district court judge. (Prior to sentencing the Division should be required to prepare a new PSI relying on objective factors and crediting Mr. Blankenship's disabilities and mental health diagnosis in properly scoring his eligibility for probation.)

DATED this 18th day of November 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 3,720 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, 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)(1), 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 18th day of November 2014.

/s/ John Reese Petty

JOHN REESE PETTY

Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of November 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, 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:

Ms. Loretta Blankenship (wife), as requested by the Appellant.

John Reese Petty
Washoe County Public Defender's Office