IN THE SUPREME COURT OF THE STATE OF NEVADA

LERON TERRELL BLANKENSHIP,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 66118

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a plea of guilty to one count of destroying the property of another, with a value over $5,000, a felony. Prior to sentencing, defense counsel filed a memorandum seeking an order requiring the mental health court staff to disclose some sort of information, and requiring the division of parole and probation to divulge the basis of their recommendation. JA 22-25. On that subject, the Opening Brief suggests that the defense was denied access to the author of the pre-sentence report. The actual record reveals no subpoena to the author and that it was the defense that successfully objected to consideration of the notes of the author. *See* JA 61. The defense presented evidence and comment about the propriety of the recommendation from the Division of Parole and Probation, but sought no remedy.

As the defense sought no remedy, the court granted none and proceeded to impose sentence. This appeal followed.

II. STATEMENT OF THE FACTS

As revealed in the Opening Brief, appellant Blankenship caused serious damage to an apartment where he resided.

III. ARGUMENT

1. There Are No Rulings of the District Court Preserved for Appeal.

The nature of the argument in the appeal can be discerned by reference to the remedy sought. Here, the proposed remedy is a new judge, and a new sentencing hearing, and a new pre-sentence report based solely on unidentified objective criteria. The problem is that the defense never moved to strike the report and never asked the court not to consider it and never asked the judge to recuse himself. Thus, the issue is raised for the first time on appeal. Issues raised for the first time on appeal should not be considered by this Court. This Court has held that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). If Blankenship wanted the judge to strike the PSI or to recuse himself, he should have said so instead of requiring the judge to try to guess at the nature of the remedy being sought.

/ / /

2. There Was No Error.

The instant claim may be that the district court should have discerned that the arguments and the evidence were being offered in support of a non-existent motion to strike the PSI. If the defense had asked the court to strike the PSI and to refuse to consider it, and if the court had refused, that would not have been error.

Perhaps it would be best to first dispose of the contentions that do not matter. For example, there seems to be a contention that the Division, when formulating its recommendation, cannot consider violent crimes that are misdemeanors and are not recent. There is no such law. The habitual criminal statute "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions," as those are considerations within the district court's discretion. *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). If the district court may consider remote and non-violent crimes at sentencing, there would seem to be no law prohibiting the Division from likewise considering such prior crimes. The contention that the Division and the court cannot consider the defendant's "disruptive" family life because the author of the report did not reveal the basis of the description ought not to detain the court. The defense could have called the author as a witness or could have declined to object to use of the author's notes, but there was no error by the court in failing to be persuaded that the absence of evidence is

somehow persuasive evidence that the author used an inappropriate standard.

Likewise, the claim that the division recommended punishment based on the defendant's mental illness was contradicted by the testimony of the representative of the Division of Parole and Probation to the effect that the recommendation is based on conduct, not the cause of the conduct. JA 76. The officer testified that "His diagnosis doesn't enter into the scoring. His behavior and how he presents do. There are many, many people with identical diagnosis that are on probation and free in the community." Thus, it seems that the mental health court refused services to the defendant not because of his mental illness, but because his crime involves threats of violence to the victim of the crime. JA 48.

The reference to impalpable and highly suspect evidence also need not detain this Court as there is no specific fact identified in the PSI that is incorrect. Instead, the dispute concerns worksheets and the scoring and the characterizations and questions such as whether the undisputed criminal history amounts to a history of a "violent" crime. As there are no real facts in dispute, but only the conclusions to be drawn from the facts, the analysis of *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), does not seem to apply. That analysis would apply only if the defense identified some evidence that was impalpable or highly suspect. The instant argument concerns only recommendations, not evidence.

So, we come to the crux of the matter. Appellant asserts that the report and the recommendation may only be based on objective criteria. The problem again is defining the terms. According to *Black's Law Dictionary, Seventh Edition*, "objective" means "Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perception, feelings or intentions."

There are statutes touching on the subject that use terms that would seem to be at odds with each other. As appellant points out, NRS 213.10988 requires that the standards for recommending probation, or not, must be based on "objective criteria." In contrast, NRS 176.145 requires that the report must have all sorts of subjective information, such as information concerning the defendant's character. In addition, NRS 176.145(2) provides that the report may contain "any additional information that [the division] believes may be helpful in imposing a sentence, in granting probation, or in correctional treatment." Likewise, the report must include information concerning the psychological harm to the victim. NRS 176.145(1)(c). That is difficult to reconcile with the reference to "objective" factors. So, the State offers this: the things considered in making the recommendation must be more than a mere hunch. The characterization of whether the defendant's home life is "disruptive" must be based on articulable facts. The characterization of something as violent or disruptive is necessarily going to

have subjective components, but the requirement that the characterization be based on articulable facts would accomplish the goals of both statutes.

In general, when construing statutes, the court should not render any part nugatory but should interpret each statute "in harmony" with other statutes. *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999). Requiring that the recommendation be based on externally verifiable phenomena, while allowing characterization of those phenomena using terms like "disruptive" and "violent" will serve to give effect to both statutes. Thus, the State contends that the appellant has failed to show that there was something inappropriate in the report. If Blankenship had asked the court to strike the report, and to allow a sentencing hearing before a new judge with a new PSI, and based that motion on the testimony of Laura Pappas, the court would not have erred in denying that motion.

3. The District Court Did Not Err in Failing to Resolve Any Factual Disputes When the Disputes Involved the Recommendation of the Report and Not Any Specific Factual Error.

This Court's recent decisions in *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. __, __, 255 P.3d 209, 213–14 (2012) and in *Sasser v. State*, ____ Nev. ____, 324 P.3d 1221 (2014) have created a cottage industry of sorts. The Court has required that where factual disputes arise about the contents of the PSI, the defendant must be given an opportunity to object, and the court must resolve the disputes so that any errors do not follow the defendant

through the corrective system. The problem here is that Blankenship never identified any specific factual error in the report. Instead, his focus was on the scoring sheets, on the information and methods used to make the recommendation. Even now, although the PSI is in the record, there is no assertion that there is some specific factual error in the report itself.

The court was fully informed of the basis for the Division's recommendation and thus was free to give it whatever weight it found appropriate. Here, there is no basis for any suggestion that the court gave the recommendation any weight at all. Instead, it seems just as likely that the court considered all that was available, including the subjective factors, and reached its own decision about what sentence was appropriate. No law prohibits the court from considering the recommendations of the Division and so the judgment of the district court should be affirmed.

IV. CONCLUSION

There is no error in failing to strike the recommendation of the Division and there is no law prohibiting the court from considering the recommendation. Hence, the judgment should be affirmed.

DATED: December 18, 2014.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

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 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 brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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 appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on 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: December 18, 2014.

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CERTIFICATE OF SERVICE

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

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