

IN THE SUPREME COURT OF THE STATE OF NEVADA

LERON TERRELL BLANKENSHIP,

No. 66118

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Tracie K. Lindeman
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Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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 REPLY BRIEF

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ARGUMENT IN REPLY

1. A correction to the State's "Statement of the Case" to eliminate possible confusion

In the "Statement of the Case" contained in Respondent's Answering Brief (RAB) at 1, the State asserts that Mr. Blankenship "suggests" he was "denied access to the author of the pre-sentence report."¹ Not so. At his sentencing hearing Mr. Blankenship argued against the reliability of the presentence investigation report's scoring process based on the scoring documents he had received from the Division of Parole and Probation (Division). In response, the State called the in-court probation officer to testify about the Division's presentence scoring procedures. As noted in the Opening Brief, that officer's testimony under-scored the subjective nature of the Division's scoring process (although bound by statute to an objective system). See Appellant's Opening Brief (AOB) at 7-10, 16. Thus, Mr. Blankenship is not claiming on appeal that he was "denied access to the author of the pre-sentence report"—frankly, Mr. Blankenship did not need his testimony at the sentencing hearing.

¹ It is unclear where in the Opening Brief this "suggest[ion]," RAB at 1, is made since the State fails to pinpoint the source of its assertion.

2. Mr. Blankenship's eligibility for probation was foreclosed by the faulty PSI

Next the State argues that this appeal should fail because Mr. Blankenship “never moved [in the district court] to strike the report and never asked the court not to consider it and never asked the judge to recuse himself.” RAB at 2. Taking these in reversal order, first, there was no basis (or legal reason) to “ask[] the judge to recuse himself”—for example, Judge Flanagan did not express actual bias or hostility to Mr. Blankenship; second, implicit in Mr. Blankenship’s argument (and pre-sentence motion) was his request that Judge Flanagan not consider the Division’s sentencing recommendation—Mr. Blankenship sought probation and entry into the district court’s specialty court, his specific complaint was that the Division’s recommendation for incarceration improperly rested on the Division’s subjective scoring methods; and finally, third, explicit in his argument (and pre-sentence motion) was his objection that the report contained impalpable and highly suspect information.² Thus, though Mr. Blankenship did not intone a talismanic

² The State would confine “impalpable and highly suspect evidence” to “fact[s] identified in the PSI that [are] incorrect.” RAB at 4 and see 6-7 (suggesting to limit a court’s review to “factual” errors and not on “the scoring sheets, on the information and methods used to make the

“objection” in the district court his point was clear: Judge Flanagan should not rely on the PSI to fashion a sentence. It is clear that he nonetheless did; he certainly did not disclaim reliance on the PSI. See Sasser v. State, 130 Nev. ____, ____, 324 P.3d 1221, 1225-1226 (2014) (noting district court’s express statement that it “would not consider certain information included in the PSI” eliminated a showing of harm). Unfortunately, Mr. Blankenship’s eligibility for probation was foreclosed because of this faulty PSI and that harm is clear.

3. A court abuses its discretion when it fails to exercise it

“This court has previously noted that an abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand.” *Patterson v. State*, 129 Nev. ____, ____, 298 P.3d 433, 439 (2013) (citing *State v. Dist. Ct. (Armstrong)*, 127 Nev. ____, ____, 267 P.3d 777, 780 (2011) (citation omitted) and *United States v. Miller*, 722 F.2d 562, 565 (9th Cir.1983) (holding that “as a general rule, the existence of discretion requires its exercise”) (internal quotation marks omitted)). As noted in the Opening Brief, AOB at 19, Judge Flanagan, despite having

recommendation”). Mr. Blankenship however, believes the phase to cover the underlying scoring process as well. That process, as evidenced here, can be “incorrect” as well and can lead to sentencing error.

objections to the PSI before him, did not address those objections and simply followed the Division's sentencing recommendation. This was error. See *Sasser v. State*, 130 Nev. ____, ____, 324 P.3d 1221, 1223 (2014) (stating that a defendant has a right to a judicial determination on the PSI "so long as [he] objects to it at the time of sentencing").

CONCLUSION

For the reasons set out above and in the Opening Brief, this Court must reverse the district court and remand for a new sentencing hearing.

DATED this 30th day of December, 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, excluding 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 1,064 words and does not exceed 15 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 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 30th day of December, 2014.

/s/ John Reese Petty
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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 30th day of December, 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
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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 Appellant.

John Reese Petty
Washoe County Public Defender's Office