

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODERICK STEPHEN SKINNER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Appeal from a Judgment of Conviction in Case Number CR14-0644
The Second Judicial District Court of the State of Nevada
Honorable David A. Hardy, District Judge

APPELLANT'S OPENING BRIEF

JEREMY T. BOSLER
Washoe County Public Defender
Nevada State Bar No. 4925
JOHN REESE PETTY
Chief Deputy Public Defender
Nevada State Bar No. 10
350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4827

Attorneys for Roderick Stephen Skinner

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MISCELLENOUS

Merriam-Webster's Collegiate Dictionary (11th ed. 2012) 12

I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on September 11, 2014. Appellant, Roderick Stephen Skinner (Mr. Skinner), filed a notice of appeal from that judgment on October 7, 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. ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals pursuant to Rule 17(b)(1) as it is "a direct appeal from a judgment of conviction based on a plea of guilty," and because it "challenges only the sentence imposed."

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Whether Judge Hardy abused his sentencing discretion when he sentenced Mr. Skinner to prison rather than grant him probation where, as here, a probation grant would have led to Mr. Skinner's immediate deportation to Australia and incarceration merely delayed the inevitable.

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IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Skinner with promotion of a sexual performance of a minor, age 14 or older, a violation of NRS 200.720 and NRS 200.750, a felony. JA 1-3 (Information).¹ Pursuant to negotiations, Mr. Skinner pleaded guilty to this charge. JA 17 (Transcript of Proceedings: Arraignment). The negotiations provided that in exchange for Mr. Skinner's guilty plea the State would be free to argue for an appropriate sentence at sentencing, would not file additional charges stemming from the arrest in this case and would dismiss a separate case (CR13-1601) after sentencing. *Id.* at 13 and JA 6 (Guilty Plea Memorandum (Paragraph 7)).

After three hearings to determine a sentence, Judge Hardy sentenced Mr. Skinner to a term of life in the Nevada Department of Corrections with parole eligibility after a minimum of five years has been served. Judge Hardy credited Mr. Skinner 411 days for time already served. Judge Hardy also ordered Mr. Skinner to pay required fees and assessments and to pay a fine of \$5,000.00. JA 218-19

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

(Transcript of Proceedings: Sentencing); JA 221-22 (Judgment of Conviction). Mr. Skinner, who was probation eligible, appeals from this sentence.

V. STATEMENT OF THE FACTS

The underlying facts, as summarized in the Presentence Investigation Report (PSI) filed on July 11, 2014² are that Sparks Police Officers contacted Mr. Skinner (a native of Australia) after two minor girls reported that he had masturbated while watching pornography in their presence. Allegedly, Mr. Skinner's minor daughter Sophie was on his lap at the time. After Mr. Skinner's arrest, police searched his apartment pursuant to a search warrant and seized "computers, pornographic DVDs, pornographic magazines/comic books and external hard drives." PSI at 4-5. A warrant-authorized search of the computer and external hard drives revealed that Mr. Skinner had downloaded and viewed child pornography over a ten-day period. *Id.* at 5. At his arraignment, Mr. Skinner's counsel stipulated to the "factual basis of the charge" of promoting a sexual performance by a minor. JA 17

² Mr. Skinner is requesting in a separate motion that this Court make the Presentence Investigation Report and the Psychosexual Evaluation filed on August 6, 2014 part of the record on appeal.

(Transcript of Proceedings: Arraignment). At sentencing, Mr. Skinner took full responsibility for his action. See JA 97-100 (per counsel's statement) and JA 200-05 (per Mr. Skinner's statement).

Robyn Wellner, an attorney in Australia, testified on Mr. Skinner's behalf. JA 33-34. Ms. Wellner testified that she has known Mr. Skinner since late 2005 after meeting and representing Mr. Skinner in a family matter in Queensland, Australia. *Id.* at 34-35. She described Mr. Skinner as "an honest man," who was "very caring for his children, and ... for people around him." *Id.* at 35.

Mr. Skinner was probation eligible.³ Ms. Wellner testified that if granted probation the kinds of resources available to him in Australia would include a police pension,⁴ a Medicare card and free medical care.⁵ Ms. Wellner testified that medical coverage would cover a family doctor and cover in part specialists' fees such as might be associated with

³ See JA 14 (prosecutor's comment that Mr. Skinner's probation eligibility rested on a "favorable psychosexual evaluation pursuant to NRS 176.139.") and Psychosexual Evaluation filed on August 6, 2014 at 6 ("Based upon measures used to identify sex crime risk, Mr. Skinner does not present a high risk to reoffend.").

⁴ Ms. Wellner testified that Mr. Skinner's police pension is "more than what our pensioners would receive," and that Mr. Skinner did not "need to work." JA 44.

⁵ Mr. Skinner is a bilateral leg amputee and suffers Crohn's Disease, neck cancer and nerve pain. PSI at 3.

treating his Crohn's Disease. *Id.* at 39-40. She also commented that Mr. Skinner had support from his family and friends in Australia. *Id.* at 40.⁶ Additionally, she and her husband would provide support as well. *Id.* at 43.

At the continued sentencing hearing Mr. Skinner's daughter, Courtney Skinner (Courtney), testified via telephone on behalf of Mr. Skinner. JA 76-78 (Transcript of Proceedings: Sentencing). As relevant here Courtney told Judge Hardy that she was applying to become a police officer because of her father's experience in the Queensland Police Force. *Id.* at 79-80. In terms of providing her father resources if allowed to return to Australia, Courtney testified that she had moved to a new home near the police academy and a hospital, that the home was wheelchair accessible and had been outfitted inside to accommodate Mr. Skinner's toilet and shower needs and to allow him to "function in the whole house without any trouble." *Id.* at 83. Courtney also told Judge Hardy that there was not an internet connection at the house. *Id.* at

⁶ At the next continued sentencing hearing Mr. Skinner's daughter, Courtney, provided Judge Hardy a list of Mr. Skinner's supporters in Australia. JA 84-86.

84.⁷ Finally, she noted that her house would be (and currently was, due to her police application) available for inspection by the Queensland Police. *Id.*

Mr. Skinner's counsel argued that his client had resources available to him in Australia, including medical care and that he would be living with his daughter in a home that had been wheelchair equipped and was without internet access, and that based on his understanding of Australian law, Mr. Skinner would be prohibited from internet access. *Id.* at 101-02. Additionally, Mr. Skinner would be subject to Australia's sex offender registration laws. *Id.* at 102-04 and 105 (noting that Mr. Skinner if placed on probation would be deported via Federal immigration and that he would have to report, be assessed and placed on supervision).

At the final sentencing hearing Kate Benzler, the author of Mr. Skinner's PSI, testified. JA 115-16 (Transcript of Proceedings:

⁷ This is significant because Judge Hardy had earlier said that Dr. Nielson's evaluation suggested that if Mr. Skinner "has access to a computer, everybody's at risk." JA 65. (Actually, however, Dr. Nielson wrote, "All child victims of pornographic exploitation remain at risk if Mr. Skinner has *unmonitored* internet access. Without internet access, that continued risk is very low." Psychosexual Evaluation at 6 (italics added)).

Sentencing). Significantly, Ms. Benzler testified that she did not know how old the scoring instruments used in the preparation of the PSI were. Nor did she know who had developed the scoring instruments. And she did not know the last time the scoring instrument had been validated. *Id.* at 137-38. She also testified that the writer has “discretion, regardless of where [a defendant] fall[s]” on a category, but acknowledged that there were no guidelines to cabin that discretion. *Id.* at 138.

Ms. Laura Pappas, a Parole and Probation Supervisor, testified that the Division had “no way to supervise” a person outside of the United States. *Id.* at 167, 169-71. But, the case would stay open. Using this case as an example Ms. Pappas said, “There’s an ICE hold, and [Mr. Skinner] will be deported, eventually, whether it’s if he’s granted probation, or when he’s released from prison. His case will stay open with the [Division], in a file cabinet. It’s called the Deportation Caseload. [If] he comes back, wanders into U.S. Borders again, and happens to have contact with law-enforcement, ... at that time [we would] assume supervision and probably proceed with violation proceedings.” *Id.* at 171-72.

Mr. Skinner's counsel asked for probation for Mr. Skinner. *Id.* at 185. He noted that if granted probation Mr. Skinner would have to comply with ICE and that in Australia Mr. Skinner would be subject to registration. *Id.* at 185-86. Judge Hardy expressed concern over supervision—stated as “How will I know, as a sentencing judge, that he doesn’t return to Australia, buy a computer, download and masturbate to child pornography images, maybe in the presence of his own child, and maybe in the presence of neighborhood children? How do I ensure that doesn’t happen?” *Id.* 189. Counsel answered honestly: “[T]here’s never a hundred percent certainty.” *Id.* Judge Hardy pressed, “But if he did that here, he would be brought back into this room, and he would go to prison on a revocation.” *Id.* Counsel again explained the constraints that would be placed on Mr. Skinner in Australia. *Id.* at 189-97.

The State asked Judge Hardy to follow the recommendation of the Division of Parole and Probation. *Id.* at 209-11.

Judge Hardy sentenced Mr. Skinner to prison. Stating that he could “control only what I can control,” *Id.* at 216, Judge Hardy concluded that he had to imprison Mr. Skinner because as a “pedophile” without “treatment, supervision, and sometime exclusion, our

community is at risk.” *Id.* at 217. Judge Hardy also said that probation was “not punitive enough; there’s simply very little punishment.” *Id.* at 218. Ultimately though Judge Hardy’s expressed concern was control. He said, “I have no way of controlling whether you will be supervised to my satisfaction. And if I’m not satisfied, I don’t have any way to bring you back into this Court, and put you in prison upon a revocation.” *Id.*

VI. SUMMARY OF ARGUMENT

District court sentencing decision are reviewed for abuse of discretion. An abuse of discretion occurs when a court fails to give due consideration to the issues at hand. Here Mr. Skinner (an Australian citizen) pleaded guilty to a felony offense that made him probation eligible. As a representative of the Division of Parole and Probation noted Mr. Skinner was subject to an ICE hold and because of this hold “will be deported, eventually, whether ... he’s granted probation, or ... released from prison.” Given the nature of the offense to which Mr. Skinner pleaded guilty, the prison sentence, if imposed, would be a life sentence with parole eligibility after serving a minimum of five years. Mr. Skinner had already served 411 days prior to imposition of sentence so his parole edibility would arrive in less than five years.

The fact is that Mr. Skinner's deportation was inevitable.⁸ A pragmatic approach, taking into consideration Mr. Skinner's disability—a bilateral leg amputee—and compromised health—Crohn's Disease, neck cancer and nerve pain—would have been to place Mr. Skinner on probation and have him immediately deported through federal immigration proceedings. Judge Hardy instead sentenced Mr. Skinner to prison where he will be under Nevada's cost of care until his eventual release from prison. A grant of probation would have led to Mr. Skinner's immediate deportation; incarceration merely delayed the inevitable. Under these circumstances, Judge Hardy abused his discretion when he sentenced Mr. Skinner to prison rather than grant him probation.

VII. ARGUMENT

Standard of Review and Discussion

District court sentencing decisions are reviewed 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

⁸ See JA 105 (Mr. Skinner's counsel noting that Mr. Skinner has "signed a voluntary departure. He has paved his way to exit the country. And my experience with ICE is that they are going to expedite that removal.").

Nev. 982, 989, 12 P.3d 953, 957 (2000) (noting that a district court's sentencing discretion is not limitless). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Additionally, "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) (citing to *Jones Rigging and Heavy Hauling v. Parker*, 66 S.W. 3d 599, 602 (Ark. 2002)).

Possibly the most salient observation made during the sentencing hearings was made by Ms. Pappas: "There's an ICE hold, and [Mr. Skinner] *will be deported, eventually, whether it's if he's granted probation, or when he's released from prison.* JA 171-72 (italics added). The fact is that Mr. Skinner's deportation is inevitable, thus the more pragmatic⁹ approach would consider this fact against other costs. That

⁹ "Pragmatism" is defined in part as "a practical approach to problems and affairs." Merriam-Webster's Collegiate Dictionary 975 (11th ed. 2012)

is, should Mr. Skinner be placed on probation now and deported, or have his stay in Nevada prolonged? It suffices to note that the effect of Judge Hardy's sentencing decision is to keep a compromised person with serious health issues in Nevada (and under Nevada's cost of care) for approximately four years—Mr. Skinner was credited 411 days toward his minimum parole eligibility date of five years—before his eventual deportation.¹⁰ Giving “due consideration to the issues at hand” Judge Hardy could have granted probation and Mr. Skinner would now be subject to Australia's sex offender registration laws. And he would be part of the Division's existing “Deportation Caseload.” Judge Hardy did not grant probation ostensibly because he would have “no way of controlling whether [Mr. Skinner would] be supervised to my satisfaction.” Judge Hardy also worried that he could not revoke Mr. Skinner's probation if he was not satisfied with Mr. Skinner's performance on probation. JA 218. Those are of course valid concerns but they would (will) also exist when Mr. Skinner is paroled and deported. In sum, a grant of probation would have led to Mr. Skinner's

¹⁰ It seems unlikely that the Nevada Department of Corrections will hold on to Mr. Skinner any longer than necessary where his deportation is assured.

immediate deportation; incarceration merely delayed the inevitable. Thus, to the extent Judge Hardy rested on this rationale to impose a prison sentence he abused his discretion or acted arbitrary and capriciously in sentencing Mr. Skinner to prison when immediate deportation was available.

VIII. CONCLUSION

Accordingly, this Court should reverse the sentence imposed below and remand with instructions to place Mr. Skinner on probation subject to his ICE hold.

DATED this 4th day of February 2015.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: JOHN REESE PETTY
Chief Deputy, Nevada Bar No. 10
jpetty@washoecounty.us

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 2,648 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 4th day of February 2015.

/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 4th day of February 2015. 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:

Roderick Stephen Skinner (#1126964)
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office