IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO BRIONES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 66944

FAST TRACK STATEMENT

1. Appellant, Fernando Briones.

2. John Reese Petty, Chief Deputy, Washoe County Public Defender's Office, 350 South Center Street, 5th Floor, Reno, Nevada 89501; (775) 337-4827.

3. Same as above.

4. Second Judicial District Court in and for the County of Washoe, in District Court Case Number CR14-0440B, Department No. 10.

5. The Honorable Elliott A. Sattler, district judge.

6. Mr. Briones entered a guilty plea to one felony count.

7. One count of burglary, a violation of NRS 205.060(1), as charged in a Third Amended Information.

8. Judge Sattler sentenced Mr. Briones to imprisonment in the Nevada Department of Corrections for a minimum term of 48 months to a maximum term of 120 months with credit on that sentence for 276 days of presentence custody time. Judge Sattler also ordered Mr. Briones to pay required fees and assessments. JA 92-93 (Judgment).[1]

9. October 30, 2014.

10. October 30, 2014.

11. Not applicable.

12. Not applicable.

13. On November 30, 2014, Mr. Briones filed his *pro per* notice of appeal. JA 94-97 (Notice of Appeal).

14. NRAP 4(b).

15. NRS 177.015(3).

16. Judgment upon guilty a plea.

17. Not applicable.

18. Not applicable.

19. Not applicable.

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[1] "JA" stands for the Joint Appendix.

20. Mr. Briones entered a guilty plea to a felony count and was sentenced as set forth in part 8 above. JA 92-93 (Judgment). Mr. Briones filed a timely notice of appeal. JA 94-97 (Notice of Appeal).

21. Facts: Upon his release from the California State Prison in Susanville Mr. Briones was taken to and dropped off in downtown Reno with $200.00 cash and a few other personal possessions. The plan was that Mr. Briones would catch a Greyhound bus back to Los Angeles to start his parole. JA 64-65 (Transcript of Proceedings: Sentencing). However, the day he arrived in Reno he slipped on ice (it was early January 2014) and cut his forehead open. *Id.* While he was on the ground another person took his belongings. Thus, Mr. Briones found himself homeless and ended up staying at a homeless shelter in Reno. Unfortunately, he resumed a drug and alcohol addiction. *Id.* at 65.

Here, Mr. Briones was charged with burglary because he had used a rock to break the window of a parked, unoccupied car. *Id.* at 66. Noting both the context of the offense—a documented addiction to drugs and alcohol, a head injury and being homeless—and the fact that the offense itself was on the "less severe end" of the scale of burglaries, Mr. Briones's counsel asked for probation or, alternatively, for a sentence of

12 to 30 months in the Nevada Department of Corrections "so that after his prison sentence is completed here, he can get back to California and resume his life there." *Id.* at 66, 67.

Mr. Briones's counsel next commented on the Division of Parole and Probation's (Division) sentencing recommendations. The Division was recommending a sentence of 48 to 120 months. *Id.* at 68. But Mr. Briones's counsel demonstrated for the district court judge that utilizing the Division's own scoring instruments actually rendered a recommended sentence of 16 to 72 months. *Id.* at 70-72.[2] Or, a sentence of 26 to 120 months "if Mr. Briones would have been found [to be] a high risk to offend." *Id.* at 73. Counsel informed the district court that the PSI writer told her "the discrepancy between his recommendation and what the table said ... was due to the concept of progressive sentencing, but that there were no specific guidelines for P & P as to when to deviate from the table for something like progressive sentencing." JA

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[2] In making her argument Mr. Briones's counsel relied on the Division's scoring documents, which are reproduced in the Joint Appendix as Exhibit 2, JA 44-48, to the Opposition to Attorney General's Motion to Quash Subpoena Duces Tecum. The Attorney General ultimately withdrew the motion to quash. See JA 56-59 (Notice of Withdrawal of Motion to Quash Subpoena Duces Tecum).

72. (See also JA 54 (Affidavit of Evelyn Grosenick) (paragraphs 2-5))[3]. "Progressive sentencing" was not specifically defined.

Judge Sattler noted that the Division's recommendation was not binding on him, and that the State was not (in this case) bound by the Division's sentencing recommendation. *Id.* 74-75.[4] Mr. Briones's counsel agreed, but explained:

> "[t]he disturbing thing to me is that the PSI is presented as a, as a recommendation based on objective criteria. In this case it is not based on objective criteria, it is based on the discretion of [a probation writer]. It's basically having a third party weighing in on what Mr. Briones's—on what his sentence should be and I don't think that's the appropriate role of P & P under the current statutory reading.

Id. at 75 and 76 ("... the problem that I see is they're coming and saying it's an objective recommendation and it's not, it's subjective, it's up to the individual P & P writer to determine whether or not they're going to deviate and why and that's never presented to the Court."); 79 (noting

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[3] Attached as Exhibit 5 to her Opposition to Attorney General's Motion to Quash Subpoena Duces Tecum.

[4] The plea negotiations left the State free to argue for a sentence. JA 6 (Guilty Plea Memorandum) (Paragraph 7); JA 11 (Transcript of Proceedings: Arraignment). Notably, though "free to argue" the State nonetheless recommended that the court follow the Division's sentencing recommendation. JA 85-86.

that the Division has no guidelines "to tell them how to deviate" from a scored sentencing recommendation); 82 ("I just don't think P & P gets to come in and say we're recommending 48 to 120, we use objective criteria and theoretically this 48 to 120 is based on objective criteria.").

Mr. Briones's counsel concluded by noting, as mitigation, that her client took responsibility for the crime, that he had "documented substance abuse issues that [were] directly related to his crime," and that he was in a "real unfortunate situation when California dropped him off here and he put a rock through the window of an unoccupied car." *Id* at 83-84.

Characterizing Mr. Briones's as a thief, *Id.* at 85-86, the State argued for the sentence recommended by the Division (adding that Mr. Briones's was "lucky he's not facing a habitual criminal today). *Id.* at 85. Adopting the State's habitual criminal meme, Judge Sattler expressed his amazement that Mr. Briones's was not being "adjudicated an [sic] habitual criminal" because he felt that Mr. Briones was one. *Id.* at 88 and 90 ("And if I had the opportunity today that is what I would have done" [adjudicated Mr. Briones a habitual criminal]). And, like the State, though not "bound" by the Division's recommendation, Judge

Sattler nonetheless followed it and imposed a sentence of 48 to 120 months. *Id.* at 91.

Mr. Briones appeals.

22. Whether Judge Sattler abused his sentencing discretion when he imposed a maximum sentence of 48 to 120 months?

23. Argument:

Judge Sattler abused his discretion or otherwise acted in an arbitrary and capricious manner when he imposed a sentence of 48 to 120 months in this case.

Standard of Review and Discussion

District court sentencing decisions are reviewed under an abuse of discretion standard. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000). "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 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998 (2001)). Additionally, "an abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand." *Patterson v. State*, 129 ____, ____, 298 P.3d 433, 439 (2013) (citations omitted).

The Division's scoring did not support the Division's recommendation

Mr. Briones, under the influence of drugs and alcohol, used a rock to break a window of a parked, unoccupied car, and apparently took $2 in change. JA 66. For this crime, which he took responsibility for, Mr. Briones was sentenced to a term of four to ten years in the Nevada Department of Corrections. The sentence imposed was the exact sentence recommended by the Division—though Mr. Briones's counsel was able to show that the Division's actual scoring methodology supported a sentencing recommendation of 16 to 72 months (or a sentence of 26 to 120 months if it was determined that Mr. Briones was a high risk to offend). The Division justified its sentencing deviation based on "progressive sentencing"—but did not define that term and admitted that there were guidelines to cabin "progressive sentencing" deviation.

As relevant here, the Division of Parole and Probation "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.[5] Moreover, "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. Thus, a PSI should 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"). Here, Mr. Briones's counsel demonstrated the "subjective" basis of the Division's recommendation—and the State did not refute her argument. See JA 84 (prosecutor's admission that he doesn't "care about scales, grades, graphs, scores." And that he didn't want to "talk about that stuff."). Accordingly, to the

[5] The impalpable and highly suspect evidence standard applies to factual errors in the PSI and, we suggest, should cover the underlying scoring process by the Division as well. Courts accept and follow the Division's sentencing recommendations in many cases. Those recommendations should not be presented as "objective" where the actual score is a "subjective" determination by the PSI writer, particularly where the court has not been informed of a deviation from the actual score.

extent Judge Sattler relied upon the Division's recommendation—he did not expressly disclaim reliance on the Division's recommendation, see *Sasser v. State*, 130 Nev. ____, ____, 324 P.3d 1221, 1225-26 (2014) (noting district court's express statement that it "would not consider certain information included in the PSI")—it was an abuse of discretion to so rely.[6]

Mr. Briones anticipates the State will respond by arguing that the Division's sentencing recommendation, even if based on "impalpable or highly suspect evidence," is of no moment because neither the district court judge nor the prosecutor was bound by it. But the State cannot dispute that here the prosecutor *expressly* requested Judge Sattler to follow the Division's recommendation, and Judge Sattler, in fact, did so. In short, though not technically bound to the recommendation, Judge Sattler embraced it as his own. Thus the Division's recommendation (and the basis for it) was a crucial matter.

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[6] All Judge Sattler said was that the Division's recommendation was "nothing more to me than a recommendation of [the Division's] that I can do with what I want ... ." JA 74-75.

The "habitual criminal" meme rendered Judge Sattler's sentence arbitrary and capricious

Even if this Court determines that the Division's sentencing recommendation was harmless because neither Judge Sattler nor the prosecutor were bound by it, Judge Sattler's sentence was nonetheless an arbitrary and capricious one as it was improperly influence by the prosecutor's "habitual criminal" meme.[7]

The State did not allege that Mr. Briones was a habitual criminal. See JA 1-3 (Third Amended Information); see NRS 207.016(2) (providing procedure for filing a habitual criminal count). Yet to bolster his argument that the Division's sentencing recommendation be imposed, the prosecutor added: "He's lucky he's not facing a habitual criminal [count] today." JA 85. Judge Sattler took note and informed Mr. Briones that he was amazed that a habitual criminal count had not been filed, "because, as [the prosecutor] stated, that's exactly what you are." JA 88. Later he added: "So certainly back to the point that I was making, ... [the prosecutor] is not in a position today to ask me to

[7] A "meme" is "an idea, behavior, style, or usage that spreads from person to person with a culture." Merriam-Webster's Collegiate Dictionary 774 (11th ed. 2012); Susan Blackmore, The Meme Machine 4-6 (Oxford University Press 2000).

adjudicate you an [sic] habitual criminal. There is no question in my mind that that is exactly what you are. And if I had the opportunity today that is what I would have done." JA 90.

In focusing on his inability to sentence Mr. Briones as a habitual criminal, Judge Sattler created a false choice between what he would have done had a habitual criminal count existed and the Division's sentencing recommendation. Unable to impose a habitual criminal sentence, Judge Sattler opted to follow and impose the maximum sentence recommended by the Division. In doing, Judge Sattler acted arbitrarily and capriciously and abused his sentencing discretion.

Conclusion

For the reasons set out in this Fast Track Statement this case should be remanded to the district court for a new sentencing hearing.

24. Counsel objected.

25. This appeal does present an issue of first impression or public interest.

VERIFICATION

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

2. I further certify that this fast track statement complies with the page—or type-volume limitations of NRAP 3C(h)(2) because it is: Proportionately spaced, has a typeface of 14 points and contains 2,355 words, and does not exceed 15 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, 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 statement is true and complete to the best of my knowledge, information and belief.

DATED this 7th day of January, 2015.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 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's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Fernando Briones (#1129231)
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P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office