

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3
4 LINDSIE NEWMAN,

Appellant,

5 vs.

6 THE STATE OF NEVADA,

Respondent.

Electronically Filed
May 19 2015 09:16 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
Case No. 67756
Case No. 67763

7
8 **FAST TRACK STATEMENT**

9
10 **1. Name of party filing this fast track statement:**

11 LINDSIE NEWMAN

12 **2. Name, law firm, address, and telephone number of attorney**

13 **submitting this fast track statement:**

14 KARIN L. KRIEZENBECK
Nevada State Public Defender
511 E. Robinson Street, Suite 1
15 Carson City, Nevada 89701
16 (775) 684-1080

17 **3. Name, law firm, address, and telephone number of appellate**

18 **counsel, if different from trial counsel:**

19 Same.

20 **4. Judicial district, county, and district court docket number of**

1 **lower court proceedings:**

2 First Judicial District Court, in and for Carson City

3 Docket No. 13 CR 00226 1B and 13 CR 00050 1B.

4 **5. Name of judge issuing decision, judgment, or order appealed**
5 **from:**

6 The Honorable James Todd Russell

7 **6. Length of trial; if this action proceeded to trial in the district**
8 **court, how many days did the trial last?**

9 Not Applicable

10 **7. Conviction(s) appealed from:**

11 Count I on 13 CR 00226 1B– Probation revocation for Possession of a
12 Controlled Substance, a category E felony. (Appellant’s Appendix at 46-47).¹

13 Count I on 13 CR 00050 1B-Probation revocation for Conspiracy to
14 Commit Grand Larceny. AA at 48-50.

15 **8. Sentence for each count:**

16 13 CR 00050 1B – 9 months with 265 days credit for time served. AA at
17 46-47.

18 13 CR 00226 1B – 12 to 32 months with credit for 0 days presentence
19 time served to run consecutive to 13 CR 000050 1B. AA at 48-50.

20 _____
1 Hereinafter “AA.”

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9. Date district court announced sentence appealed from:

March 2, 2015. AA at 36.

10. Date of entry of written judgment or order appealed from:

March 24, 2015. AA at 46, 48.

(a) if no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court:

N/A

12. If the time for filing the notice of appeal was tolled by a post-judgment motion:

N/A

(a) specify the type of motion and the date of filing the motion:

(b) date or entry of written order resolving the motion:

N/A.

13. Date notice of appeal filed:

April 7, 2015. AA at 51-53, 54-56.

14. Specify rule governing time limit for filing the notice of

1 appeal e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other:

2 NRAP 4(b).

3 **15. Specify statute, rule or other authority which grants this**
4 **court jurisdiction to review the judgment or order appealed from:**

5 NRS 177.015(3)

6 **16. Specify the nature of disposition below:**

7 Judgments of conviction entered pursuant to negotiated guilty pleas.

8 **17. Pending and prior proceedings in this Court:**

9 None known.

10 **18. Pending and prior proceedings in other courts:**

11 None known.

12 **19. Proceedings raising same issues:**

13 None known.

14 **20. Procedural history:**

15 A Criminal Complaint was filed on case no. 13 CR 00226 1B on October
16 4, 2013, charging Appellant with Possession of a Controlled Substance, a
17 category E felony. AA at 1-3. As part of plea negotiations, Appellant entered a
18 guilty plea to Possession of a Controlled Substance on November 4, 2013. AA at
19 4-12. On that date, Appellant filed a Petition for admission to the Drug Court
20 program and motion for Diversion.

1 On December 16, 2013, Appellant was originally sentenced to Possession
2 of a Controlled Substance, and then the court suspended sentencing to allow
3 Appellant to enter Drug Court. AA at 48-50.

4 On March 5, 2013, a Criminal Complaint was filed on case no. 13 CR
5 00050 1B,² charging Appellant with one count of Grand Larceny. AA at 13-14.
6 The Criminal Information amended the charge to Conspiracy to Commit Grand
7 Larceny. AA at 13-14. Appellant entered into a plea agreement on March 29,
8 2013. AA at 15-20.

9 The district court sentenced her on June 4, 2013 to nine months and
10 suspended the sentence. AA at 46-47.

11 Appellant was at one point discharged from Drug Court. She was
12 reinstated to the Drug Court Program and ordered to attend the City of Refuge
13 due to her pregnant state.³ Appellant fled the City of Refuge program and was
14 violated for 1) Controlled Substances; 2) Associates; 3) Laws; 4) Directives and
15 Conduct; 3) failure to abstain from use, possession or control of any alcoholic
16 beverages, controlled substances and stolen property; 5) Entering bars or
17 casinos; 6) failure to complete the Western Regional Drug Court Program and 7)

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19 ² The case was originally filed under case no. 13 CR 00388 1C.

20 ³ The City of Refuge program is a Christian-based program meant to assist
women with pregnancies in order to avoid abortions. The website does not
discuss substance abuse counseling. <http://refugenevada.com/index2.html>.

1 Failure to pay her financial obligations. AA at 24-29.

2 On March 23, 2015, the district court revoked Appellant's
3 probation and Appellant was then sentenced as specified in Paragraph 8 above.

4 **21. Statement of facts. Briefly set forth the facts material to**
5 **the issues on appeal:**

6 The two pertinent facts in this case are that Appellant is pregnant and
7 Appellant is a drug addict.

8 During Appellant's revocation and sentencing hearing the district judge
9 stated that

10 I want to make sure, and I guess my main concern is no matter
11 what happens in this particular matter, she stays in custody long
12 enough for that child to be born. I don't want her to go out and go
through any hoops or anything else and be out of custody until that
child's been born. . . .

13 AA at 39:6:24-7:6. The district court again expressed his opinion with "I just
14 want to make sure above all that she—and I'll sentence her accordingly—make
15 sure she stays in custody until that child is born." AA at 40:9:2-5.

16 In a discussion with the prosecutor, the prosecutor agreed with the court
17 that Appellant should remain in jail until she birthed her child stating that "[m]y
18 concern is that, you know, on the 12 to 32, she's going to serve, what, eight
19 months maximum before she's paroled. And with 170 days' credit for time
20 served, that's a substantial amount. That's like six of those eight months." AA

1 at 39:8:12-17.

2 Discussion further focused around the fact that Appellant's pregnancy
3 was high-risk and the court's comment that "it was probably high risk due to the
4 heroin use and everything else." AA at 40:11:2-3.

5 The court's final statement was "I'm doing this more than anything to
6 protect that unborn child." AA at 41:13:16-18.

7 The district court fashioned Appellant's sentence by running the cases
8 consecutive based on Appellant status as a pregnant addict rather than
9 punishment for the crimes she committed.

10 **22. Issues on appeal. State concisely the principal issue(s) in**
11 **this appeal:**

12 1. Whether the district court abused its discretion by sentencing Appellant
13 to a harsher sentence for her status as a pregnant controlled substance addict
14 rather than for punishment for committing a crime.

15 **23. Legal argument, including authorities:**

16 **A. This Court should Entertain this Appeal Despite the Issue of**
17 **Mootness.**

18 Because the issue would become moot upon the birth of Appellant's child,
19 this issue is preserved because pregnancy "provides a classic justification for a
20 conclusion of nonmootness." *Roe v. Wade*, 410 U.S. 113, 124-25, 93 S. Ct. 705,

1 712-13 (1973). The issue presented is of substantial importance, is capable of
2 repetition, and likely to otherwise evade review. *Id.*, 410 U.S. at 124-25, 93 S.
3 Ct. at 712-13.

4 [W]hen, as here, pregnancy is a significant fact in the litigation,
5 the normal 266-day human gestation period is so short that the
6 pregnancy will come to term before the usual appellate process is
7 complete. If that termination makes a case moot, pregnancy
8 litigation seldom will survive much beyond the trial stage, and
9 appellate review will be effectively denied. Our law should not
be that rigid. Pregnancy often comes more than once to the same
woman, and in the general population, if man is to survive, it will
always be with us. Pregnancy provides a classic justification for
a conclusion of nonmootness. It truly could be “capable of
repetition, yet evading review.”

10 *Id.*, 410 U.S. at 125, 93 s. Ct. at 713, quoting *Southern Pacific Terminal Co. v.*
11 *ICC*, 219 U.S. 498, 515, 31 S. Ct. 279, 283 (1911).

12 Thus, this Court should entertain Appellant’s appeal even though the
13 delivery of her child might make the issue in this case moot.

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15 **B. The District Court Abused Its Discretion.**

16 The Nevada Supreme Court has stated that it will refrain from interfering
17 with the sentence imposed by the district court “[s]o long as the record does not
18 demonstrate prejudice resulting from consideration of information or
19 accusations founded on facts supported only by impalpable or highly suspect
20 evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

1 The district court abused its discretion by sentencing Appellant to a more
2 severe sentence based on her status as a pregnant addict.

3 Addiction to the use of narcotics is “said to be a status or condition and
4 not an act.” *Robinson v. California*, 370 U.S. 660, 662, 82 S.Ct. 1417, 1418
5 (1962). “[a] state law which imprisons a person thus afflicted [with addiction to
6 narcotics] as a criminal . . . inflicts a cruel and unusual punishment in violation
7 of the *Fourteenth Amendment*.” *Id.* at U.S. 667, 82 S.Ct. at 1420-21.

8 Notably, Nevada has no statutes that criminalize substance abuse during
9 pregnancy. In fact, as decided in *Sheriff v. Encoe*, “[t]he legislature is an
10 appropriate forum to discuss public policy, as well as the complexity of prenatal
11 drug use, its effect upon an infant, and its criminalization.” 110 Nev. 1317,
12 1320, 885 P.2d 596, 598 (1994), citing *People v. Hardy*, 469 N.W.2d 50, 53
13 (Mich. Ct. App. 1991). The Nevada legislation’s preference is for pregnant
14 substance abusers to obtain counseling and assistance rather than to criminalize
15 their actions.

16 The district court’s decision in this case encroaches on the legislative
17 power in violation of separation of powers. “Judges who take it upon
18 themselves to solve problems of drug-exposed infants, however sympathetic
19 their actions may be, are acting like legislators and are making medical
20 decisions that they are usually ill-equipped to make.” Becker and Hora, *The*

1 *Legal Community's Response to Drug Use During Pregnancy in the Criminal*
2 *Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting*
3 *Attorneys, and Defense Attorneys in Ten California Counties*, S. Cal. Riv. L. &
4 *Women's Stud.*, 527, 531 (Spring 1993).

5 Procedural due process clearly prohibits judge-made crimes⁴ and vague
6 laws. Due process restrictions on judicial activity mean that, under a due
7 process analysis, a woman who comes before the court on a specific charge has
8 the right to receive a sentence for that particular crime; not for being pregnant
9 and engaging in behavior which may harm her fetus. Notably, because there are
10 no Nevada statutes criminalizing drug use during pregnancy, Appellant received
11 no notice that such behavior could be used to increase the time she spent
12 imprisoned.

13 In *Sheriff v. Encoe*,⁵ this Court confronted the issue of the criminalization
14 of pregnant women who ingest illegal substances prior to the birth of their child.
15 That case specifically dealt with the inclusion of pregnant women under a statute
16 addressing the willful endangerment of a child. Although the present case does
17 not specifically deal with a criminal statute and the criminalization of drug use

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19 ⁴ *Viereck v. United States*, 318 U.S. 236, 243 (1942) (“The unambiguous words
20 of a statute which imposes criminal penalties are not to be altered by judicial
construction so as to punish one not otherwise within its reach, however
deserving of punishment his conduct may seem.”)

⁵ 110 Nev. 1317, 1318, 885 P.2d 596.

1 while pregnant, there is very little difference in the result where a judge
2 sentences a defendant more harshly based on her status as a pregnant addict than
3 when a pregnant addict is convicted of a crime based on her status.

4 Although not binding, the New Jersey Superior Court, Appellate Division,
5 decided a case in 2004 that is on point with the present case. *New Jersey v.*
6 *Ikerd*, 850 A2d 516 (N.J. Super. Ct. App. Div. 2004). In that case, defendant
7 Ikerd, a pregnant addict, was sentenced to a more severe sentence based on the
8 fact that she was pregnant. *Id.* at 519. In fact, the court instructed defense
9 counsel that if defendant lost the baby, they could make an application to the
10 court, but in the meantime “I want to keep her off the street. I don’t want her
11 using drugs. The only way I can do it is by putting her in jail.” *Id.* at 617.

12 The New Jersey Appellate Court held that “when imposing a sentence on
13 a [violation of probation], the focus of the sentencing judge must be upon the
14 underlying crime and the sentence appropriate to that crime considered in
15 conjunction with the aggravating factors . . . at the time of the initial sentence
16 and any mitigating factors. . . .” 850 A.2d 516, 521.

17 “The purpose of the criminal justice system is to determine whether a
18 crime has been committed and, if so, to punish the guilty parties—not to
19 determine the most effective policy to combat a particular social ill.” *Id.* at 621,
20 quoting *State v. Des Marets*, 455 A.2d 1074 (1983); see also, Becker, *Order in*

1 *the Court: Challenging Judges Who Incarcerate Pregnant, Substance-*
2 *Dependent Defendants to Protect Fetal Health*, 19 Hastings Const. L. Q. 235
3 (Fall 1991). The Court vacated the sentence holding that there was no legal
4 support for the incarceration of the defendant. *Ikerd*, 850 A.2d at 524.⁶

5 In addition, in the present case, the district judge made the assumption
6 that Appellant's high-risk pregnancy was due to her substance abuse addiction.
7 This assumption is the same as basing his sentencing decision on facts supported
8 by impalpable or highly suspect evidence. There are many reasons that a
9 pregnancy can be high-risk and judges have no medical training.

10 A judge who believes incarceration benefits the fetus does not
11 understand that, in some cases, "cold turkey" withdrawal is bad for
12 fetuses. Moreover, many jails and prisons provide unhealthy living
13 arrangements where drugs and violence are common environmental
14 hazards. Recently settled lawsuits, which charged Alameda County
15 jails with cruel and unusual punishment and with providing
16 inadequate medical treatment thereby causing avoidable miscarriages
17 among pregnant prisoners, demonstrate the danger of equating
18 incarceration with medical treatment. For these reasons, many
19 medical associations nationwide strongly oppose punitive legal action
20 against pregnant addicts, and some blame punitive measures for
detering women from seeking medical treatment.

17 ⁶ For an illuminating discussion on judges that use the sentencing phase of
18 criminal trials to incarcerate pregnant substance-dependent women in an attempt
19 to protect fetal health, see Becker, *Order in the Court: challenging Judges who*
20 *Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal*
Health, Supra. The note cites to *U.S v. Vaughn*, Daily Wash. Law Rep., March
7, 1989, at 441 (D.C. Super Ct. Aug. 23, 1988). D.C., like Nevada, has no
statute criminalizing prenatal drug use.

1 *The Legal Community's Response to Drug Use During Pregnancy in the*
2 *Criminal Sentencing and Dependency Contexts: A Survey of Judges,*
3 *Prosecuting Attorneys, and Defense Attorneys in Ten California Counties,*
4 *Supra.*, at 535-536.

5 Although it could be argued that the district court sentenced Appellant
6 harshly because of her repeated violations, that was not the intension of the
7 district judge as expressed several times during the sentencing hearing—the
8 sentence was derived by the fact that Appellant was a pregnant addict, not
9 because of her violations.

10 Thus, because the district court below abused its discretion by sentencing
11 Appellant to a harsher sentence based on her pregnancy and status as an addict,
12 this court should reverse the sentencing order and remand for resentencing
13 before a different judge.

14 **24. Preservation of issues.** State concisely how each
15 enumerated issue on appeal was preserved during trial. If the issue was not
16 preserved, explain why this Court should review the issue:

17 The issue was reserved through the filing of a direct appeal.

18 **25. Issues of first impression or of public interest.** Does this
19 appeal present a substantial legal issue of first impression in this jurisdiction or
20 one affecting an important public interest? If so, explain:

1 This Court has never before considered whether a sentencing judge can sentence
2 a defendant more harshly based on substance abuse during pregnancy.

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1 VERIFICATION

2 1. I hereby certify that this fast track statement complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

5 This fast track statement has been prepared in a proportionally
6 spaced typeface using Microsoft Word 2000, Version 9.0 in Times New Roman
7 14 pt.

8 2. I further certify that this fast track statement complies with the
9 page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

10 Proportionately spaced, has a typeface of 14 points or more,
11 and contains 2898 words; or

12 Monospaced, has 10/5 or fewer characters per inch, and
13 contains ___ words or ___ lines of text; or

14 Does not exceed 15 pages.

15 3. Finally, I recognize that pursuant to NRAP 3C, I am responsible
16 for filing a timely fast track statement and that the Supreme Court of Nevada
17 may sanction an attorney for failing to file a timely fast track statement, or
18 failing to raise material issues or argument in the fast track statement, or failing
19 to cooperate fully with appellate counsel during the course of an appeal. I
20 therefore certify that the information provided in this fast track statement is true

1 and complete to the best of my knowledge, information and belief.

2 DATED this 18th day of May, 2015.

3 KARIN L. KREIZENBECK
4 Nevada State Public Defender

5 By /s/ SALLY DESOTO, Esq.
6 Chief Appellate Deputy
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of May, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
NEVADA ATTORNEY GENERAL

JASON D. WOODBURY
CARSON CITY 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. LINDSIE NEWMAN
#1136265 - FMWCC
4370 SMILEY ROAD
LAS VEGAS NV 89115

DATED this 18th day of May, 2015.

SIGNED: /s/ Tosca M. Renner
Employee of Nevada State Public Defender