

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.

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9 **FAST TRACK REPLY**

10 1. Plain Error Review

11 The State argues in its Response that because counsel did not object at
12 sentencing to the district court's harsh sentencing based on Appellant's
13 pregnancy, plain error review is appropriate.

14 Even if this Court concludes that plain error review applies, the error
15 involved would qualify as plain error.

16 "To amount to plain error, the 'error must be so unmistakable that it is
17 apparent from a casual inspection of the record.'" *Martinoirellan v. State*, ____
18 Nev. ____, ____, 343 P.3d 590, 594 (2015), quoting *Vega v. State*, 126 Nev. ____,
19 236 P.3d 632, 637 (2010). In addition, "the defendant [must] demonstrate[] that
20 the error affected his or her substantial rights, by causing 'actual prejudice or a

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1 miscarriage of justice." *Id.*, quoting *Valdez v. State*, 124 Nev. 1172, 1190, 196
2 P.3d 465, 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95
3 (2003)). Thus, reversal for plain error is only warranted if the error is readily
4 apparent and the appellant demonstrates that the error was prejudicial to his or
5 her substantial rights.

6 As in *Martimorellan*, the error is readily apparent because the sentencing
7 transcript demonstrates that the district court based its sentencing decision on
8 Appellant's status as a pregnant addict.

9 Additionally, the error affected Appellant's substantial rights to be
10 sentenced based on the crime she committed rather than her status as a pregnant
11 addict resulting in actual prejudice.

12 The State argued that prejudice could not be shown because (1) the
13 district court would probably have sentenced her to consecutive time even if she
14 were not a pregnant addict and (2) that there was no substantive difference
15 between concurrent and consecutive sentences under the facts of her case.

16 There was no evidence to support that the district court sentenced her
17 more harshly other than her status. Further the State is incorrect on the
18 sentencing. If the judge had run the sentencing concurrently, Appellant would
19 have 173 days credit on case no. 13 CR 00050, and 92 days on case no. 13 CR
20 00226, and the time would run concurrent. AA at 39:6:9-22, 40:10:14-19. The

1 district court discussed this extensively during sentencing.

2 2. Consideration of Pregnancy Status

3 The State argues that the district court did not err in considering
4 Appellant's pregnancy during sentencing because (1) the unborn child exists in
5 Appellant's body, similar to an organ; and (2) the district court can consider any
6 positive or negative effects of a particular sentence.

7 First, a fetus does not operate as a body organ. A fetus is more analogous
8 to a tumor than an organ.

9 Second, there is no case law to support the State's hypothetical that a
10 court can sentence someone to protect their health, such as a sentence that
11 protects a person with a heart issue that is an addict. Physical health would be a
12 mitigating factor to decrease a sentence rather than to increase it. *See for*
13 *example*, USSG § 5H1.4 (2008 ed.), (discussing downward departure justified in
14 Federal sentencing based on physical impairment: "Physical condition or
15 appearance, including physique, is not ordinarily relevant in determining
16 whether a departure may be warranted. However, an extraordinary physical
17 impairment may be a reason to depart downward; *e.g.*, in the case of a seriously
18 infirm defendant, home detention may be as efficient as, and less costly than,
19 imprisonment.""). Appellant contends that sentencing someone based on strictly
20 physical health reasons would be improper.

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Any additional arguments are submitted on the briefs.

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1 for filing a timely fast track reply I therefore certify that the information
2 provided in this fast track reply is true and complete to the best of my
3 knowledge, information and belief.

4 DATED this 6th day of July, 2015.

5 /s/ SALLY DESOTO
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