IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDSIE NEWMAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

Case No. 67756

Case No. 67763

APPELLANT'S OPENING BRIEF
FIRST JUDICIAL DISTRICT COURT, CARSON CITY

KARIN L. KREIZENBECK
Nevada State Public Defender

SALLY S. DESOTO
Chief Appellate Deputy
Bar I.D. No. 8790
511 E. Robinson St
Carson City, NV 89701
(775) 684-1080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I. JURISDICTIONAL STATEMENT

The bases for the Supreme Court's jurisdiction are NRS 177.015(3), NRAP 4(b)(A), and NRAP 17(a)(1)(M), (N). These are consolidated appeals from a final judgment of revocation of probation entered on April 1, 2015. Appellant's Appendix at 46-47.[1] Appellant filed timely notices of appeal to all issues of law and fact on April 7, 2015. AA at 51-56.

II. ROUTING STATEMENT

The Supreme Court presumptively retains the appeal for disposition, under NRAP 17(a)(1)(M), (N).

III. STATEMENT OF THE ISSUES

A. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO A MORE SEVERE SENTENCE BASED ON HER STATUS AS A PREGNANT DRUG ADDICT RATHER THAN FOR THE CRIME SHE COMMITTED.

IV. STATEMENT OF THE CASE

A Criminal Complaint was filed in Case No. 13 CR 00226 1B on October 4, 2013, charging Appellant with Possession of a Controlled Substance, a category E felony. AA at 1-3. As part of plea negotiations, Appellant entered a guilty plea to Possession of a Controlled Substance on November 4, 2013. AA at

[1] Hereinafter "AA."

4-12. On that date, Appellant filed a Petition for Admission to the Drug Court Program and Motion for Diversion.

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

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

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

Appellant was at one point discharged from Drug Court. She was reinstated to the Drug Court Program and ordered to attend the City of Refuge due to her pregnant state.[3] Appellant fled the City of Refuge program and was violated for 1) Controlled Substances; 2) Associates; 3) Laws; 4) Directives and Conduct; 5) Failure to abstain from use, possession or control of any alcoholic

---

[2] The case was originally filed under Case No. 13 CR 00388 1C.

[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.

beverages, controlled substances and stolen property; 6) Entering bars or casinos; 7) Failure to complete the Western Regional Drug Court Program; and 8) Failure to pay her financial obligations. AA at 24-29.

On March 23, 2015, the district court orally revoked Appellant's probation and Appellant was then sentenced in Case No. 13 CR 00050 1B to 9 months with 265 days credit for time served and in Case No. 13 CR 00226 1B to 12 to 32 months with credit for 0 days presentence time served to run consecutive to 13 CR 000050 1B. AA at 46-47, 48-50. The written judgment revoking probation was entered on April 1, 2015. AA at 46-47.

V. STATEMENT OF THE FACTS

The two pertinent facts in this case were that Appellant was pregnant and Appellant was a drug addict.

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

> I want to make sure, and I guess my main concern is no matter what happens in this particular matter, she stays in custody long 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. . . .

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

In a discussion with the prosecutor, the prosecutor agreed with the court that Appellant should remain in jail until she birthed her child stating that "[m]y concern is that, you know, on the 12 to 32, she's going to serve, what, eight months maximum before she's paroled. And with 170 days' credit for time served, that's a substantial amount. That's like six of those eight months." AA at 39:8:12-17.

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

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

It is apparent from the record that the district court fashioned Appellant's sentence by running the cases consecutive based on Appellant's status as a pregnant addict rather than commission of the crimes.

VI. SUMMARY OF THE ARGUMENT

Because Appellant was a pregnant drug addict, the district court sentenced Appellant to consecutive sentences to ensure that Appellant would be incarcerated until the birth of her infant. The district court abused its discretion in

//

this case by sentencing Appellant more harshly based on her status as a pregnant drug addict.

VII. ARGUMENT

A. STANDARD OF REVIEW

This Court will not disturb a district court's sentencing determination absent an abuse of discretion. *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). This Court has stated that it will refrain from interfering with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

B. This Court should Entertain this Appeal Despite the Issue of Mootness.

Because the issue would become moot upon the birth of Appellant's child, this issue is preserved because pregnancy "provides a classic justification for a conclusion of nonmootness." *Roe v. Wade*, 410 U.S. 113, 124-25, 93 S. Ct. 705, 712-13 (1973). The issue presented is of substantial importance, is capable of repetition, and likely to otherwise evade review. *Id.*

> [W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy

> litigation seldom will survive much beyond the trial stage, and 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."

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

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

C. The District Court Abused Its Discretion.

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

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

Notably, Nevada has no statutes that criminalize substance abuse during pregnancy. In fact, as decided in *Sheriff v. Encoe*, "[t]he legislature is an appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization." 110 Nev. 1317, 1320,

885 P.2d 596, 598 (1994), citing *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991). The Nevada legislation's preference is for pregnant substance abusers to obtain counseling and assistance rather than to criminalize their actions.

The district court's decision in this case encroaches on the legislative power in violation of separation of powers. "Judges who take it upon themselves to solve problems of drug-exposed infants, however sympathetic their actions may be, are acting like legislators and are making medical decisions that they are usually ill-equipped to make." Becker and Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties,* S. Cal. Riv. L. & Women's Stud., 527, 531 (Spring 1993).

Procedural due process clearly prohibits judge-made crimes[4] and vague laws.[5] Due process restrictions on judicial activity mean that, under a due process analysis, a woman who comes before the court on a specific charge has the right

---

[4] *Viereck v. United States*, 318 U.S. 236, 243 (1942) ("The unambiguous words 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] *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

to receive a sentence for that particular crime; not for being pregnant and engaging in behavior which may harm her fetus. Notably, because there are no Nevada statutes criminalizing drug use during pregnancy, Appellant received no notice that such behavior could be used to increase the time she spent imprisoned.

In *Sheriff v. Encoe*,[6] this Court confronted the issue of the criminalization of pregnant women who ingest illegal substances prior to the birth of their child. That case specifically dealt with the inclusion of pregnant women under a statute addressing the willful endangerment of a child. Although the present case does not specifically deal with a criminal statute and the criminalization of drug use while pregnant, there is very little difference in the result where a judge sentences a defendant more harshly based on her status as a pregnant addict then when a pregnant addict is convicted of a crime based on her status.

Although not binding, the New Jersey Superior Court, Appellate Division, decided a case in 2004 that is on point with the present case. *New Jersey v. Ikerd*, 850 A2d 516 (N.J. Super. Ct. App. Div. 2004). In that case, defendant Ikerd, a pregnant addict, was sentenced to a more severe sentence based on the fact that she was pregnant. *Id.* at 519. In fact, the court instructed defense counsel that if defendant lost the baby, they could make an application to the court, but in the

---

[6] 110 Nev. at 1318, 885 P.2d 596.

meantime "I want to keep her off the street. I don't want her using drugs. The only way I can do it is by putting her in jail." *Id.* at 617.

The New Jersey Appellate Court held that "when imposing a sentence on a [violation of probation], the focus of the sentencing judge must be upon the underlying crime and the sentence appropriate to that crime considered in conjunction with the aggravating factors . . .at the time of the initial sentence and any mitigating factors. . . ." *Id.* at 521.

"The purpose of the criminal justice system is to determine whether a crime has been committed and, if so, to punish the guilty parties—not to determine the most effective policy to combat a particular social ill." *Id.* at 621, quoting *State v. Des Marets*, 455 A.2d 1074 (1983); see also, Becker, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 Hastings Const. L. Q. 235 (Fall 1991). The Court vacated the sentence holding that there was no legal support for the incarceration of the defendant. *Ikerd*, 850 A.2d at 524.[7]

---

[7] For an illuminating discussion on judges that use the sentencing phase of criminal trials to incarcerate pregnant substance-dependent women in an attempt to protect fetal health, see Becker, *Order in the Court: challenging Judges who 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.

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

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

The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties, Supra., at 535-536; see also generally *Ferguson, et al. v. Charleston*, 532 U.S. 67, 121 S. Ct. 1281 (2001)(holding general purpose of reducing pregnant cocaine abusers, or fighting crime, does not justify violation of Constitutional rights).

Although it could be argued that the district court sentenced Appellant harshly because of her repeated violations, that was not the intention of the

district judge as expressed several times during the sentencing hearing—the sentence was derived by the fact that Appellant was a pregnant addict, not because of her violations.

D. Plain Error Review

The defense counsel in this case did not object to the harsh sentencing based on Appellant's status as a drug addict.

If this Court concludes that plain error review applies in the present case, based on counsel's failure to object, the error involved would qualify as plain error.

"To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" *Martinorellan v. State*, ___ Nev. ___, ___, 343 P.3d 590, 594 (2015), quoting *Vega v. State*, 126 Nev. , , 236 P.3d 632, 637 (2010). In addition, "the defendant [must] demonstrate[] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Id.*, quoting *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his or her substantial rights.

As in *Martinorellan*, the error is readily apparent because the sentencing

transcript demonstrates that the district court based its sentencing decision on Appellant's status as a pregnant addict.

Additionally, the error affected Appellant's substantial rights to be sentenced based on the crime she committed rather than her status as a pregnant addict, resulting in actual prejudice. The error is of constitutional dimension because it interfered with her right to be sentenced fairly. See *Dickson v. State*, 108 Nev. 1, 3, 822 P.2d 1122, 1123 (1992).

VIII. CONCLUSION

Based on the foregoing arguments, because the district court below abused its discretion by sentencing Appellant to a more severe sentence based on her pregnancy and status as an addict, this court should reverse the sentencing order and remand for resentencing before a different judge.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

KARIN L. KREIZENBECK
Nevada State Public Defender

By:/S/ SALLY DESOTO
Chief Appellate Deputy
Bar I.D. No. 8790
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 684-1080

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

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 exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, contains 3465 words and does not exceed 30 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 and volume number, if any, of the transcript or appendix where the matter relied on 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.

RESPECTFULLY SUBMITTED.

DATED this 30th day of September, 2015.

KARIN L. KREIZENBECK

Nevada State Public Defender
By /s/ SALLY DESOTO
Chief Appellate Deputy
Bar I.D No. 8790
511 East Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 684-1080

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of September, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
NEVADA ATTORNEY GENERAL

JASON D. WOODBURY
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 30th day of September, 2015.

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