

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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Tracie K. Lindeman
Clerk of Supreme Court
Case No. 67756
Case No. 67763

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9 **APPELLANT'S REPLY BRIEF**

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1 I.LEGAL ARGUMENT

2 The State argued in its Answering Brief that the district court did not err in
3 considering Appellant’s pregnancy during sentencing because (1) the unborn child
4 exists in Appellant’s body, similar to an organ (Answering Brief at 12:8-14)¹; and
5 (2) the district court can consider any positive or negative effects of a particular
6 sentence. AB at12:15-13:13.

7 First, a fetus does not operate as a body organ. A fetus is more analogous to
8 a tumor than an organ. Bourzal, K. *How a tumor is like an Embryo*,
9 <http://www.technologyreview.com/news/409004/how-a-tumor-is-like-an-embryo>

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

20 ¹ Hereinafter “AB.”

1 that sentencing someone based on strictly physical health reasons would be
2 improper and unconstitutional.

3 Last, there is basic fallacy to the State's argument that a court should be able
4 to consider Appellant's status as a pregnant addict during sentencing—this is not
5 what Appellant argues or what the district judge did in this case. A mere
6 consideration would have been expected, but here, the district judge based the
7 harshness of Appellant's sentence entirely on the fact that Appellant was a
8 pregnant addict.

9 There is no doubt that the district judge was frustrated by Appellant's
10 inability to complete any of the programs that the court had previously granted. If
11 the district court had sentenced her merely because of that, that would have been
12 completely in the court's discretion. But the court expressly stated that the basis
13 for its decision was to "make sure she stays in custody until that child is born."
14 AA at 40:9:2-5.

15 The State further argued that laws created to encourage women to seek
16 prenatal care and medical treatment, such as Nevada's legislative preference to not
17 criminalize pregnant addicts, do not create a get-out-of-jail-free card. AB at 14:9-
18 15:4. Specifically, the State argued that there are several instances where pregnant
19 women will not seek medical care, such as when they are victims of domestic
20 violence. AB at 14:17-20.

1 Victims of domestic violence are not comparable to the pregnant addict.
2 Certainly the State would agree that it would be unconstitutional for a judge to
3 sentence a domestic violence victim to prison to protect her. But more
4 importantly, neither the district attorney's office or a district judge have the legal
5 right to circumvent policies or laws that are created by the legislature. *Viereck v.*
6 *United States*, 318 U.S. 236, 243 (1942).

7 Lastly, the State argued that there would have been very little difference in
8 concurrent or consecutive sentences. AB at 18:4-19:10. There is a lengthy
9 discussion in the transcripts on how the credits could be applied in this case and
10 not one has the same conclusion as the State's argument in its brief. AA at 39:6:9-
11 40:11:10. The district court had several options available, including running the
12 sentences concurrently. The State argued that despite an order that the sentences
13 run concurrent they would still effectively run consecutively. The district court
14 obviously did not agree with this conclusion or it would not have struggled as it did
15 in crafting a sentence that would guarantee that Appellant remained in prison until
16 her child was born.

17 In fact, this struggle that the court demonstrated in constructing the sentence
18 clearly proves that the judge would not have sentenced Appellant to consecutive
19
20

1 terms if she had not been a pregnant addict, as the State alleged in its brief. AA at
2 17:7-18:3.

3 Any additional arguments are submitted on the briefs.

CERTIFICATE OF COMPLIANCE

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

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

7 2. I further certify that this reply brief complies with the page- or
8 type-volume limitations of NRAP 28(a)(1)-(2) and NRAP 32(a)(7) because it is
9 either:

10 [] Proportionately spaced, has a typeface of 14 points or more, and
11 contains 1542 words; or

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

14 [X] Does not exceed 15 pages.

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3. Finally, I recognize that pursuant to NRAP 3C, I am responsible ///
for filing a timely reply brief I therefore certify that the information provided in
this reply brief is true and complete to the best of my knowledge, information and
belief.

DATED this 17th day of December, 2015.

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