

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 DEVON RAY HOCKEMIER,

No. 68333

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.
8
9

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10 APPELLANT'S OPENING BRIEF

11 APPEAL FROM A JUDGMENT OF CONVICTION

12 FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
13 IN AND FOR THE COUNTY OF ELKO
14

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1 I. JURISDICTIONAL STATEMENT

2 This is an appeal from a judgment of conviction entered pursuant to pleas of
3 guilty to two counts of LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE,
4 A CATEGORY A FELONY AS DEFINED BY NRS 201.230. App., p. 33. A
5 Judgment of Conviction was filed on Jun 9, 2015. App., p. 33. A Notice of Appeal
6 was filed on June 29, 2015. App., p. 37. This Court has jurisdiction pursuant to
7 NRAP 4(b) and NRS 177.015(3).

8 II. STATEMENT OF THE CASE

9 On August 28, 2014, a Criminal Information was filed charging Mr. Hockemier
10 with:

11 COUNT 1: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
12 YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3).

13 In the alternative to Count 1

14 COUNT 2: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A
15 CATEGORY A FELONY AS DEFINED BY NRS 201.230.

16 In the alternatives to Counts 1 and 2

17 COUNT 3: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210.

18 COUNT 4: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
19 YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3)

20 In the alternative to Count 4

21 COUNT 5: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A
22 CATEGORY A FELONY AS DEFINED BY NRS 201.230.

23 In the alternative to Counts 4 and 5

24 COUNT 6: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210

25 COUNT 7: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
26 YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3)

27 In the alternative to Count 7

28 COUNT 8: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A

CATEGORY A FELONY AS DEFINED BY NRS 201.230.

In the alternative to Counts 7 and 8

COUNT 9: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210.

COUNT 10: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3).

In the alternative to Count 10

COUNT 11: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A
CATEGORY A FELONY AS DEFINED BY NRS 201.230.

In the alternative to Count 10 and 11

COUNT 12: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210.

COUNT 13: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3).

In the alternative to Count 13

COUNT 14: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A
CATEGORY A FELONY AS DEFINED BY NRS 201.230.

In the alternative to Counts 13 and 14

COUNT 15: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210.

COUNT 16: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14
YEARS, A CATEGORY A FELONY AS DEFINED BY NRS
200.366(3).

In the alternative to Count 16

COUNT 17: LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A
CATEGORY A FELONY AS DEFINED BY NRS 201.230.

In the alternative to Counts 16 and 17

COUNT 18: OPEN OR GROSS LEWDNESS, A GROSS MISDEMEANOR
AS DEFINED BY NRS 201.210.

COUNT 19: KIDNAPPING IN THE FIRST DEGREE, A CATEGORY A
FELONY AS DEFINED BY NRS 200.310(1).

In the alternative to Count 19

COUNT 20: KIDNAPPING IN THE SECOND DEGREE, A CATEGORY B

1 FELONY AS DEFINED BY NRS 200.310(2).

2 App., p. 1. An Amended Memorandum of Plea Agreement was filed on February 18,
3 2015. App., p. 10. The Agreement contemplated that the parties would be free to
4 argue for any sentences they deemed appropriate, including whether the sentences
5 should be run concurrently or consecutively. App., p. 10. On March 16, 2015, Mr.
6 Hockemier entered pleas of guilty to Counts 2 and 14 of the Criminal Information,
7 both counts being LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE.
8 App., p. 33. Sentencing occurred on May 21, 2015. On Count 2, Mr Hockemier was
9 sentence to life in prison with the possibility of parole after 10 years, with credit for
10 339 days previously served. On Count 14, he was sentenced to life in prison with the
11 possibility of parole after 10 years, said sentence to run consecutively with the
12 sentence for Count 2. App., p. 34.

13 III. STATEMENT OF ISSUES

14 A. WHETHER THE DISTRICT COURT ERRED IN RUNNING
15 APPELLANT'S TWO SENTENCES CONSECUTIVELY RATHER
16 THAN CONCURRENTLY.

17 IV. STATEMENT OF FACTS

18 As noted above, the Criminal Information was filed on August 29, 2014. The
19 offenses were alleged to have occurred "from on or about the 1st day of September,
20 2009, to on or about the 28th day of February, 2010." App., p. 1. Mr. Hockemier,
21 whose date of birth is November 24, 1992, was seventeen (17) years of age when the
22 offenses occurred. App., p. 18.

23 The victim in Count 2 of the Criminal Information was identified as "O.M."
24 Count 14 of the Information identified the victim for that count as "S.B." App., p. 2,
25 6.

26 After Mr. Hockemier had entered his pleas of guilty on March 16, 2015, the
27 Division of Parole and Probation (P & P) prepared a Presentence Investigation Report
28 (PSI). App., p. 17. At the conclusion of the report P & P recommended that the

1 sentences for Counts 2 and 14 of the Criminal Information be run concurrently. App.,
2 p. 25.

3 At the sentencing hearing, the State called two witnesses: Hydrie Overhooser
4 and Charles Bridge. App., p. 45, 49. Ms. Overhooser is the mother of O.M. and the
5 step-mother of S.B. App., p. 46. Mr. Bridge is the father of S.B. and the step-father
6 of O.M. App., p. 50. Both parents recommended that the two sentences be run
7 consecutively. App., p. 48, 51. The State also recommended that the sentences be
8 run consecutively, while the defense argued for concurrent sentences. App., p. 55,
9 60. At the conclusion of the sentencing hearing, Judge Porter ordered that the two
10 sentences be run consecutively. App., p. 63,34 .

11 V. ARGUMENT

12 THE DISTRICT COURT ERRED IN RUNNING THE SENTENCES 13 CONSECUTIVELY RATHER THAN CONCURRENTLY.

14 NRS 176.035(1) provides that a District Court has the discretion to run two or
15 more sentences concurrently or consecutively with each other. Appellant recognizes
16 that, normally, a sentence within statutory limits will not be disturbed on appeal
17 unless the sentencing court relied on "highly suspect or palpable information."
18 Smith v. State, 112 Nev. 871, 873 (1996); Silks v. State, 92 Nev. 91, 94 (1976). In
19 the instant case, the sentences imposed were within the statutory limits. However, the
20 district court appeared to have simply ignored the recommendations made by both the
21 defense counsel and the Division of Parole and Probation (PSI).

22 Of greatest concern to Appellant is that the sentencing court appears to have
23 simply disregarded P & P's recommendation. Recommendations by P & P are not
24 binding on the sentencing court. See Etcheverry v. State, 107 Nev. 782, 786 (1991).
25 However, the upward deviation in this case was so dramatic that it can only be
26 deduced that the lower court failed to give any weight or credence to the
27 recommendation in the PSI.

28 It is Appellant's position that P & P is the entity with the greatest ability to

1 determine an appropriate sentencing structure. It was P & P's position that the
2 appropriate structure was to have the two sentences be run concurrent. By ignoring
3 this recommendation, and imposing the maximum sentence, the lower court abused
4 its discretion in sentencing Appellant. Thus the matter should be remanded for an
5 new sentencing hearing.

6 VI. CONCLUSION

7 Based on the foregoing, Appellant respectfully requests that the Court reverse
8 and remand his case to the District Court for a new sentencing hearing.

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10 DATED this 10 day of December, 2015.

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20 CERTIFICATE OF COMPLIANCE

21 1. I hereby certify that this brief complies with the formatting requirements of
22 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
23 requirements of NRAP 32(a)(6) because this brief has been prepared in a
24 proportionally spaced typeface using WordPerfect Office x5 in 14-point Times New
25 Roman font.

26 2. I further certify that this brief complies with the page or type-volume limitation
27 of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP
28 32(a)(7)(C), it 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

1 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
2 assertion in the brief regarding matters in the record to be supported by a reference
3 to the page and volume number, if any, of the transcript or appendix where the matter
4 relied on is to be found. I understand that I may be subject to sanctions in the event
5 that the accompanying brief is not in conformity with the requirements of the Nevada
6 Rules of Appellate Procedure.

7 DATED this 10 day of December, 2015.

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17 CERTIFICATE OF SERVICE

18 I certify that this document was filed electronically with the Nevada Supreme
19 Court on the 10 day of December, 2015. Electronic service of the foregoing
20 document shall be made in accordance with the Master Service List as follows:

21 Nevada Attorney General
22 Sherburne M. Macfarlan, III
23 Elko County District Attorney

24 I further certify that I served a copy of this document by mailing a true and
25 correct copy thereof, postage prepaid to the following address(es):

26 Devon Hockemier, # 1140743
27 c/o Lovelock Correctional Center
28 1200 Prison Rd.
Lovelock, NV 89419


Danielle Leyva