IN THE SUPREME COURT OF THE STATE OF NEVADA

UPUTAUA DIANA POASA, No. 76676

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Marilee Cate, Deputy District Attorney, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issue: None.

5. Procedural history: The State accepts appellant Uputaua Diana Poasa's (hereinafter, "Poasa") account.

6. Routing Statement: The State agrees with Poasa.

7. Statement of facts: The State agrees with Poasa's rendition of the facts. However, the State provides the following additional facts that are relevant to the district court's decision in this case.

Poasa had issues complying on pretrial supervision. Poasa failed to appear in justice court after being released on her own recognizance. Joint Appendix, hereafter, JA at 22. She was a high risk on the pretrial risk assessment tool. *Id.* She asked to be released again from custody at arraignment after she entered her plea. *Id.* at 21. The State did not object to an own recognizance release. *Id.* at 23.

The district court released Poasa on her own recognizance. *Id.* Sentencing was set for April 11, 2018, but the district court issued an order revoking Poasa's pretrial release on February 7, 2018. *Id.* at 25. Poasa failed to appear for her sentencing date in April, and was finally arrested at the end of May in another jurisdiction. *Id.* at 37. She remained in custody until sentencing which occurred on August 8, 2018. *Id.* at 31, 37.

The district court sentenced Poasa to probation with additional jail time and drug court as a condition. *Id.* at 41, 46-48. The court told Poasa there are consequences for not showing up. *Id.* at 41. The court ordered her to serve an additional 29 days in custody and to forfeit her 99 days in presentence custody. *Id.* at 41-42. Poasa objected on the grounds that she

did not want that sentence. *Id.* at 42. And, the district court, noted, "Well, I know. No one really wants to go to prison, and no one wants their time, but that is what we're going to do. It's significant here because you're going in with not much credit." *Id.* at 42.

8. Issues on appeal:

Whether the district court abused its discretion in refusing to provide Poasa credit for the time she spent in custody prior to sentencing due to her failure to comply with her pretrial release requirements?

9. Legal argument:

This is an appeal from a judgment of conviction, pursuant to a guilty plea to grand larceny of an automobile of less than $3,500, a category C felony. JA at 46. On appeal, Poasa asserts the district court should have given her credit toward her sentence for the time she spent in custody prior to sentencing. The Nevada Supreme Court has consistently recognized that the district courts have wide discretion in sentencing decisions. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). In this case, the district court's decision to not provide Poasa credit for the time she spent in presentence custody was within the bounds

of law, as expressly provided by the Nevada Legislature in NRS 176.055, and within the bounds of reason considering the circumstances of Poasa's case. As such, this Court should affirm the judgment of conviction.

In order to affirm Poasa's judgment of conviction, this Court must reexamine and clarify language in some of its cases considering NRS 176.055(1). It is appropriate to do so because the bright line rule that has developed does not find support in the statute or Nevada legislative history on point. As such, it is appropriate for this Court to reexamine its holdings concerning district courts' discretion to award presentence credit at sentencing. *See Harris v. State*, 130 Nev. Adv. Op. 47, 329 P.3d 619 (2014) (internal quotations and citations omitted) ("[a]lthough the doctrine of stare decisis militates against overruling precedent, when governing decisions prove to be unworkable or are badly reasoned, they should be overruled").

In 1967, the Nevada Legislature enacted NRS 176.055. In doing so, it specifically gave the district courts discretion regarding whether to award presentence credit. In relevant part, NRS 176.055 provides, "whenever a sentence of imprisonment in the county jail or state prison is imposed, the court **may** order that credit be allowed against the duration of the sentence, including any minimum term or minimum aggregate term, as applicable,

thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction...." NRS 176.055(1) (**emphasis added**).

Poasa asserts that the Nevada Supreme Court has removed the discretion afforded to the district court in NRS 176.055(1) and determined that presentence credit is mandatory.[1] Poasa's position finds it primary support in the Court's holding in *Kuykendall v. State*, which provided that "[d]espite the discretionary language or NRS 176.055(1)... the purpose of the statute is to ensure that all time served is credited towards a defendant's

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[1] Poasa relies on a handful of cases that discuss NRS 176.055(1) and presentence credit. *See* Fast Track Statement ("FTS"), filed Sep. 21, 2018, at pp. 7-9. Each case is factually distinguishable from Poasa's case, since they do not concern a defendant with pretrial violations, failures to appear, bench warrants, or a court's decision to deny pretrial credit as an incentive to encourage success on probation. *See Anglin v. State*, 90 Nev. 287, 525 P.2d 34, 36 (1974) (where appellant was entitled credit because he was financially unable to post bail prior to sentencing); *Kuykendall v. State*, 112 Nev. 1285, 926 P.2d 781 (1996) (where appellant was entitled to credit for the time he was held without bail prior to sentencing); *Nieto v. State*, 119 Nev. 229, 231-32, 70 P.2d 747, 748 (2003) (where appellant was entitled to credit for the time he spent in custody in California before extradition); *Johnson v. State*, 120 Nev. 296, 89 P.3d 669 (2004) (where appellant was entitled credit on multiple counts when he was sentenced concurrently); *Haney v. State*, 124 Nev. 408, 185 P.3d 350 (2008) (considering good time credits and NRS 211.320, but noting that credit time served is "mandatory").

Poasa also relies on cases involving jail time as a condition of probation and credit on the ultimate sentence if it has to be served. *See* FTR at 9-10. These cases are also factually distinguishable. As such, the holdings in those cases should not govern the Court's analysis of this case.

ultimate sentence." 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996). In *Kuykendall*, this Court recognized that the language of NRS 176.055(1) and its prior interpretation of the statute, in *Anglin v. State*, 90 Nev. 287, 525 P.2d 34, 36 (1974), indicate that the award for presentence confinement credit is discretionary. *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783. Yet, instead of stopping its analysis there (since the statute is clear on its face), the *Kuykendall* Court looked to other jurisdictions to interpret Nevada's statute. The Court was persuaded by California Supreme Court cases considering California's statute on point, despite the Court's recognition that the California statute includes mandatory language. *See id.* ("However, the California Supreme Court has reached the opposite conclusion, holding that the statute requiring mandatory credit applies to all felony convictions, not only to those in which presentence incarceration occurred as a result of indigency."). The *Kuykendall* Court adopted the California Supreme Court's analysis of the California statute and, in doing so, determined that Nevada's statute has a purpose that is at odds with its plain language. *See id.*; *Compare* NRS 176.055(1) (indicating that the district court "may" order credit against the ultimate sentence) *with* Cal. Penal Code § 2900.5 (California's statute examined by the California

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Supreme Court which indicates that credit "shall" be provided against the ultimate sentence).

Poasa's position also finds support in the Court's ruling in *Haney v. State*, 124 Nev. 408, 185 P.3d 350 (2008). In *Haney*, the Court considered sheriffs' ability to award good time credits post-sentence under NRS 211.320. *Id.* at 413, 354. The Court compared good time credits to credit time served and noted that credit time served is "mandatory," citing NRS 176.055 and *Kuykendall*. *Id*. at n. 19. However, the *Haney* Court went on to recognize that the Nevada Legislature intended to give district courts discretion over credit time served. Then Court aptly noted, "[i]t is clear the Legislature did not intend for the district courts to have any authority to restrict the sheriff's ability to award good time credits but *did intend to grant district courts the authority to award credit for time served*." *Id*. at 413, 354 (*emphasis added*). The State agrees and asks this Court to overrule *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783, *Haney*, 124 Nev. at 413, 185 P.3d at 354, and related precedent to the extent they hold that good time credits are mandatory under NRS 176.055(1).[2]

[2] This can be done without disturbing the holding in *Anglin v. State*, 90 Nev. 287, 292, 525 P.2d 34, 37 (1974), which recognizes that an individual should not be punished more harshly because he did not have the means to make bail. In *Anglin*, the Court held that presentence credit is discretionary unless (1) bail has been set for the defendant and (2) the

This Court should find that NRS 176.055(1) is discretionary based on the plain language of the statute. The term "may" is not ambiguous. This Court has held many times that "'may' is construed as permissive and 'shall' is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature." *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972) (citation omitted). Nevada Supreme Court Rule 2(9) and Nevada District Court Rule 2(6) also define "may" as permissive. The term "may," as used in NRS 176.055(1), should be interpreted and applied consistent with its plain meaning.

Even if this Court looks beyond the plain language of the NRS 176.055(1), it is evident that the subsection was enacted to afford district courts discretion to award presentence credit. While there is very little in the legislative history regarding the adoption of the subsection at issue here, there was a brief discussion about it on March 16, 1967, during an Assembly Committee on Judiciary meeting. The purpose described for the section was to allow judges to use presentence custody time against the sentence, which was being done by some judges already. The committee could have easily mandated credit, since some judges were giving credit and others were not. Instead, the committee simply codified the judges' ability

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defendant was financially unable to post the bail. *Id.* at 292, 37.

to decide what to do with the presentence credit. *See* Nevada Assembly Comm. on the Judiciary, 54th Session, Minutes of Meeting held March 16, 1967, concerning section 234.5 to AB 81. NRS 176.055 has been amended a handful of times since 1967, but the legislature has not changed the discretionary nature of NRS 176.055(1) since it was adopted in 1967. *See Haney*, 124 Nev. at 413, 185 P.3d at 354 (considering the legislature's opportunities to amend a statute and its inaction important when considering legislative history). The Nevada legislature's intention to afford the district courts with discretion to award presentence credit is clear. This Court has repeatedly recognized the discretionary language that appears in NRS 176.055. As such, this Court should reexamine its authority indicating that presentence credit is mandatory and consider each case presented regarding pretrial credits on the merits to determine if the sentencing court abused its discretion, instead of following a blanket rule that the credit is mandatory.

In this case, the district court did not abuse its discretion because its decision to deny Poasa the benefit of her pretrial credit was based in law (NRS 176.055(1)) and in reason. Initially, it is important to note that Poasa does not claim that the district court's decision somehow subjects her to sentence outside the statutory limits. The real issue is that she wants her

99 days of credit in case she fails to comply with the terms of probation. Certainly, the limited history included in the record provides some cause for concern regarding her ability to perform well on probation. But, that concern should not carry any weight. The fact of the matter is that despite Poasa's pretrial behavior, the district court still placed her on probation and gave her the opportunity to remain out of custody. The district court's comments concerning its decision not to apply Poasa's pretrial credit indicate it did so in an effort to provide her with an additional incentive, or encouragement, to behave on probation. *See* JA at 42; *accord*. at 40 (the district court even told her that "this was grown up time" and she needed to take it seriously). Probation compliance is a reasonable consideration for the district court during sentencing and a consideration that certainly justifies its decision in this case in light of Poasa's past performance. The district court's decision was consistent with the authority provided in NRS 176.055(1) and did not exceed the bounds of law or reason. Therefore, the judgement of conviction should be affirmed.

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10. Preservation of issues: The State agrees with Poasa.

DATED: October 11, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: MARILEE CATE
Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response 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 response has been prepared in a proportionally spaced typeface using Word 2013 in 14 Georgia font.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 11 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

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response is true and complete to the best of my knowledge, information and belief.

DATED: October 11, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 11, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

Margaret Ford
Washoe County District Attorney's Office