IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket Number 77294

Dist Ct. Case. CR-FP-17-3893

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE NANCY PORTER

FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

The State by way of its Answering Brief has put forth certain facts, and objections to facts as stated in Appellant's Opening Brief which must be addressed herein. All remaining factual allegations found in the Opening Brief remain strong in support of the arguments of Appellant, Tennillle Rae Whitaker.

The State takes exception with Appellant's statement that a "Petition", the document containing the signature of over 70 folks with no personal involvement in this case, which the State alleged was attached to the Presentence Report which was dated 9/17/19, was delivered untimely to the defense, in violation of Due Process. Yet, let's look at this setting. Even if the State was correct that the Petition was attached to the PSI, the document would have been mailed to defense counsel on 9/17/18 with a sentencing date hearing of 10/04/18. That is still about 2 weeks to investigate and competently confront a document containing illegible signatures. The document was dated May 7, 2018, a week after the arraignment. AA 80. There is no explanation provided by the State as to why that document was not timely provided to the defense.

The content of the Petition included not only allegations against Ms. Whitaker which were completely untrue, and proven untrue at a civil restraining order hearing, but allegations against her spouse. Area citizens attempted to keep

Ms. Whitaker's husband restrained from driving down the Interstate, all the while knowing he worked for NDOT. AA 80, 178-179.

The State further attempted to portray this sentencing hearing as less than contentious. Usually the courtroom antics of the crowded room do not appear in black and white sentencing transcripts. That was not the case herein. The Judge repeatedly advised onlookers in the courtroom of its decorum rules and advised that the Bailiff would remove unruly people from the courtroom. No place in the record is the fact that defense counsel was offered an armed escort to his vehicle after the hearing concluded, but Mr. Bergeron, as an officer of the Court, would let this court know that happened. It is impossible to cite to the record on appeal but it is also difficult to allow the State attempt to portray this particular sentencing as anything other than a small community showing their opinions against Ms. Whitaker by way of an improper Petition and by courtroom presence. It may be an open court, but it should be an impartial open court.

Mr. Bergeron asked the court, during the sentencing hearing, "Is there some sort of petition that has reached the Court, that I don't know about? If the answer is "no", I'm okay with it." AA 141.

The Court responded, "It was a letter that was signed by several people." AA 141. The Court admitted these people were not victims at law.

Mr. Bergeron argued that a petition was improper in a sentencing hearing. In response, Judge Porter indicated it was not influencing her. Yet, it is a petition signed by over 70 people, not noticed to the defense in a timely manner, full of suspect information and illegible signatures.

Mr. Bergeron advised the Court that the case had suffered from excessive media coverage, ranging with nationwide news articles including an article in England. AA 177.

As for seeking recusal of the Court, trial counsel did not file a pretrial motion but then again, trial counsel explained to the court that he was unaware of a possible petition having reached the court until the day of sentencing and stated he had not seen such a petition. The cause for recusal became apparent at the time of sentencing. Contrary to Respondent's assertion, trial counsel objected to the use of suspect evidence by way of his very sentencing argument, including the restraining order allegations which were found in the suspect petition. AA 174-175, 178-179.

Respondent objected to Appellant's use of facts found in the PSI. The State placed inadequate facts upon this Court's record by way of a nolo contendre plea offer of proof for appellate counsel to use the State's factual allegations in support of this appeal. The facts as found in the PSI are the facts of the case, as amended

during the sentencing hearing. *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 135 P.3d 807 (2006), AA 144.

Again, Respondent argued that the school system was combined so that the various campuses in Wells constitute one school. AA 182-183. That is simply not true. The fact that there is one Principal overseeing several campuses does not make one school. The high school students are separated from the elementary school, where Ms. Whitaker taught. Ms. Whitaker was not even licensed to be a high school teacher. Respondent did not explain why the memorandum of plea does not contain any factual allegations on which the State relied to prosecute and convict the Defendant. AA 6-13. Respondent does not explain why the Offer of Proof that was filed into court to support a nolo contendre plea contained insufficient facts to support the entry of a plea. Respondent argued that it placed Ms. Whitaker on notice that she taught or volunteered at the same school that the four young males attended. This is untrue. Ms. Whitaker taught at the elementary school, not the high school. Two of the young males had no association with Ms. Whitaker at the elementary school. AA 14-15.

Respondent did not explain why, if Respondent had such strong opinion against the report of Steven Ing, M.A., MFT, why Respondent did not request the Division of Parole & Probation be ordered to prepare an independent psychosexual evaluation upon Ms. Whitaker. Respondent argued that it was not incumbent upon

the Court to order a psycho-sexual evaluation. Answering Brief, Page 9. Respondent argued that the District Court did not state it would not recognize the findings of Mr. Ing. Answering Brief, Page 10. Yet, the Court specifically noted that it found the fact that Ms. Whitaker had treated with Mr. Ing to conflict with Mr. Ing's ability to generate the report in an unbiased manner. Judge Porter stated "I do question his objectivity." AA 212. At no time did the Court advise defense counsel that it would question the reliability of the report provided by Steven Ing, or the objectivity of the author so that another report could be sought.

ARGUMENT

1. NRS 201.540 is unconstitutional, as written and as applied in this case.

This law is one of the most poorly written statutes that counsel has reviewed to date. There are many interpretations of this statute which would preclude legal activity between consenting adults and find consenting sexual acts between people worthy of criminal sanctions. That constitutes a law which is overbroad. This statute criminalizes protected behavior and violates the right to privacy.

Respondent improperly alleged that Appellant did not object to the statute or raise its unconstitutionality. While it is accurate that trial counsel did not file a motion to dismiss or a pretrial writ attacking NRS 201.540, trial counsel

repeatedly objected during the sentencing hearing and repeatedly argued that the statutory scheme failed to meet constitutional muster. Defense counsel argued the State filed charges against Ms. Whitaker that did not amount to a crime. AA 158-166; 171. Judge Porter told defense counsel his objection would have to be heard by the federal court system. AA 212.

The goal of the statute was to criminalize **consensual** sexual relationships between a teacher and a student. The statutory scheme does not constitute a crime against the person. Rather, the statute is intended to protect morals and public decency. See NRS 201.540 & Title 15, Chapter 201. Society is the victim. See Hearing on S.B. 122 Before the Senate Judiciary Comm., 69th Leg. (Nev. March 13, 1997).

NRS 201.540 is unconstitutionally vague because it fails to define its essential terms, the term "pupil." The test for constitutionality has two prongs. By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law. The failure to define terms provided an opportunity to misunderstand whether two of the young men who were students at a differing school were actually protected by this statutory scheme from having consensual sex with a teacher.

The second prong of review is also critical and more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006).

To avoid a standardless statute, the Legislature must establish minimal guidelines to govern law enforcement in its enforcement obligation. *Cornella V. Justice Court*, 132 Nev. ___, 377 P. 3d 97 (2016) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

NRS 201.540 was applied unconstitutionally herein because the statute uses the term school, not school district and the State argued that the Wells Unified School District was one school. This is simply not true. There is more than one physical building associated with the school district and each building contains a separate school. The high school students are not combined with the elementary aged students. The legislature specifically noted that it was because of the particular relationship of a person who is in authority and has an unusual amount of authority or control over a student that NRS 201.540 was passed. See Hearing on S.B. 122 Before the Assembly Judiciary Comm., 69th Leg. (Nev., May 2, 1997 & May 16, 1997, Exhibit G.). The Legislative Counsel Bureau voiced its opinion that the provisions of S.B. 122 clearly reflect

a goal of 'striking [at] the evil' of sexual exploitation in one of the areas where sexual exploitation is most likely to occur, the student-teach relationship. See Hearing on S.B. 122, Before the Assembly Judiciary Comm., 69th Leg. (Nev., May 2, 1997 & May 16, 1997, Exhibit C: LCB letter to Senator McGinness dated 5/1/1997). Ms. Whitaker was not the teacher of any of the males involved herein. Two of the students were aides at the elementary school, but one student was not her aide at the time of the relationship. Ms. Whitaker did not work at the high school the young men attended and there was not a teacher/student relationship, nor was there a position of authority over two of the victims. Two of the convictions should be set aside herein.

This statute would apply to parents who arrived at school to help clean up the playground or deliver cupcakes for a party. Just who would not qualify to have a position of authority over a student at a school? How many concerned and involved parents have not attended a fundraiser at the school? Any visitor to the school campus would qualify for criminal prosecution under NRS 201.540.

Fundamental to a democratic society is the ability to wander freely and anonymously without being compelled to divulge information to the government about who we are or what we are doing. This right to be let alone —to simply live in privacy—is a right protected by the Fourth Amendment and undoubtedly sacred

to us all. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *Brown v. Texas*, 443 U.S. 47, 52-53 (1979), *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). The real question becomes, was the invasion of privacy reasonable? In this case, the right to privacy prevails.

The Rule of Lenity requires that the Supreme Court liberally interpret an ambiguous criminal law in favor of the accused. *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011). When interpreting this statutory scheme, it must fail constitutional review.

2. The District Court should have recused itself from the sentencing proceeding. The Court relied upon suspect evidence and violated the Due Process Rights of Appellant.

This transcript of sentencing, coupled with the fact that the Department of Parole & Probation delivered a deviation recommendation to put this Defendant in prison, (AA 151), Ms. Whitaker's evaluation with a low risk to reoffend,(AA 29, 31), her lack of criminal record, (PSI) and the consensual nature of the crime, bias is demonstrated by the sentencing Court. The District Court specifically noted that Steven Ing's report was insufficient for the Court to see the low risk to reoffend due to the fact that Mr. Ing treated the Defendant. The District Court failed to advise the defense that its position would be such that the value of the report of

Steven Ing was to be questioned by the Court so that accommodation could be made to obtain another report from a nontreating professional. This occurred in spite of the approximate five months between receipt of the report and the sentencing hearing. The Court's simple statement that it would not consider the petition filed by members of the community, who had no say by law in what the court should do on this case, is inadequate to demonstrate a lack of bias by the suspect statements contained in that Petition. The Court's commentary that there were many people present in court for this hearing shows the attempt by the community to have sentencing occur as a "community standard" rather than an individualized proceeding. The late arrival of victim impact evidence was unnecessary. The letter from the President of the Board of Trustees of the Elko county School District was improper. The letter from Tammy Myers was improper. AA 100, 108, PSI pages 3-4; AA 156-157; 154. There was virtually five months from plea to sentencing on this case. The late delivery of the PSI, two weeks to hearing, coupled with the question of whether the attachments to the PSI were ever delivered to defense counsel, demonstrates the Court's lack of concern for the due process rights of the Defendant.

Notably, Ms. Whitaker lost everything by accepting responsibility and accepting this plea offer. She lost her liberty, her home, access to her children because the prison refuses visits between a parent and a child in a sex offense

conviction, her job, her position in the community and her teaching license. Ms. Whitaker had attended 25.5 hours of counseling in Reno between the date of her arrest and the sentencing. AA 20. It appears the Court did not ponder any of those losses when imposing consecutive maximum sentences which were in excess of the plea bargain, in excess of the PSI (which was already an increased and deviated recommendation), as well as Ms. Whitaker's low risk to reoffend position that was found by Steven Ing. The appearance of bias and reliance upon suspect evidence shines rather highly through this proceeding.

The goal of a new sentencing proceeding is one of fairness. A judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, Due process requires a fair trial in front of a fair tribunal. In Re Murchison, 349 U.S. 133, 136 (1955); 5th & 14th Amendments.

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party... NCJC Canon 3E(1) . This Court exercises its independent judgment of the undisputed facts.

A judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the parties to the action. NRS 1.230(1). To disqualify a

judge based on personal bias, the moving party must allege bias that stems from an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971)).

The required "risk of bias" standard is objective and is based on appearances. Rippo v. Baker, 137 S. Ct. 905 at 906-07 (2017).

A review of this sentencing transcript, the procedures involved and the decision of the sentencing court to impose maximum consecutive terms of prison on this fact setting demonstrates bias. Suspect evidence permeated this sentencing hearing. Due process was violated.

As for other issues found in Appellant's Opening Brief, Appellant stands by her argument therein.

CONCLUSION

Ms. Whitaker's rights under the Due Process Clause of the 5th & 14th Amendments were violated by the District Court. NRS 201.540 is unconstitutional as applied regarding the two male victims who were not student aides and who attended a different school, the high school. Those convictions must be set aside. NRS 201.540 is unconstitutionally vague, overbroad and violates the Equal

Protection Clause. The statute should be stricken by this Court as unconstitutional. The statutory scheme is overbroad. The statutory scheme violates the right to privacy.

Alternatively, Ms. Whitaker is entitled to a new sentencing hearing before a judge who has not been part of the case to date.

DATED this 22 day of April, 2019.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages .

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. The document was prepared in Word. There are 13 typed pages, 3,165 words in this brief and 295 lines of type. The Brief has been prepared in Word, proportionally spaced type, 14 point Times New Roman with 2.0 line spacing.

DATED this 22 day of April, 2019.

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X First Class Mail, United States Post Office

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DATED this 22nd day of April, 2019.

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