

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO MERINO OJEDA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

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No. 77917

Appeal from Judgment of Conviction in Case Number CR15-0829
The Second Judicial District Court of the State of Nevada
The Honorable Lynne K. Simon, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on December 14, 2018. JA 115-116 (Judgment of Conviction).¹ Appellant, Francisco Merino Ojeda (Mr. Ojeda), timely filed a notice of appeal from that judgment on January 14, 2019. JA 117-118 (Notice of Appeal). This Court’s jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because it is an appeal from a judgment of conviction based on a guilty plea. Mr. Ojeda’s case was the subject of an earlier writ proceeding initiated by the State. See *State v. Second Judicial Dist. Court (Ojeda)*, 134 Nev. Adv. Op. 94, 431 P.3d 47 (2018) (denying petition). The issue resolved in that proceeding—defense access to veniremember information obtained by the State through a search of a governmental database—does not require this appeal to remain in the Nevada Supreme Court.

¹ “JA” stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1).

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Past is prologue. Did the district court abuse its discretion by sentencing Mr. Ojeda to a term of life without the possibility of parole where, as here, Mr. Ojeda had no significant prior criminal history and had maintained a law-abiding life for over ten years prior to his arrest?

IV. STATEMENT OF THE CASE

The State charged Mr. Ojeda with one count of murder with the use of a deadly weapon, a violation of NRS 200.010, NRS 200.030, and NRS 193.156, a category A felony. JA 1-4 (Information). Subsequently, the State filed an amended information charging murder in the first degree as a stand-alone count without the weapon enhancement. JA 5-8. Thereafter, Mr. Ojeda entered his guilty plea to the murder count contained in the Amended Information. JA 28 (Transcript of Proceedings: Change of Plea).

The district court sentenced Mr. Ojeda to a term of life in the Nevada Department of Corrections without the possibility of parole and credited him for 1,375 days in predisposition custody. JA 115-16 (Judgment of Conviction). The district court also imposed statutorily required fees, assessments, and costs. The district court also ordered Mr. Ojeda to pay \$500.00 for legal representation. *Id.*

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V. STATEMENT OF THE FACTS

Change of Plea hearing

On August 7, 2018, Mr. Ojeda was in the district court for a scheduled hearing on pretrial motions. JA 15-31 (Transcript of Proceedings: Change of Plea). However, at that time the parties informed the district court that Mr. Ojeda would be entering a guilty plea to a charge of murder in the first degree as contained in an amended information. *Id.* at 17-19.

Mr. Ojeda's guilty plea was the product of plea negotiations. The content of those negotiations is captured in a guilty plea memorandum: "In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The State and I will each be free to argue for an appropriate sentence. The State will not file additional criminal charges or enhancements resulting from the arrest in this case." JA 1-12 (Guilty Plea Memorandum) (Paragraph 7), and during Mr. Ojeda's change of plea hearing: "MS. HICKMAN: We waive a formal reading and advisement [of the Amended Information]. In exchange for his pleading guilty, the parties will be free to argue for an

appropriate sentence.” JA 18 (Transcript of Proceedings: Change of Plea).

The district court canvassed Mr. Ojeda and accepted his guilty plea. *Id.* at 21-28.

Prior to sentencing the State filed a sentencing memorandum, JA 32-47 (Sentencing Memorandum²), which was opposed in part by Mr. Ojeda. JA 49-53 (Opposition to the State’s “Sentencing Memorandum”).³

Sentencing hearing

On December 14, 2018, Mr. Ojeda was in the district court for his sentencing hearing. JA 54-114 (Transcript of Proceedings: Sentencing). Mr. Ojeda did not have any additions or corrections to the presentence investigation report. *Id.* at 58-59. Through his counsel Mr. Ojeda asked the district court to sentence him to a term of years in the Nevada Department of Corrections. Specifically, Mr. Ojeda sought the minimum sentence allowed by NRS 200.030(4)(b)(3)—50 years with parole eligibility after serving 20 years. *Id.* at 69-70.

² The State’s sentencing memorandum had eight supporting exhibits. Those exhibits are not referenced in this opening brief and consequently have not been reproduced in the appendix.

³ The concerns raised by the parties in these pleadings were resolved by the district court at the sentencing hearing prior to argument. JA 59-69.

In support of this request, counsel noted that Mr. Ojeda had pleaded guilty to first degree murder; that he had admitted to the offense and had shown remorse for what he did. *Id.* at 70. Counsel said that such a sentence would provide some hope for Mr. Ojeda and his family; and that the district court—“despite the terrible acts in this case”—could nonetheless find that Mr. Ojeda was “deserving of just an opportunity, not a guarantee, but an opportunity that one day he would be released from prison and he would be able to be reunited with his family.” *Id.* at 70-71. More specifically, counsel noted that Mr. Ojeda admitted to the offense when he was first contacted by Orange County law enforcement officers in California, and has never denied the acts he did. “He has accepted responsibility, and he has accepted the horrible nature of the crime that was inflicted on [the victim (Kyla Annan⁴)].” *Id.* at 71.

Not to deny responsibility but in support of mitigation, Mr. Ojeda’s counsel presented background information regarding Mr. Ojeda, noting his childhood, his addictions to alcohol and drugs, his drug induced delusional thoughts about Ms. Annan, the crime, and his life

⁴ See JA 36-40 (Sentencing Memorandum).

after leaving Nevada and moving to California—where he spent approximately ten years establishing a family life that was drug and alcohol free. *Id.* at 73-77. Mr. Ojeda’s wife, Maria, spoke on behalf of herself and their children noting that during the ten years they were together Mr. Ojeda “was very good to us. He was very attend to us. Very responsible with us.” “I mean I don’t recognize what I’m hearing about him, because he was, for my daughters and for me he was give all his attention. He would take care of us a lot.” *Id.* at 78 and 79 respectively. Mr. Ojeda’s daughter, Maitzel, echoed her mother’s sentiments. *Id.* at 79-81.

Mr. Ojeda’s counsel argued that the court should consider Mr. Ojeda’s family life and conduct after the crime as mitigation, along with his remorse and his cooperation with law enforcement. In sum, counsel argued that the district court should

sentence [Mr. Ojeda] in a way that honors the life that he took but also nurtures the part of the criminal justice system that can reflect the best, not just in Mr. Ojeda but in all of us, that there is hope, there is mercy, and that if he is who he has shown he can be, he will have the opportunity to one day be reunited with his family.

Id. at 84.

Mr. Ojeda spoke to the court about his life, his family, his remorse. He spoke too about the radical change in his life occasioned by his marriage to his wife and the birth of their four daughters. He asked the court for forgiveness and compassion, and asked for “an opportunity to be, to be able to be once again with my family.” *Id.* at 86-89 and 89 (quoted language).

The State answered: “[T]he defendant does not deserve a chance at parole.” *Id.* at 89. The State’s ensuing argument focused on the crime and on a related event that occurred a few days before Ms. Annan’s murder. *Id.* at 90-96. It also focused on the ten years that Mr. Ojeda was free in California before he was arrested. *Id.* at 100-04 (arguing that Mr. Ojeda did not “come forward” (an informant provided information later confirmed through DNA testing), and arguing that “he should have been in prison” during this time). As part of this aspect of the State’s presentation the State argued this: Mr. Ojeda should have been in prison, his ten years of freedom were “stolen,” and “[i]f he was in prison then and repented and changed his life, that would be great,” but his ten years of freedom “does not mitigate what he did far enough down to give him an opportunity at parole.” *Id.* at 104-05. Finally, the

State argued that the court's sentence should "send a message that you don't get a benefit if you run." *Id.* at 106.

Ms. Annan's parents addressed the court and gave victim impact statements. *Id.* at 108-09 (Cheryl Annan); 109-11 (Steven Annan).

In sentencing Mr. Ojeda to a life in prison without the possibility of parole, the district court made these observations:

- The facts of this case were "egregious."
- Mr. Ojeda's expressions of remorse are (in the words of the prosecutor) "forced remorse."
- Aside from the life Mr. Ojeda built, the love of his wife and children, "you ran."
- Mr. Ojeda was "calculated in how you did this."
- The Annans "can't see their daughter ever"; Mr. Ojeda "not going to see your daughters in person."

Id. at 112-13.

Mr. Ojeda appeals his sentence. JA 117-18 (Notice of Appeal).

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VI. SUMMARY OF ARGUMENT

A district court is afforded wide discretion in its sentencing determinations. Sentencing discretion requires the weighing of various factors and sentencing alternatives to strike a fair balance between a defendant's need for rehabilitation and society's interest in safety and deterrence. These are not binary opposites. A sentencing court must exercise its discretion in a considered way; its decision must reflect a rational selection from various sentencing alternatives in a manner consistent with the aims of the sentencing process.

Here the district court abused its sentencing discretion in sentencing Mr. Ojeda to a term of life without the possibility of parole. Mr. Ojeda stood before the court with no significant criminal history. He also had lived a law-abiding life for approximately ten years before he was arrested. He accepted responsibility and showed remorse. To be sure, the crime he committed was inexcusable, but *he* was not without redemption; he is not unsalvageable. The district court overlooked Mr. Ojeda's redeeming qualities primarily because the crime was egregious, Mr. Ojeda ran, and he showed "force remorse." None of these factors

standing alone or considered together warranted a sentence of life without the possibility of parole.

This Court should vacate the sentence and remand for a new sentencing hearing

VII. ARGUMENT

The district court abuse its discretion by sentencing Mr. Ojeda to a term of life without the possibility of parole where, as here, Mr. Ojeda had no significant prior criminal history and had maintained a law-abiding life for over ten years prior to his arrest.

Standard of Review

District court sentencing decisions are reviewed under an abuse of discretion standard. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000). As a general matter, reviewing courts “will refrain from interfering with the sentence imposed” where the record “does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Major v. State*, 130 Nev. 657, 661, 333 P.2d 235, 238 (2014) (internal quotation marks omitted) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

However, an abuse of sentencing discretion can occur where “the

district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason," *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)), or "fails to give due consideration to the issues at hand." *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013) (citations omitted).

Discussion

The people of the State of Nevada, through their Legislature, has determined that non-capital murder in the first degree may be punished:

By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

NRS 200.030(4)(b).

In *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989), the Nevada Supreme Court contemplated the meaning of a sentence of life

without the possibility of parole. In *Naovarath*, the Court observed that “[a]ll but the deadliest and most unsalvageable of prisoners *have the right* to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences.” 105 Nev. at 526, 779 P.2d at 944 (italics added). Denial of this “vital opportunity,” the Court added, “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and the spirit of [the prisoner], he will remain in prison for the rest of his days.” *Id.* (footnote omitted). *Naovarath* dealt with a sentence of life without the possibility of parole for a 13-year-old first-degree murder defendant—the Court’s observations quoted above are particularly poignant in that context. But the existential nature of those observations is no less prescient in the context of this case.

To be sure Mr. Ojeda was convicted of a serious offense. Nonetheless, it begs credulity to say that because of this offense he is among “the *deadliest* and *most unsalvageable*” of human beings. And the record demonstrates otherwise. Mr. Ojeda had no significant prior

criminal history before or at the time of the commission of this offense. Additionally, in the ten years between the commission of this offense and his arrest, Mr. Ojeda had lived a law-abiding existence in California providing for his wife and four daughters. There was no evidence presented of any criminal behavior on Mr. Ojeda's part. If such behavior existed the State would surely have offered it in aggravation. It did not.

Past is prologue. Mr. Ojeda's life demonstrates redeeming qualities set to ensure that one day he can return to society and his family. The district court simply overlooked these facts by embracing the State's narrative that Mr. Ojeda ran and did not come forward and therefore had "forced remorse." The fact that Mr. Ojeda did not turn himself in after the crime is not unique to Mr. Ojeda. Nor is the fact that he did not come forward until contacted by law enforcement officers. He did immediately admit to the crime when he was contacted. The fact that he ran and did not come forward should not crowd out the actual life he led during that time. For example, had Mr. Ojeda ran and continued a life of crime in California such continued activities would suggest that he was in fact *deadly* and *unsalvageable* and a true

contender for a sentence of life without the possibility of parole. But the life he in fact led suggests the opposite and that he is not without redemptive qualities. Accordingly, Mr. Ojeda should be in that class of prisoners that have the “vital opportunity” to one day appear before the board of parole to try and show that he has behaved well in prison confines and that his moral and spiritual betterment merits consideration of some adjustment of his sentence.

Although a district court has wide discretion in its sentencing decision, *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), that discretion is not limitless. *Parish v. State*, 116 Nev. at 989, 12 P.3d at 957. A sentencing decision “by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant’s need for rehabilitation and society’s interest in safety and deterrence.” *People v. Watkins*, 613 P.2d 633, 635-36 (Colo. 1980) (citations omitted). “[T]he discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. On the contrary, the sentencing decision should reflect *a rational selection* from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process.”

Id. at 636 (italics added). Here, the district court might not have felt that a term of years was a sufficient sentence; and it was free to reject defense counsel's sentencing recommendation. Because Mr. Ojeda cannot be considered among the deadliest and most unsalvageable, the district court should also have rejected the State's sentencing recommendation. The district court should also have rejected the notion that any sentence other than life without the possibility of parole would "send a message" that running from criminal responsibility was a benefit. Here the State conflates running away with subsequent conduct in an attempt to over shadow that good conduct with the label of run away. Instead the district court accepted the State premise: noting that aside from the life Mr. Ojeda built and the love of his wife and children, he ran.

That leaves a life sentence *with* the possibility of parole as the most applicable sentence in this case (taking into consideration the dominant aims of the sentencing process).

This Court does not sit as a re-sentencing body, but it can vacate the existing sentence and remand for a new sentencing hearing.

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VIII. CONCLUSION

For the reasons set out above, this Court should vacate the sentence imposed below and remand for a new sentencing hearing.

DATED this 16th day of May 2019.

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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 brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 3,356 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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.

DATED this 16th day of May 2019.

/s/ John Reese Petty

JOHN REESE PETTY

Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of May 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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