

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

LUIGY RICHARD LOPEZ-DELGADO)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

Case No. 78472

Appeal from Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Jerome Polaha

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I. JURISDICTIONAL STATEMENT

This is an appeal from a sentencing hearing held March 14, 2019, (Joint Appendix pages 71-92) and the Judgment of Conviction filed on March 15, 2019, (JA pages 48-49) Corrected Judgment of Conviction filed March 18, 2019 (JA pages 50-51) and Second Corrected Judgment of Conviction (JA pages 69-70). Appellant filed a timely notice of appeal. NRAP 4(b); (JA pages 56-57).

II. ROUTING STATEMENT

This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based upon a plea of guilty, and challenges only the sentence imposed.

III. STATEMENT OF THE ISSUE ON APPEAL

The district court abused its discretion in sentencing Luigi Richard Lopez-Delgado to sentences of 48 to 120 months for Statutory Sexual Seduction by Person Age 21 or Older, with a consecutive sentence of 28 to 72 months for Possess Visual Pornography of Person Under Age 16, and an additional concurrent sentence of 48 to 120 months for Lewdness with a Child Older than 14 despite compelling mitigation evidence. A new sentencing is warranted.

IV. STATEMENT OF THE CASE

Defendant Luigi Richard Lopez-Delgado (hereinafter "Mr. Lopez-Delgado")

On December 13, 2018, Mr. Lopez-Delgado pleaded guilty to Statutory Sexual Seduction by Person Age 21 or Older, a violation of NRS 200.368.1, a category B felony; Possess Visual Pornography of Person Under Age 16, a violation of NRS 200.730.1, a category B felony; and Lewdness with a Child Older than 14, a violation of NRS 201.230.3, a category B felony. (JA pages 19-26, Guilty Plea Memorandum). Thereafter, he was sentenced to a term of incarceration of 48 to 120 months for Statutory Sexual Seduction by Person Age 21 or Older, with 456 days credit for time served, with a consecutive sentence of 28 to 72 months for Possess Visual Pornography of Person Under Age 16, and an additional concurrent sentence of 48 to 120 months for Lewdness with a Child Older than 14. (JA pages 69-70, Second Corrected Judgment of Conviction).

Mr. LOPEZ-DELGADO is 25 years of age with no significant criminal history, other than some traffic violations. He has not had any failures to appear on any such citations. (See, Pre-Sentence Investigation Report, filed under seal) He has admitted in culpability in this matter, recognizing that his actions were legally unacceptable. He stipulated in the Guilty Plea Memorandum to join with the State to recommend that he receive a sentence of 48-120 months on Count II, 28-72 months on Count IV and 48-120 months on Count VI, and that all sentences run concurrent to one another. Mr. LOPEZ-DELGADO had been in custody for almost one (1) year at the time of the sentencing. At sentencing, Mr. LOPEZ-DELGADO

presented documentation of significant family support. (JA pages 44-47) He also presented his extremely limited criminal history, as well as his remorse regarding the victim in the present case. He provided information that he had been employed full-time prior to his arrest and that he was capable of obtaining new employment.

As the evidence at sentencing further showed, Mr. Lopez-Delgado has no history of violence or aggressive behavior, nor a general disregard for the rights of others including the rights of females. (See, Psycho-Sexual Risk Assessment, Page 7, filed under seal) He has struggled with substance abuse and some depression issues throughout his adult life. (See, Psychological Evaluation, filed under seal) Despite this, he was determined not to be a high risk to reoffend by Sheri J. Hixon-Brenenstall, Ph.D., who performed a psycho-sexual evaluation for the Nevada Division of Parole and Probation. (See, PSI and Psycho-Sexual Evaluation, filed under seal).

Dr. Hixon-Brenenstall described Mr. Lopez-Delgado as a moderate risk to reoffend, and that he had expressed willingness to participate in both sex-offense specific treatment and substance abuse treatment. (See, PSI and Psycho-Sexual Evaluation, filed under seal).

In addition to Dr. Hixon-Brenenstall's report, Mr. Lopez-Delgado relied upon letters provided to the court from his family. Those letters, without exception,

noted that he was a good father to his children as well as supportive of friends and family. (JA pages 45-46).

Mr. Lopez-Delgado expressed genuine remorse at the sentencing hearing, expressing concern for the future well-being of the victim in this case. He also expressed concern for the negative impact his crimes would have on his family. (JA pages 87-88)

Mr. Lopez-Delgado did not request that he be granted probation, rather acknowledged that his crimes required incarceration and that is the reason for the stipulated sentence. (JA pages 74-75) The parties both argued in favor of sentences of 48-120 months on Count II, 28-72 months on Count IV and 48-120 months on Count VI, and that all sentences run concurrent to one another. (JA pages 74-75 and 84-85.)

Mitigating factors offered in favor of Mr. Lopez-Delgado included his age, his lack of criminal history including his lack of violence and his genuine remorse for the victim. In addition, the psycho-sexual evaluation provided further information that supported the sentence agreed upon and recommended by the parties, as outlined above.

Despite all of the mitigation evidence provided, the court sentenced Mr. Lopez-Delgado to 48 to 120 months for Statutory Sexual Seduction by Person Age 21 or Older, with a consecutive sentence of 28 to 72 months for Possess Visual

Pornography of Person Under Age 16, and an additional concurrent sentence of 48 to 120 months for Lewdness with a Child Older than 14. See, Second Corrected Judgment of Conviction (JA pages 69-70)

V. SUMMARY OF ARGUMENT

At Mr. Lopez-Delgado's sentencing, the court abused its discretion by failing to properly weigh the mitigation evidence provided and sentenced him to maximum consecutive terms of imprisonment on both charges.

VI. ARGUMENT

The district court abused its discretion in sentencing Luigi Richard Lopez-Delgado to sentences of 48 to 120 months for Statutory Sexual Seduction by Person Age 21 or Older, with a consecutive sentence of 28 to 72 months for Possess Visual Pornography of Person Under Age 16, and an additional concurrent sentence of 48 to 120 months for Lewdness with a Child Older than 14 despite compelling mitigation evidence. A new sentencing is warranted.

It is true that a Judge is allowed wide discretion in sentencing matters. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987); *see also, Deveroux v. State*, 96 Nev. 388, 610 P.2d 711 (1980).

NRS 176.015(3)(b) provides that, before a district court imposes sentence, a victim may "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." This is commonly referred to as the "victim impact statement." A victim's interests

must be balanced with those due process rights afforded to a criminal defendant. *State v. Bauscher*, 106 Nev. 890, 804 P.2d 1046 (1990).

A sentencing decision is reviewed for an abuse of discretion. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000) (a court's discretion is not limitless). An abuse of discretion occurs when prejudice to the defendant results from the fact that the sentencing court relied upon "information or accusations founded on facts supported only by impalpable or highly suspect evidence." *See Silks*, 92 Nev. at 94, 545 P.2d at 1161; *see also, Castillo v. State*, 110 Nev. 535, 874 P.2d 1252 (1994) (overruled on other grounds) (a new sentencing is required when a court relies upon prejudicial information at the time of sentencing).

Futhermore, while it is the function of the Legislature to set penalties and ranges, it is the judge's job to decide what penalty to impose. *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009). In deciding the appropriate sentence, a district court is required to consider mitigating factors. *See NRS 197.163*.

In pronouncing the sentence in the instant case, the court failed to address or show it had considered any of the mitigating information provided by Mr. Lopez-

Delgado, instead stating “This is a very upsetting and disgusting set of facts ...”
(JA page 89, Transcript of Proceedings - Sentencing)

The court failed to note that Mr. Lopez-Delgado had been found not to be a high risk to reoffend, nor did it appear to consider his age and lack of criminal history. The court appears to have failed to weigh any of that information or the recommendation of the parties in pronouncing the sentences in this case.

The court failed to properly consider and weigh this significant mitigation evidence in pronouncing the sentence in this case. Given all of this, Luigi Richard Lopez-Delgado should receive a new sentencing, before a different district court judge.

VII. CONCLUSION

For the reasons put forth above, Luigi Richard Lopez-Delgado respectfully requests that this case be remanded for a new sentencing, before a different district court judge.

DATED this 22nd day of July, 2019.

MARC PICKER
Washoe County Alternate Public Defender

By: /s/ Marc Picker
MARC PICKER, ESQ.
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Attorney for Appellant

CERTIFICATE OF COMPLIANCE
(NRAP 28.2)

1. I hereby certify that Appellant's Opening 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 the Opening Brief was prepared in a proportionally spaced typeface using Microsoft Word 2003 version in 14 point Times New Roman.

2. I further certify that Appellant's Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read the Opening 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 the Opening 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 appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I

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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 22nd day of July, 2019.

MARC PICKER
Washoe County Alternate Public Defender

By: /s/ Marc Picker
MARC PICKER
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of APPELLANT'S OPENING BRIEF to the following:

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DATED this 22nd day of July, 2019.

/s/ Randi M. Jensen
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