

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 81472

Dist. Court No.

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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from a Judgment of Conviction
Second Judicial District Court, Washoe County
Honorable Kathleen Drakulich, District Court Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned certifies that Steven Floyd Voss is the true name of a natural person, and that no corporation is involved in this litigation. The undersigned further certifies that she is the only attorney who has represented Steven Floyd Voss in this appeal.

/s/ Tracie K. Lindeman
Attorney for Appellant

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1 **STATEMENT OF JURISDICTION**

2 This is an appeal from a judgment of conviction, pursuant to a jury
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4 verdict, of one count of burglary, two counts of uttering a forged instrument, two
5 counts of forgery, and one count of attempted theft. II AA 274-76. The judgment
6 of conviction was entered on July 8, 2020. *Id.* Appellant, Steven Voss, timely
7 filed a notice of appeal from that judgment on July 10, 2020. II AA 277-78. This
8 court’s jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure
9 (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final
10 judgment in a criminal case).

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14 **ROUTING STATEMENT**

15 This appeal is presumptively assigned to the Nevada Court of Appeals
16 because it does not involve a conviction for any offenses that are category A or B
17 felonies. NRAP 17(b)(2).

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20 **STATEMENT OF THE LEGAL ISSUES PRESENTED**

21 I. Whether the district court abused its discretion by denying
22 appellant’s presentencing motions in limine.

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24 II. Whether the sentence imposed at resentencing runs afoul of the
25 concerns expressed in the findings of fact and conclusions of law upon which the
26 resentencing was predicated.
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1 **STATEMENT OF THE CASE**

2 Mr. Clarke was originally convicted, pursuant to a jury verdict of
3 burglary (Count I), uttering a forged instrument (Counts II and III), forgery (Counts
4 IV and V), and attempted theft (Count VI). Subsequent to the dismissal of his direct
5 appeal, Mr. Voss filed a pro se petition for a writ of habeas corpus (post-conviction).
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7 I AA 008. The district court conducted an evidentiary hearing, and on August 9,
8 2001, entered an order granting relief, in part. I AA 008-14. In particular, the
9 district court found that the sentence imposed was based on impalpable or suspect
10 evidence, and therefore concluded that Mr. Voss was entitled to a new sentencing
11 hearing. I AA 013-14.
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15 On August 15, 2018, the Nevada Court of Appeals entered an order
16 granting Mr. Voss's pro se petition for extraordinary relief, based on the district
17 court's failure to conduct a new sentencing hearing. I AA 017-19. The court issued
18 a writ of mandamus, instructing the district court to resentence Mr. Voss, as
19 directed in the August 9, 2001, order. I AA 018-19.
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22 The district court finally conducted a new sentencing hearing on July
23 7, 2020. II AA 233-78. A new judgment of conviction was entered by the district
24 court on July 8, 2020. II AA 279-81. Mr. Voss filed a timely notice of appeal on
25 July 10, 2020. II AA 282-83.
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1 **STATEMENT OF THE FACTS**

2 Mr. Voss was found guilty by a jury, of one count of burglary (Count
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4 I), two counts of uttering a forged instrument (Counts II and III), two counts of
5 forgery (Counts IV and V), and one count of attempted theft (Count VI). I AA
6 006-07. The Hon. James Stone sentenced Mr. Voss: for Count I, to a term of 48 to
7 120 months; for Counts II and III, to a term of 16 to 48 months for each count; for
8 Counts IV and V, to a term of 16 to 48 months for each count; and for Count VI,
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10 to a term of 16 to 48 months. *Id.* All terms were made consecutive. *Id.*

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12 Following the dismissal of his direct appeal, Mr. Voss filed a pro se
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14 petition for a writ of habeas corpus. The district court conducted an evidentiary
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16 hearing and on August 9, 2001, entered findings of fact and conclusions of law. I
17 AA 008-15. The district court found merit in Mr. Voss's argument that the
18 sentence imposed was based on impalpable or suspect evidence. Specifically, the
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20 district court found:

21 Even though Voss has not been charged for the murder of Ms. Baxter,
22 Judge Stone made reference in his rendition of sentence, to his belief
23 that she would not be found alive. He then imposed the maximum
24 sentence on Voss, a sentence clearly outside the heartland of sentences
25 for a person with Voss's criminal record being sentenced for forgery
26 offenses.

27 I AA 013. Based on this finding, the district court concluded: "Because Judge
28 Stone based Voss's onerous sentence, at least in part, on the suspect and impalpable

1 ground that Voss had murdered Ms. Baxter, Voss is entitled to a new sentencing
2 hearing.” I AA 013-14. The district court did not, however, conduct a new
3 sentencing hearing, and approximately 17 years passed.
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5 On August 25, 2018, the Nevada Court of Appeals entered an order
6 granting Mr. Voss’s petition for extraordinary relief and directed the district court
7 to conduct the new sentencing hearing that had been ordered in 2001. I AA 017.
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9 Prior to the new sentencing hearing, Mr. Voss filed various pro se
10 motions, including a motion for new trial, a motion to rescind the order staying the
11 proceedings, presentencing motions in limine, an amended motion for new trial, a
12 motion to suspend resentencing, and a motion for the return of property. I AA 020,
13 I AA 055, I AA 0605, I AA 076, I AA 155, I AA 167.
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16 The district court resolved all of the motions in a single order that was
17 entered on July 7, 2020. II AA 224. The same day, the district court conducted
18 the re-sentencing hearing. II AA 233. The new judgment of conviction was
19 entered on July 8, 2020. II AA 279-81. The district court sentenced Mr. Voss: for
20 Count I, to a term of 12 to 48 months; for Counts II and III, to a term of 12 to 32
21 months for each count; for Counts IV and V, to a term of 12 to 32 months; and for
22 Count VI to a term of 12 to 32 months. II JA 275-76. The sentences were ordered
23 to run in a combination of consecutive and concurrent terms, with the aggregate
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1 sentence imposed totaling a minimum of 48 months with a maximum of 144
2 months. II JA 276. This appeal followed.

4 **LEGAL ARGUMENT**

5 Prior to the appointment of undersigned counsel, Mr. Voss filed an
6 extensive pro se opening brief. The filing of this brief does not represent an
7 abandonment of any of the arguments raised in the pro se brief but instead draws
8 the court's attention to two of Mr. Voss's arguments.

11 **I. WHETHER THE DISTRICT COURT ABUSED ITS** 12 **DISCRETION BY DENYING APPELLANT'S** 13 **PRESENTENCING MOTIONS IN LIMINE.**

14 Mr. Voss raised various arguments in his presentencing motions in
15 limine, and the arguments can be sorted into 3 basic categories. First, that the
16 charges of uttering a forged instrument and forgery are duplicative; second that the
17 charge of attempted theft is duplicative of all of the other counts, and finally that
18 there was no finding of probable cause sufficient to bind Mr. Voss over on the
19 forgery and burglary charges because the language in the charges in the criminal
20 information differed from that in the criminal complaint.

23 Turning to the first and second arguments, it has long been recognized
24 that the Double Jeopardy Clause protects against, inter alia, multiple punishments
25 for the same offense. "Whether conduct that violates more than one criminal
26 statute can produce multiple convictions in a single trial is essentially a question
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1 of statutory construction, albeit statutory construction with a constitutional overlay.
2 *See United States v. McLaughlin*, 164 F.3d 1, 7-8, 334 U.S. App. D.C. 1 (D.C. Cir.
3 1998).” *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012). The
4 test utilized by the U.S. Supreme Court and by this court is set forth in *Blockburger*
5 *v. United States*, 284 U.S. 299 (1932). That test “inquires whether each offense
6 contains an element not contained in the other; if not, they are the 'same offence'
7 and double jeopardy bars additional punishment and successive prosecution.”
8 *United States v. Dixon*, 509 U.S. 688, 696 (1993).

12 However, “regardless of the outcome of the *Blockburger* test, a court
13 may not impose punishment without ultimately concluding that the legislature so
14 intended.” *McLaughlin*, 164 F.3d at 9. Although the charges of uttering a forged
15 instrument, forgery, and attempted theft may arguably “pass” the *Blockburger* test,
16 this court should consider whether the legislature actually intended to impose
17 punishments for all of these charges when they arise from the same incident. It is
18 submitted that to allow Mr. Voss to be convicted for multiple counts of uttering a
19 forged instrument, forgery, and attempted theft amounts to a violation of the
20 Double Jeopardy clause.

1 Finally, Mr. Voss argues that he was bound over on a criminal
2 complaint that was insufficiently specific with regard to the charge of forgery.¹
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4 The district court focused on whether the charges were sufficiently specific for
5 purposes of NRS 173.075. NRS 173.075 requires that “the indictment or the
6 information must be a plain, concise and definite written statement of the essential
7 facts constituting the offense charged.” The district court, however, overlooked an
8 important component of Mr. Voss’s argument. In addition to arguing that the
9 charges were not sufficiently specific, Mr. Voss also argued in his motion that
10 “there exist[ed] a material variance between the Count V charge as specified within
11 the State’s criminal complaint, and the Count V charge as specified within the
12 State’s subsequent criminal information.” I JA 064. Mr. Voss made the same
13 argument with regard to Count I. I JA 070. The district court completely failed to
14 address this argument in its order resolving the motion. Given the district court’s
15 failure to address this part of the motion, this court cannot determine whether the
16 district court abused its discretion by denying the motion and this matter should be
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25 ¹Undersigned counsel has had difficulty obtaining various documents
26 in this matter, due to the age of the case. Undersigned counsel has so far been
27 unable to obtain a file-stamped copy of the complaint for inclusion in the appendix.
28 Nonetheless, it is submitted that this court can consider whether the district court
failed to analyze this issue, even without being able to compare the complaint to
the information.

1 remanded to allow the district court to address the argument on its merits. *Lioce v.*
2 *Cohen*, 124 Nev. 1, 24-25, 174 P.3d 970, 985 (2008).
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4 In sum, Mr. Voss argues that the district court's denial of his
5 resentencing motions in limine was erroneous, and the judgment of conviction
6 should be vacated and this matter remanded.
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8 **II. WHETHER THE SENTENCE IMPOSED AT**
9 **RESENTENCING RUNS AFOUL OF THE CONCERNS**
10 **EXPRESSED IN THE FINDINGS OF FACT AND**
11 **CONCLUSIONS OF LAW UPON WHICH THE**
12 **RESENTENCING WAS PREDICATED.**

13 The primary issue that prompted the 2001 district court to order a new
14 sentencing hearing recurred in the sentencing that occurred in 2020. Specifically,
15 the district court in 2001 found that Mr. Voss's sentence was based on impalpable
16 and suspect evidence because of the sentencing judge's belief that Mr. Voss might
17 have been guilty of murdered the victim. This court has long held that "an abuse
18 of discretion will be found when the defendant's sentence is prejudiced from
19 consideration of information or accusations founded on impalpable or highly
20 suspect evidence." *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007
21 (1982).
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25 During the re-sentencing hearing, the State argued that the district
26 court should take into consideration Mr. Voss's subsequent felony conviction, the
27 very evidence which was found to be impalpable and suspect at Mr. Voss's first
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1 sentencing hearing. The State essentially attempted to repeat the same error which
2 the re-sentencing hearing was supposed to eliminate. This matter should therefore
3 be remanded so that Mr. Voss can finally get a sentencing hearing that comports
4 with the directive issued by the post-conviction court nearly 20 years ago.
5

6 7 **CONCLUSION**

8
9 Based upon the foregoing, appellant Steven Floyd Voss respectfully
10 requests that this Court reverse the conviction entered below.
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12 Respectfully submitted this 24th day of February, 2021.
13

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CERTIFICATE OF COMPLIANCE

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 with 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 the reference 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 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.

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1 I hereby certify that this brief complies with the formatting
2 requirements of NRAP 32(a)(4)-(6) because the brief has been prepared in a
3 proportionally spaced typeface using Microsoft Word in Times New Roman 14. I
4 further certify that this brief complies with the page or type-volume limitations
5 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is
6 proportionately spaced, has a typeface of 14 points or more and does not exceed
7 30 pages.
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11 Dated this 24th day of February, 2021.
12
13

14 Respectfully submitted,

15 /s/ Tracie K. Lindeman

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