

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 81472

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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from a Judgement of Conviction
Second Judicial District Court of the State of Nevada, Washoe County
Honorable Kathleen Drakulich, District Judge, District Court Case No. CR96-1581

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
3. Law firm appearing in the Court(s) Below:

Oldenburg Law Office

DATED this 10TH day of August, 2021.

VICTORIA T. OLDENBURG, ESQ.
Oldenburg Law Office
Nevada State Bar No. 4770
Counsel for Appellant

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JURISDICTIONAL STATEMENT

Appellant incorporates the Statement of Jurisdiction set forth in the Opening Brief as though fully set forth herein.

SUPPLEMENTAL STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion by denying Appellant's Motion to Suspend Resentencing to allow him a reasonable opportunity to present mitigating evidence and evidence to support corrections to the Presentence Investigation Report?

STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of the Case set forth in the Opening Brief on file herein.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts set forth in the Opening Brief on file herein.

Supplemental Facts:

On May 4, 2020, Respondent filed an Application for Order to Produce Prisoner for the resentencing of Appellant to occur by audio-visual means on May 8, 2020. Supplemental Appellant's Appendix (SAA), Vol. 1, 001. On May 5, 2020, the district court issued an Order to Produce Prisoner for the May 8, 2020 hearing. 1 SAA 003. A second Application for Order to Produce Prisoner for the re-sentencing hearing was filed on June 4, 2020 re-setting the hearing for July 7, 2020. 1 SAA 005. On June 5, 2020, the district court issued an Order to Produce Prisoner for the July 7, 2020 hearing. 1 SAA 007.

On May 28, 2020, Appellant filed a Motion to Suspend Resentencing. 1 AA 155. In his Motion Appellant requested an additional 90 days' notice of the date set for resentencing so that he had time to issue and serve subpoenas for mitigating witnesses to appear at his re-sentencing hearing, and so that he could submit

documents regarding his dispute with the contents of the Presentence Investigation Report (PSI). 1 AA 155, 163-164.

On June 24, 2020, ten (10) days prior to the July 7, 2020 re-sentencing hearing, the district court issued a Notice of Audio-Visual Hearing. 1 SAA 010. The Notice was mailed to Appellant that day. 1 SAA 013. The Notice did not provide instructions to Appellant, who was representing himself at the re-sentencing hearing, on how to issue subpoenas to witnesses in order to ensure their appearance at the audio-visual hearing, such as information that needed to be provided to subpoenaed witnesses including the Zoom contact information. 1 SAA 010, 011. As to the introduction of Exhibits, the Notice provided that any exhibits had to be filed with the district court clerk within three (3) business days prior to the hearing. *Id.*

On July 7, 2020 during the resentencing hearing, the district court ruled on the Motion to Suspend Resentencing and the written order was filed later that day; the district court did not rule on Appellant's Motion for a continuance of the resentencing date. 2 AA 233, 239-250, 2 AA 224, 229-230. Notwithstanding that Appellant objected at the hearing to proceeding by audio-visual means, and the fact it was not clear Appellant received the Notice of Audio-Visual Hearing, 2 AA 233, 237, the Court proceeded to sentence Appellant.

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SUPPLEMENTAL ARGUMENT

Appellant adopts and incorporates by reference the arguments set forth in the Opening Brief on file herein.

Appellant has a Fifth and Fourteenth Amendment right to a fair sentencing hearing, which includes a reasonable opportunity to present mitigating evidence. Nev. Const. Art 1, §8, and U.S. Constitution, Amendments V and XIV. In his resentencing Appellant was entitled to all rights conferred to him in his first sentencing, even under the unique circumstances of this case, in addition to the right to correct errors in the PSI.

- 1. At the resentencing Appellant was not afforded a reasonable opportunity to present evidence to support corrections to his PSI.¹**

¹ Pursuant to NRS 176.156 (1)(b), the district court may order the Division to correct the contents of a PSI following sentencing of the defendant if, within 180 days after the date on which the judgment of conviction was entered, the prosecuting attorney and the defendant stipulate to correcting the contents of the PSI. In *Stockmeier v. State Board of Parole and Probation*, the Nevada Supreme Court found that “[b]ecause Nevada law does not provide any administrative or judicial scheme for amending a PSI after the defendant is sentenced, it is imperative that a defendant contest his PSIs at the time of sentencing if he believes that his PSI contains inaccuracies.” *Stockmeier v. State Board of Parole and Probation*, 127 Nev. 243, 250, 255 P.3d 209, 213 (2011) (even if disputed factual statements do not affect a defendant’s sentence any significant inaccuracy could follow a defendant into the prison system and be used to determine his classification and placement in certain programs).

The Notice of Audio-Visual Hearing informed Appellant that any exhibits he wanted to submit for sentencing needed to arrive at the filing office three (3) business days prior to the sentencing hearing, i.e. July 1, 2021.² 1 SAA 010, 011. The Notice was mailed to Appellant on June 24, 2021. 1 SAA 010, 013. Adding three days for mailing, which does not take into account the time spent for processing mail at the prison, Appellant may have received the Notice, at the very earliest, around June 28 or 29th. At the Sentencing Hearing Appellant did not state he received the Notice but that he received the order to produce prisoner (likely the June 5, 2021 Order, 1 SAA 005). 2 AA 253, 237. Even assuming, *arguendo*, Appellant received the Notice on June 28, 2021, he could not have had ample time to submit his exhibits to the court which were due on July 1, 2021.

At the resentencing hearing Appellant informed the district court he had documentation to contradict statements on the PSI. 2 AA 233, 264:14-24. Even though the district court gave Appellant the benefit of the doubt regarding the inaccuracies Appellant raised regarding the PSI, 2 AA 233, 265:15-24, 266:1, a defendant still has a right and is required to raise errors in a PSI with the sentencing judge which Appellant was unable to do through the presentation of documents.

2. At the resentencing, Appellant was not afforded a reasonable opportunity to present mitigating evidence.

² State and County offices were closed on July 5, 2021.

As previously set forth above, on May 28, 2020, Appellant filed a Motion to Suspend Resentencing. 1 AA 155. In his Motion Appellant requested an additional 90 days' notice of the date set for resentencing so that he had time to issue and serve subpoenas for mitigating witnesses to appear at his re-sentencing hearing. 1 AA 155, 163-164. The district court did not rule on this issue at the resentencing hearing. 2 AA 233, 239-250, 2 AA 224, 229-230.

While Appellant had notice sometime after June 5, 2020 that his resentencing hearing would be held on July 7, 2021, 1 SAA 005, neither the June 5, 2021 Application for Order to Produce Prisoner or the June 24, 2021 Notice of Audio-Visual Hearing provided any guidance, direction, or process for obtaining subpoenas for witnesses to appear at an audio-visual hearing, including how to appear at a Zoom hearing and the link information. This is especially concerning given Appellant would have to issue subpoenas from prison and have them served which is clearly an arduous process. Therefore, Appellant did not have a reasonable opportunity to present mitigating evidence at his sentencing hearing in violation of his constitutional rights.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court reverse the conviction entered below.

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ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals under NRAP 17 (b) (2).

DATED this 10th day of August, 2021.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 1,681 words.

3. Finally, I certify that I have read the 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 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.

DATED this 10th day of August, 2021.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

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

Washoe County District Attorney
Marilee Cate, Appellant Deputy

Aaron D. Ford
Nevada Attorney General

Via USPS

Steven Floyd Voss, #52094
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Carson City, Nevada 89702

DATED this 10th day of August, 2021.

Victoria T. Oldenburg
Attorney for Appellant