

IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVATORE WILLIAM MIELE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from Judgment of Conviction in Case Number CR20-2853
The Second Judicial District Court of the State of Nevada
The Honorable David A. Hardy, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on May 10, 2021. JA 82-83. (Judgment).¹ Appellant, Salvatore William Miele (Mr. Miele), timely filed a notice of appeal from the judgment on June 8, 2021. JA 84-85. (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.

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Whether the district court abused its sentencing discretion when it apparently limited its consideration of mitigating factors to those not already considered by the prosecutor in her charging decision.

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

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Miele with one felony count of coercion with physical force or immediate threat of physical force, a violation of NRS 207.190, a category B felony. JA 1-3 (Information). Mr. Miele pleaded guilty to this count. JA 17 (Transcript of Proceedings: Arraignment). Plea negotiations left the parties free to argue for an appropriate sentence, however Mr. Miele also agreed not to argue for a grant of probation and instead accept a term of incarceration in the Nevada Department of Corrections. JA 6 (Guilty Plea Memorandum) (Paragraph 7); JA 13-14 (Transcript of Proceedings: Arraignment).

At Mr. Miele's sentencing hearing the district court imposed a term of 28 to 72 months in the Nevada Department of Corrections and credited Mr. Miele for 13 days in predisposition custody. JA 82-83 (Judgment). The district court also imposed administrative assessments, fees, and attorney fees.

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V. STATEMENT OF THE FACTS

Arraignment

The State charged Mr. Miele with one count of coercion with physical force or immediate threat of physical force, a violation of NRS 207.190, a category B felony. JA 1-3 (Information). Mr. Miele pleaded guilty to this charge at his district court arraignment. JA 17 (Transcript of Proceedings: Arraignment). The negotiations behind Mr. Miele's guilty plea provided that the parties were free to argue for an appropriate sentence except Mr. Miele would not request a grant of probation and instead would recommend a period of incarceration in the Nevada Department of Corrections. JA 6 (Guilty Plea Memorandum) (Paragraph 7); JA 13 (Transcript of Proceedings: Arraignment). The parties also agreed to set sentencing out for 120 days. *Id.* Following a canvas of Mr. Miele by the court, the court accepted his guilty plea. JA 13-17.

After accepting Mr. Miele's guilty plea the court expressed some uncertainty "about his liberty status" since "his presumption of innocence has been extinguished" and the "standards for bail release are altered." *Id.* at 17. The court said, "[i]t is mandatory prison and you

are talking about a delay of some 120 days.” *Id.* at 17-18. The court’s uncertainty stemmed from “a tremendous ratio of non-surrender and non-compliance going on right now” in other cases. *Id.* at 18. “So,” observed the court, “I’ve got a risk that Mr. Miele might not want to appear or surrender.” The court asked Mr. Miele’s counsel about Mr. Miele’s bail status. Chief Deputy Jennifer Mayhew answered,

Your Honor, he is out on bail and it is my understanding that he has been compliant. I reviewed the Pretrial Services report. He reports to his officer daily, I believe. He has employment. He has an apartment. He has been doing everything that has been asked of him. He is testing clean.

Id.

The State was not seeking presentencing incarceration of Mr. Miele noting that “he has been extremely cooperative” and adding that the delay is to allow Mr. Miele to “get set on medications ... before he goes into prison,” which prison authorities indicated had to be in place in order to part of his medical regimen in prison. *Id.* 19. The prosecutor said that she had talked with Ms. Mayhew and did not have “any concerns about Mr. Miele showing up.” *Id.* at 19-20. She concluded,

[a]s based on the negotiations in this case, it is my understanding that he 100 percent

acknowledges he is going to go to prison and he wouldn't have pled guilty if today if he was going to run.

Id. at 20.

The court found the comments made by counsel to be “helpful information” and set sentencing out for 120 days and ordered Mr. Miele “to surrender to the Washoe County Jail no later than May 8th, 2021.”

Id.

Sentencing

The court first informed the parties that it had read all of the letters submitted on behalf of Mr. Miele. JA 57-58 (Transcript of Proceedings: Sentencing).² It then noted that it had not read anything from the victim and asked whether the victim “will be heard in some way?” The prosecutor answered that she would be reading a letter “that was drafted on her behalf by her father.” *Id.* The prosecutor did not expect to present witnesses. *Id.* at 58.

The court then invited Mr. Miele to address the court in mitigation. Mr. Miele apologized to everyone who had been affected by his actions and he said he did not want what happened “to define who I

² The letters are collected and reproduced in the Joint Appendix at pages 24-54.

am as a person.” *Id.* at 59. Ms. Mayhew agreed and added that one’s mistakes do not define your character, “it’s what you do after you’ve made the mistake that makes all the difference.” *Id.* 60. Ms. Mayhew noted that Mr. Miele has taken responsibility for his actions early on; that he turned himself in for sentencing as ordered by the court at his arraignment (in the meantime he had been compliance with release conditions); and he was ready to be sent to prison “as a 24-year-old young man.” *Id.* “The question” for the court, Ms. Mayhew said, “is how long he’s going to go to prison for.” *Id.*

Ms. Mayhew, referencing the letters in support, noted that Mr. Miele was “a good-hearted, loving, caring individual that made a terrible mistake” and then presented a compelling argument on Mr. Miele’s good character. *Id.* at 61-64. The incident followed a day of drinking at Lake Tahoe with friends and parents of friends. *Id.* at 64. Afterwards Mr. Miele talked with a father figure about what occurred and followed the advice he received, which was to go “to the police department.” *Id.* at 65.

Ms. Mayhew asked the court to sentence Mr. Miele on the charged offense and not on the original charge (sexual assault). *Id.* In

support Ms. Mayhew reiterated salient points in Mr. Miele's favor. *Id.* at 65-67. And she requested that the court sentence Mr. Miele to a term of 12 to 36 months in the Nevada Department of Corrections in acknowledgement of how he has conducted himself in this case. *Id.* at 66.

The prosecutor began by highlighting the eight months she and Ms. Mayhew have been discussing the case and working toward a resolution. She said that Ms. Mayhew "[p]retty much ... gave me a sentencing argument." *Id.* at 67. She put that on the record because she wanted "there to be an acknowledgement that the—all of those factors that are being considered [by the court] have been considered" by her. She then asked for the maximum sentence of 28 to 72 months in the Nevada Department of Corrections. *Id.* Continuing, the prosecutor said the maximum sentence was appropriate because of the original charge. *Id.* at 68.

I'm not necessarily—he's not convicted of sexual assault, but that does not mean that he did not commit the facts that are alleged in this PSI. *You're sentencing him for his actions, whether it's labeled sexual assault or whether it's labeled coercion with force.* You're sentencing him for that mistake, and that mistake was reprehensible.

Id. (italics added). The prosecutor made further arguments and then read the victim's father's letter into the record. *Id.* at 68-72. Ms. Mayhew interjected that Mr. Miele was not being sentenced on sexual assault. And stressed that while the court should take into consideration the victim's wishes, it also had to consider mitigation factors such as Mr. Miele's youth, employment, and his ability to leave prison and be a member of society. *Id.* at 72.

This prompted the court to ask the prosecutor if Ms. Mayhew's mitigation arguments had influenced her "decision to back off of the initial charge." *Id.* at 73. The prosecutor essentially answered affirmatively. *Id.* at 73-74. The court summarized what it heard like this,

The mitigation presented was an influence in the ultimate charge to which Mr. Miele pled guilty, and the mitigation leading to the charge fully set in place the direction of our sentencing, because the range of time is so different for this crime than it was for the originally charged sexual assault.

Id. at 74. The prosecutor responded, "100 percent." *Id.* The court inquired about other crimes the prosecutor considered. *Id.*

The court asked Ms. Mayhew for comment and she said, “I understand what you’re trying to take out or if the mitigation was *already contemplated in the negotiations.*” *Id.* at 77 (italics added). The court answered, “That was very articulate. I was trying to say that succinctly. Well done.” *Id.* Ms. Mayhew argued that even if the prosecutor used mitigation information to influence her charging decision, that information should also be used by the court in its sentencing calculations. *Id.* at 77-78. Ultimately, the court framed its question as whether “mitigation was embedded in the negotiations.” *Id.* at 78.

The court then proceeded to sentencing and imposed a sentence of 28 to 72 months as requested by the State.

VI. SUMMARY OF ARGUMENT

According to the court, at Mr. Miele’s sentencing hearing his counsel presented “a very authentic, holistic, compassionate argument” in support of her request that Mr. Miele receive a sentence of 12 to 36 months. But the court nonetheless discounted counsel’s argument because mitigation information had already been “embedded” in the prosecutor’s charging decision through negotiations. But mitigation

information is not divisible; it is not a consumable commodity such that if used in one setting it cannot be used in another or for other purposes. The court abused its discretion by restricting itself from consideration of all available mitigation information, which it may not do.

This Court should reverse and remand for a new sentencing hearing.

VII. ARGUMENT

The district court abused its sentencing discretion when it apparently limited its consideration mitigating factors to those not already considered by the prosecutor in her charging decision.

Standard of Review

District court sentencing decisions are reviewed under an abuse of discretion standard of review. *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). “An abuse of discretion occurs if 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 if it “fails to give

due consideration to the issues at hand.” *Patterson v. State*, 129 Nev. 163, 176, 298 P.3d 433, 439 (2013) (citations omitted).

“Sentencing 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.

Discussion

As set out in the facts it appears that the court limited its consideration mitigating factors by making a distinction between mitigation “embedded” in the plea negotiations and other mitigation. At the sentencing hearing the court commented to the prosecutor that Mr. Miele’s attorney “has presented a very authentic, holistic, compassionate argument on behalf of her client.” JA 73. And added,

“I’m wondering where Ms. Mayhew’s advocacy came in in your decision to back off the initial charge?” *Id.* The prosecutor answered that she “acknowledge all of those things that she presented to Your Honor; the fact that he – it is true that he went and showed up at the Reno Police Department voluntarily and gave the statement that he gave. It is true that since being released from custody he appears to have been successful in that regard. That’s certainly something that we consider.” *Id.* The court took the prosecutor’s comments to mean that mitigation presented in court had already been considered by the prosecutor in her charging decision and such that “the mitigation leading to the charge fully set in place the direction of our sentencing” because different sentencing ranges. *Id.* at 74. And the prosecutor agreed completely. *Id.* (“100 percent. If you proceed on a sexual assault, there just isn’t that discretion, right, it’s 10 to life.”). Following up the court asked the prosecutor to identify other charges she had considered and she answered that her “original offer was an “attempted sexual assault.” *Id.* She felt that provided an appropriate sentencing range. *Id.* at 75. “So,” asked the court, “if the ultimate conviction would have been attempted sexual assault you would be arguing for essentially the same range, the

time you are arguing for now; is that what you're saying?" The prosecutor answered, "Yes, Your Honor." *Id.*

Mr. Miele's attorney reminded the court that it must take into consideration all of the mitigation. *Id.* at 77. But the court cut her off noting that "my single question you succinctly captured, was mitigation embedded in the negotiations." *Id.* at 78.

Mitigation information is not divisible; it is not a consumable commodity such that if used in one setting it cannot be used in another. That said, the fact that the prosecutor received mitigating information from Mr. Miele's attorney and used it (and other information³) to fashion *her* charging decision does not mean that that same mitigation information could not be used by *the court* in making its sentencing determination. In fact, to say otherwise could lead to implicit prosecutorial caps on mitigating information for sentencing purposes simply by announcing that that information has *already* been considered in the charging decision. To self-delimit consideration of available mitigation information constitutes an abuse of discretion. See *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) ("A sentencer may not refuse

³ For example, the plea negotiations meant significantly that the victim would have to "testify against her brother's best friend." JA 76.

to consider or be precluded from considering any relevant mitigating evidence.”).⁴

VIII. CONCLUSION

Mr. Miele’s counsel presented “a very authentic, holistic, compassionate argument” in support of her request for a sentence of 12 to 36 months. The court abused its discretion by discounting it on the basis that it was “embedded” in the charging decision. This Court should reverse and remand for a new sentencing hearing.

DATED this 5th day of October 2021.

JOHN L. ARRASCADA
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⁴ It appears that to the extent the court did consider information also used by the prosecutor, it related to the 28 to 72 months sentence the prosecutor was seeking because her proposed sentence for attempted sexual assault would have been similar. Here the court remarked the sentences “essentially [are in] the same range, the time you are arguing for now.”

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 2,935 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 5th day of October 2021.

/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 5th day of October 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

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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