

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANELL CATHRINE MARTIN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

) CASE NO. 83665

)

)

)

)

)

)

)

)

)

)

Electronically Filed
Nov 30 2021 10:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

The name of the party filing this fast track statement is Shanell Cathrine Martin.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

The attorney filing this fast track statement is Benjamin C. Gaumond of the Ben Gaumond Law Firm, PLLC. His address is 495 Idaho Street, Suite 209, Elko, Nevada 89801. His telephone number is (775)388-4875.

///

1 **3. Name, law firm, address, and telephone number of**
2 **appellate counsel if different from trial counsel:**

3 Appellate counsel and trial counsel are the same.

4 **4. Judicial district, county, and district court docket number**
5 **of lower court proceedings:**

6
7 This is an appeal from the Fourth Judicial District Court, in and
8 for the County of Elko, State of Nevada, Department 1. The docket
9 number in the lower court is DC-CR-21-126.
10

11 **5. Name of judge issuing decision, judgment, or order**
12 **appealed from:**

13 The Honorable District Court Judge Kriston N. Hill issued the
14 Judgment of Conviction in this case.
15

16 **6. Length of trial. If this action proceeded to trial in the**
17 **district court, how many days did the trial last?**

18
19 This case did not proceed to trial.

20 ///

21
22 ///

1 **7. Conviction(s) appealed from:**

2 Shanell Cathrine Martin was convicted of Possession of a
3 Controlled Substance, a category E felony in violation of NRS 453.336.
4

5 **8. Sentence for each count:**

6
7 Shanell Cathrine Martin was sentenced to serve twelve to thirty
8 (12-30) months in the Nevada Department of Corrections with credit for
9 twenty-four (24) days of time served as of September 13, 2021.
10

11 **9. Date district court announced decision, sentence, or order**
12 **appealed from:**

13 The district court announced the sentence on September 13, 2021.
14

15 **10. Date of entry of written judgment or order appealed from:**

16
17 The district court entered the judgment of conviction on
18 September 15, 2021.
19

20 ///

21 ///

22 ///

1 **11. If this appeal is from an order granting or denying a**
2 **petition for a writ of habeas corpus, indicate the date**
3 **written notice of entry of judgment or order was served by**
4 **the court:**

5 This appeal does not involve a petition for a writ of habeas corpus.

6 **12. If the time for filing the notice of appeal was tolled by a**
7 **post-judgment motion.**

8 There is no post-judgment motion that would toll the time for
9
10 filing the notice of appeal.

11 **13. Date notice of appeal filed:**

12 The notice of appeal was filed on October 11, 2021.

13
14 **14. Specify statute or rule governing the time limit for filing**
15 **the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS**
16 **34.575, NRS 177.015, or other:**

17 The rule governing the time limit for filing the notice of appeal for
18 this case is NRAP 4(b)(1)(A).

19 **15. Specify statute, rule or other authority which grants this**
20 **court jurisdiction to review the judgment or order**
21 **appealed from:**

22 This court has jurisdiction under NRS 177.015(3).
23
24
25

1 **16. Specify the nature of disposition below, e.g., judgment**
2 **after bench trial, judgment after jury verdict, judgment**
3 **upon guilty plea, etc.:**

4 This is an appeal from the judgment of conviction upon a plea of
5 guilty.

6
7 **17. Pending and prior proceedings in this court. List the case**
8 **name and docket number of all appeals or original**
9 **proceedings presently or previously pending before this**
10 **court which are related to this appeal (e.g., separate**
11 **appeals by co-defendants, appeal after post-conviction**
12 **proceedings):**

13 Counsel is not aware of any other proceedings pending before this
14 court which are related to this appeal.

15 **18. Pending and prior proceedings in other courts. List the**
16 **case name, number and court of all pending and prior**
17 **proceedings in other courts which are related to this**
18 **appeal (e.g., habeas corpus proceedings in state or federal**
19 **court, bifurcated proceedings against co-defendants):**

20 Counsel is not aware of any proceedings in other courts which are
21 related to this appeal.

22 ///

23 ///

1 **19. Proceedings raising same issues. List the case name and**
2 **docket number of all appeals or original proceedings**
3 **presently pending before this court, of which you are**
4 **aware, which raise the same issues you intend to raise in**
5 **this appeal:**

6 Counsel is not aware of any appeals or proceedings pending
7 presently before this court which raise the same issues as this appeal.

8 **20. Procedural history. Briefly describe the procedural history**
9 **of the case (provide citations for every assertion of fact to**
10 **the appendix, if any, or to the rough draft transcript):**

11 The criminal information was filed in the Fourth Judicial District
12 Court on May 4, 2021. *Joint Appendix 1.* The first guilty plea
13 agreement was filed on May 21, 2021 wherein Shanell Cathrine Martin
14 agreed to plead guilty to Possession of a Controlled Substance. *Joint*
15 *Appendix 4.* The “First Amended Guilty Plea Agreement” was filed on
16 June 7, 2021 wherein the State agreed to stipulate to drug diversion
17 with the conditions of participation in drug court and inpatient
18 rehabilitation and, if Ms. Martin did not comply, the parties would be
19 free to argue for an appropriate sentence. *Joint Appendix 20-21.*

20 Furthermore, the State agreed to defer prosecution on another felony
21
22
23
24
25

1 matter on the condition of Ms. Martin complying with probation in the
2 instant case. *Joint Appendix 21.*

3 The arraignment was held on June 7, 2021. *Joint Appendix 41.*
4 Ms. Martin entered her guilty plea at that hearing. *Joint Appendix 41.*
5

6 The judgment of conviction was filed on September 15, 2021.
7 *Joint Appendix 41.* The notice of appeal was filed on October 11, 2021.
8
9 *Joint Appendix 44.*

10 **21. Statement of facts. Briefly set forth the facts material to**
11 **the issues on appeal:**

12 In the “First Amended Guilty Plea Agreement,” the parties agreed
13 that Ms. Martin would plea guilty to Possession of a Controlled
14 Substance, a category E felony in violation of NRS 453.336. *Joint*
15 *Appendix 20.* As part of that resolution, the parties agreed that in
16 “accordance with NRS 176.211, for a first or second offense of NRS
17 453.336, the court shall defer judgment upon the consent of the
18 defendant.” *Joint Appendix 21.* Elko County District Attorney Tyler J.
19 Ingram signed this plea agreement on behalf of the State of Nevada.
20
21 *Joint Appendix 25.*
22
23

1 At the time of sentencing in this matter, Deputy Elko County
2 District Attorney Justin Barainca represented the State of Nevada.
3 *Joint Appendix 30.* Mr. Barainca recommended drug diversion. *Joint*
4 *Appendix 36.* However, he stated that “[NRS] 176.211, the plea
5 agreement doesn’t contemplate is which one we go with.” *Joint*
6 *Appendix 36.* He added that “the State is recommending the program
7 as noted - - or a program of treatment under 176A as opposed to
8 176.211. I don’t think that pursuant to the plea negotiations, that’s all
9 the State can recommend at this point of time, Judge.” *Joint Appendix*
10 *36-37.*

14 The Presentence Investigation Report was prepared on June 17,
15 2021. *Presentence Investigation Report 1.*¹ In this report, the Division
16 of Parole and Probation reported that Ms. Martin had exactly one (1)
17 prior conviction for Possession of a Controlled Substance and that such
18 a conviction was suffered on May 12, 2014. *Joint Appendix 5-7.*

22 ¹ An order directing the Elko County Clerk’s Office to release this
23 Presentence Investigation Report was entered on November 19, 2021.

1 At the sentencing hearing, undersigned defense counsel reminded
2 the district court that since the instant infraction would represent Ms.
3 Martin's second infraction under NRS 453.336, this was a mandatory
4 diversion case under NRS 176.211. *Joint Appendix 37.*

5
6 Ms. Martin was going to drug counseling through Jeff Price and
7 her plan was to continue to do that after her sentencing. *Joint*
8 *Appendix 37-38.* She confirmed with the district court that she planned
9 on getting the Vivitrol shot. *Joint Appendix 38.* When the district court
10 asked why she did not get the Vivitrol shot before, Ms. Martin corrected
11 the district court's misapprehension and clarified that she had the
12 Vivitrol shot in the past but it is only a six-month shot. *Joint Appendix*
13 *38.*

14
15 The district court, in sentencing Ms. Martin to prison, asserted
16 that Ms. Martin has "four prior felony convictions. You have two
17 dishonorable discharges from parole. You have one probation revoked.
18 I have zero faith or confidence that you will follow through on
19 treatment. You've had plenty of opportunity to do that, and you have
20 failed to at this point." *Joint Appendix 39.*

1 **22. Issues on appeal. State concisely the principal issue(s) in**
2 **this appeal:**

- 3 1) Did the district court commit reversible error in exceeding its
4 jurisdiction when it sentenced Shanell Cathrine Martin to prison
5 when NRS 176.211 required diversion for a second offense of
6 Possession of a Controlled Substance?
7
8 2) In the alternative, did the district court commit plain error in
9 sentencing Shanell Cathrine Martin to prison when the plea
10 agreement stated that she was to receive mandatory diversion?
11
12 3) Is a remand to district court necessary to allow a withdrawal of
13 Shanell Cathrine Martin's plea of guilty contingent on the State
14 violating the plea agreement during this appeal?
15

16 **23. Legal argument, including authorities:**

17 **1) The district court exceeded its jurisdiction when it**
18 **sentenced Shanell Cathrine Martin to prison on a second**
19 **offense of Possession of a Controlled Substance when NRS**
20 **176.211 required diversion.**
21

22 Under NRS 176.211(1)-(3):
23
24
25

1. Except as otherwise provided in this subsection, upon a plea of guilty, guilty but mentally ill or nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer judgment on the case to a specified future date and set forth specific terms and conditions for the defendant. The duration of the deferral period must not exceed the applicable period set forth in subsection 1 of NRS 176A.500 or the extension of the period pursuant to subsection 2 of NRS 176A.500. **The court may not defer judgment pursuant to this subsection if the defendant has entered into a plea agreement with a prosecuting attorney unless the plea agreement allows the deferral.**

2. The terms and conditions set forth for the defendant during the deferral period may include, without limitation, the:

- (a) Payment of restitution;
- (b) Payment of court costs;
- (c) Payment of an assessment in lieu of any fine authorized by law for the offense;
- (d) Payment of any other assessment or cost authorized by law;
- (e) Completion of a term of community service;
- (f) Placement on probation pursuant to NRS 176A.500 and the ordering of any conditions which can be imposed for probation pursuant to NRS 176A.400; or
- (g) Completion of a specialty court program.

3. The court:

- (a) Upon the consent of the defendant:
 - (1) **Shall** defer judgment for any defendant who has entered a plea of guilty, guilty but mentally ill or nolo contendere to a violation of paragraph (a) of subsection 2 of NRS 453.336; or
 - (2) May defer judgment for any defendant who is placed in a specialty court program. The court may extend any deferral period for not more than 12 months to allow for the completion of a specialty court program.
- (b) Shall not defer judgment for any defendant who has been convicted of a violent or sexual offense as defined in NRS 202.876, a

1 crime against a child as defined in NRS 179D.0357 or a violation of
2 NRS 200.508.

3 (Emphasis added.)

4 NRS 453.336(2)(a), likewise, requires diversion on a second
5 offense of violating NRS 453.336:

6
7 For a first or second offense, if the controlled substance is listed in
8 schedule I or II and the quantity possessed is less than 14 grams, or
9 if the controlled substance is listed in schedule III, IV or V and the
10 quantity possessed is less than 28 grams, is guilty of possession of a
11 controlled substance and shall be punished for a category E felony
12 as provided in NRS 193.130. In accordance with NRS 176.211, the
13 court **shall** defer judgment upon the consent of the person.

14 (Emphasis added.)

15 Based on the plain language of NRS 176.211 **and** NRS
16 453.336(2)(a), the district court did not have jurisdiction to sentence
17 Shanell Cathrine Martin to prison at the sentencing hearing. The State
18 consented to diversion pursuant to NRS 176.211(1). Ms. Martin
19 consented to diversion pursuant to NRS 453.336(2)(a). Diversion is
20 mandatory on a second offense of NRS 453.336 with the consent of the
21 defendant.

22 ///

1 Instead of addressing the mandatory diversion statutes, the
2 district court focused on matters that were irrelevant to the issue of
3 mandatory diversion: (1) the district court's lack of faith in Ms. Martin,
4 (2) the prior four convictions for felonies, (3) the two dishonorable
5 discharges from parole, (4) the one revocation of probation, and (5) Ms.
6 Martin's prior "opportunity" for drug treatment. Nowhere in NRS
7 176.211(1) or NRS 453.336(2)(a) does the law allow the district court to
8 send Ms. Martin to prison for any of the above enumerated reasons.
9

10
11 As such, this Court should reverse Ms. Martin's sentence of
12 imprisonment and the felony conviction and remand this matter for a
13 re-sentencing hearing wherein NRS 176.211(1) and NRS 453.336(2)(a)
14 are followed. Specifically, this Court should remand this case with the
15 instruction that Ms. Martin's case be deferred.
16

17
18 ///

19 ///

20 ///

21 ///

22 ///

1 **2) In the alternative, this Court should reverse the**
2 **conviction of Shanell Cathrine Martin’s under a plain error**
3 **standard because the plea agreement ensured that she**
4 **would receive drug diversion.**
5

6 This Court has held that “a guilty plea is presumptively valid, and
7 the defendant has the burden of establishing that the plea was not
8 entered knowingly and intelligently.” Hubbard v. State, 110 Nev. 671,
9 675, 877 P.2d 519, 521 (1994), citing Bryant v. State, 102 Nev. 268, 272,
10 721 P.2d 364, 368 (1986).
11

12 A plain error analysis applies when there was no objection lodged
13 to the sentencing decision. See NRS 178.602; see also Mendoza-Lobos v.
14 State, 125 Nev. 634, 643, 218 P.3d 501, 507-08 (2009); Puckett v. United
15 States, 556 U.S. 129, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266
16 (2009).²
17
18
19

20
21 ² The defense would submit that no objection was ultimately necessary
22 when the district court exceeded its jurisdiction. Colwell v. State, 118
23 Nev. 807, 812, 59 P.3d 463, 467 (2002), citing Swan v. Swan, 106 Nev.
24 464, 469, 796 P.2d 221, 224 (1990) (“subject-matter jurisdiction is not
25

Ms. Martin was given the assurance that on a second infraction of NRS 453.336 that her sentence would be deferred. The law requires it upon the consent of Ms. Martin. The parties stipulated that Ms. Martin's sentence must be deferred on a second infraction of NRS 453.336. The trial court proceeded to sentence Ms. Martin in complete contravention of the plea agreement and complete contravention of the law.

Ms. Martin's plea could not have been knowingly and intelligently entered when the district court went against the plea agreement. Her sentence of imprisonment and a felony was as plain an error as it gets. Her sentence of imprisonment and a felony should be overturned.

///

///

waivable, and a court's lack of such jurisdiction can be raised for the first time on appeal.")

1 **3) A remand back to district court with a re-sentencing is**
2 **necessary if the State of Nevada breaks the plea agreement**
3 **during the course of this appeal.**

4 “When a State enters into a plea agreement, it ‘is held to “the most
5 meticulous standards of both promise and performance” with respect to
6 both the terms and spirit of the plea bargain.” Sparks v. State, 121
7 Nev. 107, 110, 110 P.3d 486, 487 (2005), quoting Van Buskirk v. State,
8 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v.
9 Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

10 This Court has cited United States Supreme Court precedent
11 when discussing the issue of a prosecuting authority breaching a plea
12 agreement:

13 [The sentencing judge] stated that the prosecutor's
14 recommendation did not influence him and we have no reason to
15 doubt that. Nevertheless, we conclude that the interests of justice
16 and appropriate recognition of the duties of the prosecution in
17 relation to promises made in the negotiation of pleas of guilty will be
18 best served by remanding the case to the state courts for further
19 consideration [of the appropriate relief for the breach-specific
20 performance or withdrawal of the plea].

21 Echeverria v. State, 119 Nev. 41, 43-44, 62 P.3d 743, 745 (2003),
22

1 quoting Santobello v. New York, 404 U.S. 257, 262-63, 30 L. Ed. 2d 427,
2 433, 92 S. Ct. 495, 499 (1971).

3 This court went further and declared “that the State’s violation of
4 a plea agreement “requires reversal.”” Id. at 44, 745, quoting Citti v.
5 State, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991) (quoting Van Buskirk
6 v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986)); see also Kluttz
7 v. Warden, 99 Nev. 681, 684, 669 P.2d 244, 246 (1983); Riley v. Warden,
8 89 Nev. 510, 513-14, 515 P.2d 1269, 1271 (1973). Harmless-error
9 analysis is inapplicable in the event that a prosecutor breaches a plea
10 agreement. Id.

11 When an appellate court determines that a prosecutor has
12 breached a plea agreement and that specific performance is the proper
13 remedy, a re-sentencing must be ordered before a different sentencing
14 judge. Id. See, e.g., Citti, 107 Nev. at 94, 807 P.2d at 727; Wolf v. State,
15 106 Nev. 426, 428, 794 P.2d 721, 723 (1990); Van Buskirk, 102 Nev. at
16 244, 720 P.2d at 1217; Kluttz, 99 Nev. at 684, 669 P.2d at 246; Riley, 89
17 Nev. at 514, 515 P.2d at 1271.

18
19
20
21
22
23 ///

1 Ordinarily, undersigned appellate counsel would not
2 prophylactically bring up a potential appellate issue that could arise in
3 a fast track response. However, when a deputy district attorney (Justin
4 Barainca) makes a glaring misstatement of law at the sentencing
5 hearing, a potential breach of the plea agreement becomes an issue on
6 appeal.
7

8 The State of Nevada, through Deputy District Attorney Justin
9 Barainca, indicated at the sentencing hearing that NRS 176.211 did not
10 apply. Of course NRS 176.211 applies. The State consented to
11 mandatory diversion. Ms. Martin consented to mandatory diversion.
12 NRS 453.336(2)(a) requires diversion on an infraction of Possession of a
13 Controlled Substance (Second Offense) when the defendant consents –
14 which she clearly did in her own words as well as her legal counsel’s
15 words.
16
17
18

19 District Attorney Tyler J. Ingram signed the plea agreement –
20 which clearly indicates that NRS 176.211 applies and, as such, Ms.
21 Martin was entitled to mandatory diversion. Why Deputy District
22

1 Attorney Justin Barainca contradicted Mr. Ingram is unclear.

2 However, between the two prosecutors, Mr. Ingram was right.

3 If the State stands by the plea agreement during this appeal, then
4 there will be no need to remand this matter back to the district court for
5 a breach of the plea agreement. Otherwise, there is a need.

7 **24. Preservation of issues. State concisely how each**
8 **numerated issue on appeal was preserved during trial. If the**
9 **issue was not preserved, explain why this court should review**
10 **the issue:**

11 Pertaining to the issue of the lack of jurisdiction of the district
12 court to sentence Ms. Martin to imprisonment on a felony conviction,
13 that does not require preservation because it is a matter of jurisdiction.

14 As for the matter of the plain error of the district court in
15 sentencing Ms. Martin to imprisonment on a felony conviction, this
16 Court allows for review on the plain error standard even without a
17 preservation of error – although a reversal on jurisdictional grounds
18 makes this lack of preservation issue moot.

21 Finally, as to the issue of a potential breach of the plea agreement
22 that could arise on this appeal, this Court has ruled that a harmless-
23

1 error analysis does not apply to a breach of a plea agreement. Hence,
2 error preservation is not required.
3

4 **25. Issues of first impression or of public interest. Does this**
5 **appeal present a substantial legal issue of first impression**
6 **in this jurisdiction or one affecting an important public**
7 **interest: If so, explain:**

8 This appeal presents an issue of first impression insofar as there
9 is no appellate ruling from this jurisdiction as to the mandatory
10 diversion provisions of NRS 176.211 and NRS 453.336(2)(a).
11

12 **26. Routing statement pursuant to NRAP 17:**

13 This case involves a direct appeal from a judgment of conviction
14 based upon a plea of guilty. Under NRAP 17(b)(1), this case is
15 presumptively assigned to the Court of Appeals.
16

17 However, under NRAP 17(a)(11), this Court retains and decides
18 matters of first impression.
19

20 Based on this case presenting an issue of first impression, Shanell
21 Cathrine Martin asks that this Court retain this appeal.
22

23 ///

VERIFICATION

1
2 1. I hereby certify that this fast track statement complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6)
5 because this fast track statement has been prepared in a proportionally
6 spaced typeface using Microsoft Word 2013 in size 14 Century
7 Schoolbook font.
8
9

10 2. I further certify that this fast track statement complies with the
11 page- or type-volume limitations of NRAP 3C(h)(2) because it is either:
12

13 ☒ Proportionately spaced, has a typeface of 14 points or more,
14 and contains three thousand seven hundred eighty-one (3,781) words; or

15 ☐ Monospaced, has 10/5 or fewer characters per inch, and
16 contains ____ words or ____ lines of text; or
17

18 ☐ Does not exceed 16 pages.

19 3. Finally, I recognize that pursuant to NRAP 3C, I am responsible
20 for filing a timely fast track statement and that the Supreme Court of
21 Nevada may sanction an attorney for failing to file a timely fast track
22 statement, or failing to raise material issues or arguments in the fast
23
24
25

1 track statement, or failing to cooperate fully with appellate counsel
2 during the course of an appeal.

3 4. I therefore certify that the information provided in this fast track
4 statement is true and complete to the best of my knowledge,
5 information and belief.
6

7 DATED this 30th day of November, 2021.
8

9 BEN GAUMOND LAW FIRM, PLLC

10
11
12 By: 

BENJAMIN C. GAUMOND, ESQ.

Nevada Bar Number 8081

495 Idaho Street, Suite 209

Elko, Nevada 89801

(775)388-4875 (phone)

(800)466-6550 (facsimile)

17 CERTIFICATE OF SERVICE

18 (a) I hereby certify that this document was electronically filed
19 with the Nevada Supreme Court on the 30th day of November, 2021.
20

21 (b) I further certify that on the 30th day of November, 2021,
22 electronic service of the foregoing document shall be made in accordance
23

1 with the Master Service List to Aaron Ford, Nevada Attorney General;
2 Tyler J. Ingram, Elko County District Attorney; and Ryan I.
3 McCormick, Deputy Elko County District Attorney.

4 (c) I further certify that on the 30th day of November, 2021, I
5 mailed one copy with postage prepaid to Shanell Cathrine Martin,
6 NDOC # 1172591, Florence McClure Women's Correctional Center,
7 4370 Smiley Road, Las Vegas, NV 89115-1808.
8

9
10 DATED this 30th day of November, 2021.

11
12
13 

14 Benjamin C. Gaumond, Owner
15 Ben Gaumond Law Firm, PLLC
16
17
18
19
20
21
22
23
24
25