IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANELL C MARTIN,

Appellant,

Case No. 83665

vs.

THE STATE OF NEVADA,

Respondent.

FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada.

2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:** Deputy District Attorney, Ryan I. McCormick Office of the Elko County District Attorney, 540 Court Street, Second Floor, Elko, NV 89801, (775) 738-3101.

3. **Name, law firm, address, and telephone number of appellate counsel, if different from trial counsel:** N/A.

4. **Proceedings raising same issues:**

This is a fast-track response to Appellant's fast-tract statement made in connection with the sentencing hearing heard in case DC-CR-21-126 held in the Fourth Judicial District.

5. **Procedural history:** Respondent is satisfied with the procedural history set forth in the fast-track statement.

6. **Statement of facts:** Respondent is satisfied with the statement of facts set forth in the fast-track statement.

7. **Issues on appeal:**

1) Did the district court commit reversible error when interpreting NRS 176.211 and NRS 453.336 to read that Ms. Martin was not entitled to mandatory diversion under the statute or by the terms of the plea agreement?

2) Is a remand to district court necessary to allow a withdrawal of Ms. Martin's plea of guilty contingent on the State Violating the plea agreement?

8. **Legal argument:**

(1) The plain language of NRS 176.211 and NRS 453.336 gave the District Court discretion to not grant Appellant diversion.

There is no disagreement that the district court is bound by the plain language of NRS 176.211 and NRS 453.336. However, the Respondent believes that the interpretation by the Appellant is incorrect, thus, the District Court was fully within its discretion to sentence Ms. Martin to a term of imprisonment. NRS 176.211 reads, in pertinent part:

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 crime against a child as

defined in NRS 179D.0357 or a violation of NRS 200.508. NRS 176.211 (1)-(3) (emphasis added).

The statue is unambiguous and should be given its plain meaning. The Appellant's interpretation would render the last sentence in subsection (1) and subsection (3) superfluous. "Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033 (2004). The goal of statutory interpretation "is to give effect to the Legislature's intent." *Hobbs v. State*, 127 Nev. 234, 237 (2011). To ascertain the Legislature's intent, we look to the statute's plain language. *Id*. "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582-83 (2003). This court "avoid[s] statutory interpretation that renders language meaningless or superfluous," *Hobbs*, 127 Nev. at 237 and "whenever possible . . . will interpret a rule or statute in harmony with other rules or statutes," *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 79 (2015) (quotation marks omitted).

When read together, subsection (1) of 176.211 gives the sentencing judge discretion to give the defendant a period of deferment upon a plea, without the defendant being bound by a plea agreement. This section applies to all charges under the Nevada Revised Statutes that are not specifically exempted in subsection (3)(b). The last sentence of subsection (1) removes discretion from the

sentencing judge when the defendant has entered into a plea agreement with the State. Subsection (3)(a)(1) is specific to entries of pleas under NRS 453.336. This subsection applies only when a defendant, without a plea agreement, pleads to the charge of simple possession at his or her arraignment. Thus, subsection (1) of 176.211 does not apply to subsection (3)(a)(1), any other reading would render subsection (3)(a)(1) superfluous. There is also absolutely no language in subsection 3(a)(1) that removes, nor grants, discretion to the sentencing judge when a plea agreement is in place. This situation was specifically contemplated in subsection (1); thus, it would seem logical that it would have been if the legislature intended it to.

As it pertains to the facts in this case, Ms. Martin initially entered into a plea agreement with the State, the filing of that agreement occurred on May 21, 2021. Ms. Martin subsequently failed to appear for her arraignment in that matter as scheduled. A warrant went out for Ms. Martin and when she was arrested on that matter, it was alleged that she had controlled substances with her. In exchange for her new plea, the State agreed to defer prosecution on the new charge and agree to recommend diversion, in hopes of getting her treatment. The new agreement was filed on June 6 of the same year. The new agreement did recommend diversion. The District Court ultimately decided against diversion and sentence Ms. Martin to a term of imprisonment.

First, the State believes that the first subsection of 176.211 does not apply whatsoever. The mere application of subsection (1) would render subsection (3)(a)(1) superfluous. While the District Court did not explain its reasoning, it was fully within its discretion to deny Ms. Martin diversion under 176.211. As stated above, Ms. Martin would have had to have plead straight up to the charge at her arraignment to receive diversion under 176.211(3)(a)(1). Thus, because she did enter a plea pursuant to a plea agreement, she was not guaranteed it.

Furthermore, to say that Ms. Martin has only one conviction for possession of a controlled substance goes against conventional wisdom. "The elements of simples possession are included in possession for sale . . . if one is guilty of possession of sale, he or she will necessarily be guilty of simple possession." *LaChance v. State*, 130 Nev. 263, 273 (2014). While I was unable to find a case that directly states that simple possession is a lesser included of trafficking in a controlled substance, it would make sense to make that assumption. While there is a very careful distinction between guilty and convicted, it would seem rational to consider this fact when sentencing.

If the Court accepts this logic, then all the arguments presented by the defense pertaining to NRS 176.211 and NRS 453.336 would be irrelevant. There is no dispute as to the plain language of NRS 453.336, in so far as, diversion is only mandatory when the defendant has two or less convictions of simple

possession. As it is, and so conveniently unrepresented by counsel for Appellant, Ms. Martin has one previous conviction for possession for purposes of sale and one conviction for attempted trafficking in a controlled substance. Thus, logically she was guilty of simple possession in both of those cases and could not be afforded the protection of 176.211.

If the Court accepts the plain language of NRS 173.211 as presented by Respondent, then the District Court was fully within its discretion to impose a term of imprisonment. Also, factually speaking, if the Court believes that a conviction of possession for purposes of sale and a conviction of attempted trafficking in a controlled substance necessarily take her out over two convictions of simple possession, then none of this is relevant. Thus, we ask this Court to affirm the decision of the District Court and leave the sentence of Ms. Martin as is.

2) The State did not violate the terms of the plea agreement, thus no remand would be necessary.

Respondent contends that all the case law cited by Appellant are true and correct representations of law. However, the factual representations made by Appellant are misrepresented, at best. Factually speaking, at no time during the sentencing hearing did the State violate the plain terms of the amended plea agreement.

The contention that Mr. Barainca made a "glaring misstatement of the law" is nothing more than hyperbole. First, 176A.100 is a mandatory probation statute and 176.211 is the diversionary statute. The practical effect of the use of either is that the defendant is placed on probation in lieu of prison. Thus, to say that it is a glaring misstatement of the law is patently absurd.

Mr. Barainca, after some clarification as to which plea agreement was controlling, simply stated a method for which the Appellant could be placed on probation. Mr. Barainca was instructed by the District Court as to which was, and then recommended that the Appellant be given diversion. This statement was in accordance with language of the amended plea agreement.

Furthermore, to say that the State specifically agreed to diversion under 176.211 is untrue. The terms of the agreement that the State specifically agreed to are contained on page 1 of the Amended Plea Agreement and lines 1-6 of page two of the same document. The only mention of NRS 176.211 is contained in the section of the document entitled "Consequences of the Plea," a section in which the defendant is informed of what the sentencing possibilities are. The section is written in the first person, which denotes that the defendant is aware of what could happen at the time of sentencing. The section also informs the defendant of what could happen if a term of imprisonment is ordered. The "terms" in this section are nothing more than boilerplate language each defense counsel places in

each plea agreement they sign. Thus, to say that they are specifically agreed to terms of the agreement is clearly untrue.

All this agreement amounts to is a recommendation by the State that the defendant be placed on probation. The State, through counsel Justin Barainca, recommended diversion pursuant to the agreement. Consequently, the State followed through with its end of the bargain, and no remand, nor specific performance is necessary in this action.

9. **Preservation of issues:**

This case did not proceed to trial, thus no issues could have been preserved on the record for appeal.

10. **Court of Appeals assignment statement pursuant to NRAP 17:** This case involves a direct appeal from a Judgment of Conviction upon the entry of a guilty plea, pursuant to a plea agree, that does not involve a conviction for any offense that is a category A or category B felony. See NRAP 17(b)(1). As such, it appears this case will be presumptively assigned to the Court of Appeals. The State does not contend that the Supreme Court should retain this appeal.

VERIFICATION

I hereby certify that this fast track response 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). This fast track response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this fast track response complies with the type-volume limitations of NRAP 3C(h)(2) because it contains 1,989 words.

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or for failing to cooperate fully with appellate counsel during the course of an appeal.

///

///

///

///

///

///

///

///

I therefore certify that the information provided in this Fast Track Response is true and complete to the best of my knowledge, information and belief.

DATED this 17th day of December, 2021.

TYLER J. INGRAM
ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, 2nd Floor
Elko, NV 89801
(775) 738-3101

By: _____
Ryan I. McCormick
Deputy District Attorney
State Bar Number: 15434

CERTIFICATE OF COMPLIANCE

I hereby certify that this fast track response 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). This fast track response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the fast track response exempted by NRAP32(a)(7)(C), it contains 1,989 words.

Finally, I further certify that I have read this fast track response, 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 response 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 response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of December, 2021.

TYLER J. INGRAM
ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, 2nd Floor
Elko, NV 89801
(775) 738-3101

By: _____
Ryan I. McCormick
Deputy District Attorney
State Bar Number: 15434

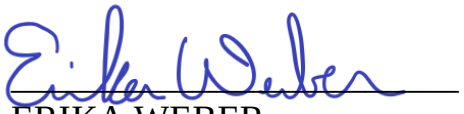
CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of December, 2021. Electronic Service of the Fast Track Response shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

And

BENJAMIN GAUMOND
Attorney for Appellant



ERIKA WEBER
CASEWORKER

DA#: AP-21-02611