IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83049

D. Ct. DC-DV-20-69

APPEAL FROM JUDGMENT OF
THE HONORABLE KRISTON HILL

FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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I: STATEMENT OF FACTS:

The State of Nevada, Respondent herein, argued to this Court that none of the flawed victim impact evidence that was improperly admitted by the sentencing court affected the sentence in this case. Respondent is wrong.

Here are some key allegations that constituted suspect evidence and was intentionally provided to the sentencing court to garner a maximum possible consecutive sentences:

a. Two page letter from Jana (a rancher in the area) found at AA 93-95. In that letter, Jana asked the court to impose the toughest sentence the court do as she worried that Ms. Whitaker would not stop. Jana is not a parent of a child who was a victim in the case. Jana advised the court that she felt threatened for her and her family by writing a letter to the court but continued to attack Ms. Whitaker and provide her personal opinion of Ms. Whitaker, her gossip of the fact setting, and her angst for the entire community that was victimized by Ms. Whitaker. This letter should have been stricken. AA 94-95.

b. A letter from Kirk and Jennifer. Neither of these people are parents of a

victim of the case. Both of these folks tell the court that they do not want her in their community. AA 96. This letter should have been stricken.

c. A letter from Heather, who purported to be a close friend of Ms. Whitaker's who demanded mandatory jail time and fines, advised the court about society's inadequate punishment of teachers who abuse their position of power and cited to a 2007 Montana high school student who committed suicide after being raped by a teacher, a Texas math teacher who received probation, an Indiana coach who had sexual relations with a 17 year old student in order to support her view that Ms. Whitaker should be severely punished by the court. AA 97-98. This letter should have been stricken.

d. A letter from Tammy Myers, who had children the same age as the victims in this case but was not a parent of a true victim, in which Tammy argued that Ms. Whitaker should not be granted probation by the court, that the community demands more punishment than probation, that the community of Wells will not tolerate child abuse in any form. AA 100. This letter should have been stricken.

e. Anne Battenfield, a mother of children the age of the victims in this case took

the time to advise the court that probation would not be a deterrent for Ms. Whitaker and that she would re-offend, that the community of Wells needs to know that the legal system will work and justice will prevail. Anne was surprised that probation was even a possibility in the case. AA 101.

f. Thad Ballard, President of the Board of Trustees of the Elko County School District decided for himself that if Ms. Whitaker admitted to four victims, there are undoubtedly others. AA 107. This is suspect evidence at its finest. Mr. Ballard decided it was his obligation to advise the court about temporary restraining orders against Ms. Whitaker, and let the court know that Ms. Whitaker's attorney perpetuated harm to the victims by representing Ms. Whitaker. Mr. Ballard asked that Ms. Whitaker be punished to the full extent of the law. He advised the court that every parent in the community is a victim as they are questioning whether their children were victims of Ms. Whitaker. He was even upset that the reputation of their community was maligned by Ms. Whitaker's actions. AA 108. He ended by reminding the court that as a school board member, he wanted to see MS. Whitaker get the maximum prison time and a maximum fines possible. AA

108. This letter should have been stricken.

g. The "Petition" itself which was generated by a victim and was signed randomly by citizens and told the court that the letter was written because: "after settling our thoughts, immediately, the dismay set in, about the possibility of a probation versus a prison sentence". The Petition seeks prison for Ms. Whitaker. It is signed by about 70 random signatures. The Petition is addressed to the "District Attorney Ingram and Assistant Deputy DA: AA 80-84. This Petition constituted suspect evidence and should have been stricken. This same Petition was not provided to Mr. Bergeron. During the sentencing, Mr. Bergeron asked, "Is there some sort of petition that has reached the Court, that I don't know about?" AA 174.

Judge Porter minimized the Petition stating it had been signed by several people and that it was not influencing her. Yet, it was generated by a victim's parent and signed by over 70 people. Mr. Bergeron should have sought recusal of the judge and a continuance of the sentencing hearing. AA 175. One would think he would at least have wanted to see the documents.

Respondent failed to address the fact that Ms. Whitaker scored through the Department of Parole & Probation for a term of probation, not prison. See PSI. An Addendum to the PSI was completed by the Department to increase and justify a prison sentence that was identical to the plea offer maximum of the DA's office. This was authored by Lt. Harp. AA 156-157 and PSI. Respondent admitted that without the deviation, a probation recommendation would have been made. AA 189. Ms. Whitaker's psychosexual evaluation included that "Ms. Whitaker's risk to the community is as low as she could possibly score, using the actuarial tables described in his report." AA 212.

Notably, Ms. Whitaker's attorney, Byron Bergeron, failed to object to the suspect evidence, the improper victim impact evidence, the improper Petition or the PSI addendum seeking prison rather than probation. AA 137-217. Ms. Whitaker was deemed a low risk to re-offend. AA 167. Mr. Bergeron argued to the court that the PSI contained "rumors" but did not object and seek to have portions changed. AA 168.

While the court admitted that she had read every word of every statement in

the file, she noted that people submitted letters that are not victims and she would not consider them to be victims. At the same time, Judge Porter did not deem whether or not the sentencing evidence was relevant and material. AA 154.

It was clear that this was a heated sentencing proceeding. Respondent made light of that in their Answering Brief. The sentencing commenced with the court advising that: "I have authorized the bailiff and the deputies to remove anyone who isn't behaving appropriately. They have my authority to do that, without my having to tell them to do so." AA 137-138. During the announcement of the sentence, the court advised the people in court: "I'm going to advise the observers again to behave appropriately, or you will be removed. AA 214.

II: ARGUMENT

A. SENTENCING COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

The District Court had an obligation to admit only relevant evidence at the sentencing proceeding. The passage of Marsy's Law provided a right to *victims* of crime to be heard by the court system. The argument that the entire Wells

community was a victim of Ms. Whitaker's conduct is suspect. A victim under Marsy's Law must be directly and proximately harmed.

NRS 176.015(5)(d) defines a victim as:

> "A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)."

This sentencing hearing was fraught with inadmissible suspect evidence. Counsel Bergeron should have objected. Counsel Bergeron should have ensured that Ms. Whitaker received a fair sentencing hearing and protected her due process rights. Sentencing decisions should be based upon reliable and relevant evidence. NRS 48.015 & NRS 176.015(6). The community's thoughts as expressed by a letter signed by 70 strangers to the proceedings is inherently unreliable. Ms. Whitaker could not even read the signatures to begin to investigate why so many strangers wanted her to go to prison.

This Court provided guidance on how the district court should proceed with Marsy's Law and NRS 176.015 in *Aparicio v. State*, 137 Nev. Adv. Op. 62, decided October 7, 2021. This Court provided clear authority that counsel must

be effective at a sentencing proceeding – a critical stage of the proceedings. *Gonzales v. State*, 137 Nev. Adv. Op. 40 decided July 29, 2021.

The non-victim evidence provided in this sentencing matter was prejudicial. Purported friends of Ms. Whitaker sought prison time. Non-victim evidence as admitted in this proceeding did not further the goals of sentencing, i.e. retribution, deterrence, incapacitation, and rehabilitation. *State v. Boston*, 131 Nev. 981, 363 P. 3d 456 (2015). People who had no right to speak to the sentencing court voiced opinions, by letter and by petition. Defense counsel did not even see the Petition, let alone object to its presence.

A review of the sentencing transcript provides this court with ample evidence that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Bergeron's failure to object to the antics of the sentencing hearing caused a waiver of appellate review of the issues. Docket 77294, *Whitaker v. State.*

The failure of counsel to object to the deviation entered by the Department of Parole & Probation directly prejudiced Ms. Whitaker's sentencing outcome.

Ms. Whitaker qualified for a probation recommendation. Instead of receiving that, the Department increased its recommendation to that of the maximum cap of the plea bargain from the State. This negatively impacted the sentencing hearing. Ms. Whitaker's low risk to re-offend evaluation was virtually eradicated by the heft of inadmissible and unreliable sentencing evidence provided to the sentencing judge.

The District Court erred when it dismissed the Petition for Writ of Habeas Corpus (postconviction) without holding an evidentiary hearing so that Judge Porter's testimony on the inadmissible evidence could be heard. Dismissal without access to an evidentiary hearing constituted error. *Hargrove . State,* 100 Nev. 498, 686 P.2d 222 (1984). The District Court abused its discretion and denied Ms. Whitaker her right to due process under the Fifth Amendment when it refused to allow Ms. Whitaker access to court and the opportunity to support her allegations with competent evidence.

Contrary to the Respondent's argument that the maximum possible consecutive sentences would have been imposed upon Ms. Whitaker without the offending inadmissible and irrelevant evidence at the sentencing hearing,

Appellant is confident that a lesser sentence would have been imposed. Ms. Whitaker had attended counseling for 15 months. Ms. Whitaker was remorseful, apologized to the victims and lost virtually everything in her world. Ms. Whitaker had the support of family and friends. A new sentencing hearing is mandated by the facts of this case.

III: CONCLUSION

This Court should vacate the sentence imposed upon Ms. Whitaker and remand this matter for sentencing before a different district court judge. Alternatively, this Court should remand this matter for an evidentiary hearing on the postconviction allegations so that Judge Porter, Byron Bergeron and Chad Thompson's testimony will be presented to the court.

DATED this 29 day of October, 2021.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages and meets the parameters of Word Count and Line Count.

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. The document was prepared in Word Perfect, Times New Roman. There are 10 typed pages, 1876 words in this brief and 167 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing.

DATED this 29 day of October, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X E-Flex delivery system of the Nevada Supreme Court addressed as follows:

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DATED this 29 day of October, 2021.

KARLA K. BUTKO, Esq.