IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. LOCKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.
/

No. 84070

Electronically Filed
Feb 03 2022 09:55 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

## FAST TRACK STATEMENT

1. Appellant, Michael J. Locker.

2. John Reese Petty, Chief Deputy, Washoe County Public Defender's Office, 350 South Center Street, 5th Floor, Reno, Nevada 89501; (775) 337-4827.

3. Same as above.

4. Second Judicial District Court in and for the County of Washoe, in District Court Case Number CR21-1297B, Department 15

5. The Honorable David A. Hardy, District Judge.

6. Mr. Locker pleaded guilty to possession of less than fourteen grams of a schedule I controlled substance, a violation of NRS 453.336(2)(a), a category E felony.

7. See paragraph 6, *supra*.



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8. The district court sentenced Mr. Locker to a term of 19 to 48 months in the Nevada Department of Corrections, with credit for 120 days in predisposition custody. JA 42-43 (Judgment).[1] The district court suspended the sentence and placed Mr. Locker on probation for a fixed period of eighteen months under terms and conditions. *Id.* and JA 44-46 (Order Admitting Defendant to Probation and Fixing the Terms Thereof). Mr. Locker appeals. JA 47-48 (Notice of Appeal).

9. December 9, 2021.

10. December 9, 2021.

11. Not applicable.

12. Not applicable.

13. A notice of appeal was timely filed on January 9, 2022. JA 47-48 (Notice of Appeal).

14. NRAP 4(b).

15. NRS 177.015(3).

16. Judgment based on a guilty plea.

17. Not applicable.

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[1] "JA" stands for the Joint Appendix, which is being filed contemporaneously with this fast track statement.

18. Not applicable.

19. Not applicable.

20. Mr. Locker entered a guilty plea to one category E felony and was sentenced as set forth in part 8 above.

21. Facts

*Arraignment*

Mr. Locker pleaded guilty to one count of possession of less than fourteen grams of a schedule I controlled substance; specifically, less than fourteen grams of methamphetamine, and/or psilocybin, and/or heroin. JA 1-3 (Information), JA 4-8 (Guilty Plea Memorandum), JA 16 (Transcript of Proceedings: Arraignment).

The negotiations left the parties free to argue for an appropriate disposition. JA 6 (Guilty Plea Memorandum) (Paragraph 7), JA 12 (Transcript of Proceedings: Arraignment). The district court canvassed Mr. Locker and accepted his guilty plea. *Id.* at 12-17.

*NRS 176A.240 Election filed*

On December 8, 2021, Mr. Locker, through his counsel, filed notice of his election to undergo a treatment program. JA 20-22 (Election of Assignment to a Program of Treatment Pursuant to NRS

176A.240). Mr. Locker acknowledged that under this election the district court could "impose any conditions that could be imposed as conditions of probation," that he could be "under the supervision of the treatment provider for a period of time not less than one year nor more than three years," that he could be "confined inside a treatment facility or released for supervised care in the community," and that if he "satisfactorily complete[d] the treatment program and satisfied the conditions of the Court, the conviction will be set aside, but if he does not satisfactorily complete the treatment program and satisfy the Court's conditions, he may be sentenced and the sentence executed." *Id.* at 20-21.

*Sentencing*

Sentencing took place remotely. The district court acknowledged receipt of Mr. Locker's election for assignment to a treatment program. JA 24 (Transcript of Proceedings: Sentencing). Mr. Locker likewise acknowledged that he had been in treatment programs, including inpatient programs, before and had successfully completed each program. *Id.* at 24-25. Mr. Locker's counsel surmised that because the court had gone "through Mr. Locker's history of treatment" there might

be a question "about whether he should be directly transported to the inpatient program or not." *Id.* at 27. Counsel reviewed Mr. Locker's history, noted his motivating desire to parent his son, and added that Mr. Locker already had "a verbal acceptance from Bristle Cone." *Id.* at 27-30, 30.

The district court noted that Mr. Locker had multiple positive drug tests while under supervision. JA 30. Ms. Pitt, from the Division of Parole and Probation explained that Mr. Locker had been under the supervision of pretrial services out of the Reno Justice Court. She said that the Justice Court likes to work with individuals who appear to be making progress. *Id.* 31-32. The district court expressed some disagreement with that approach here because the facts indicated that Mr. Locker had "a concealed weapon on his person." *Id.* at 32.

The deputy district attorney treated this case as "a mandatory probation case" and suggested that Mr. Locker enter and complete adult drug court as a condition of probation. She also recommended an underlying sentence of 19 to 48 months in the Nevada Department of Corrections. *Id.* at 33. Finally, she indicated her preference for

probation over a deferred sentence because "'the firearm presence requires probation as opposed to the deferred sentence." *Id.* at 33-34.

The district court proceeded to sentencing. *Id.* at 34. After making some general comments and observations (including that this was Mr. Locker's first felony conviction although he had 12 prior criminal convictions), the district court elected to "try something today that we haven't tried in the past," which was to keep Mr. Locker in jail as a condition of probation "for a significant period of time" before "attending drug court." *Id.* at 34-37, 37-38.

The district court sentenced Mr. Locker to a term of 19 to 48 months in the Nevada Department of Corrections, with credit for 120 days in predisposition custody, suspended the sentence and placed Mr. Locker on probation for a fixed term of 18 months. *Id.* at 39, JA 42-43 (Judgment), JA 44-46 (Order Admitting Defendant to Probation and Fixing the Terms Thereof). As a condition of probation, Mr. Locker was ordered to remain in the custody of the Washoe County Jail for a period of 60 days. *Id.* at 43.

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22. Issue: When conditions of NRS 453.336(2)(a) have been met the statute requires a district court to, with the consent of the defendant, defer judgment for a first or second offense. Did the district court commit legal error or abuse its discretion by not deferring judgment in this case where the statutory conditions were met.

23. Argument: The district court erred in not deferring judgment in this case as NRS 453.336(2)(a) makes deferral mandatory where the defendant consents and the offense is a first or second offense.

Generally, district court sentencing decisions are reviewed under an abuse of discretion standard. *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). However, "[w]hile review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *Matter of Aragon*, 136 Nev. 647, 648, 476 P.3d 465, 467 (2020) (internal quotations and citation omitted).

Mr. Locker pleaded guilty to violating NRS 453.336(2)(a). The State's sole factual allegations were that Mr. Locker, on April 20, 2021, "did knowingly or intentionally, possess less than 14 grams of a Scheduled I controlled substance, specifically, Methamphetamine

and/or Psilocybin and/or Heroin, at or near Vine Street." JA 1-2 (Information) (some capitalization omitted). This was Mr. Locker's first offense. JA 33, 36 (Transcript of Proceedings: Sentencing).

NRS 453.336(2)(a), which took effect on July 1, 2020,[2] states in relevant part:

> [f]or a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams ... [a person who violates this section] is guilty of possession of a controlled substance and shall be punished for a category E felony as provided in NRS 193.130. In accordance with NRS 176.211, *the court shall defer judgment upon the consent of the person.* (Italics added).

Questions of statutory interpretation are reviewed de novo. *Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 106, 460 P.3d 443, 447 (2020); *In re P.S.*, 131 Nev. 955, 956, 364 P.3d 1271, 1271 (2015). Statutory interpretation starts with the statute's plain language. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When the meaning of the language is clear, the analysis ends. *In re P.S.*, 131 Nev. at 956, 364 P.3d at 1271 (stating that "'when the

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[2] See Laws 2019, c. 633, § 113, eff. July 1, 2020

language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise.") (internal quotation marks, citation omitted).

Whether the district court committed legal error here turns on the proper construction of NRS 453(2)(a). Subsection (2)(a) of NRS 453.336, as applied in this case, means that because Mr. Locker committed a first offense of "possessing a controlled substance that is listed in schedule I and the quantity possessed is less than 14 grams" he was "guilty of possession of a controlled substance ... a category E felony as provided in NRS 193.130." And "in accordance with NRS 176.211" because Mr. Locker consented to a deferred sentence the district court was required to "defer judgment." The operative term in the statute is "shall," *i.e.*, "the court shall defer judgment," which divested the district court of discretion to do otherwise.

The "use of the word 'shall' in the statute divests the district court of judicial discretion." *Goudge v. State*, 128 Nev. 548, 553, 297 P.3d 301, 304 (2012) (some internal quotations omitted, citations omitted). In *Goudge* the Supreme Court added:

> [t]his court has explained that, when used in a statute, the word "shall" imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. *Id.*; *see also Johnson v. Dist. Ct.*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) (explaining that "shall is mandatory and does not denote judicial discretion (quoting *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006))).

*Id.* at 553, 297 P.3d at 304 (some internal quotations omitted).

*Goudge* is instructive. In *Goudge* the district court, after holding a hearing on an issue of lifetime supervision, entered an order denying Goudge's petition to be released from lifetime supervision "based on the severity of the crime committed" and without analyzing factors found in NRS 176.0931.[3] The Supreme Court stated that "the district court found that it had discretion to consider witness testimony in evaluating whether appellant was a proper candidate for release from lifetime supervision." And "[b]ased on 'the totality of the circumstances,' the district court found that Goudge was not such a candidate." On appeal

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[3] In *Goudge* the Supreme Court noted that "[a]ccording to NRS 176.0931, if the petitioner meets the requirements set forth in NRS 176.0931(3), the district court 'shall grant [the] petition' for release from lifetime supervision." 126 Nev. at 553, 287 P.3d at 304 (alteration in the original).

Goudge argued that he had "complied with the statutory requirements to earn a release from lifetime supervision and, thus, that the district court was required to grant his petition for release." In contrast, the State countered that "because determining punishments is within the purview of the district court," it "had [the] discretion to decide whether Goudge would be relieved of his punishment." *Id.* at 551-52, 287 P.3d at 302-03. The district court agreed with the State, but the Supreme Court *reversed* stating,

> [b]ecause the Legislature can define punishments, we conclude that it is within the Legislature's power to limit punishments as well. *Therefore, when the Legislature imposes mandatory language limiting the extent of a punishment, the district court must comply with the Legislature's mandate.* Based on the plain language of NRS 176.0931, we conclude that the Legislature has limited the district court's discretion in the context of a petition for release from lifetime supervision, such that if the district court determines that a petitioner has complied with the statutory requirements, *the district court lacks discretion* to deny the petition for release from lifetime supervision.

*Id.* at 554, 287 P.3d at 304 (italics added).

So too here. The State sought probation in lieu of a deferred sentence because, in the prosecutor's mind, "firearm presence requires

probation as opposed to a deferred sentence." The prosecutor provided no authority for that proposition and the statute does not condition a deferred sentence on the absence or presence of a firearm. Notably, the charging documents did not contain a firearm allegation.

By its terms NRS 453.336(2)(a) self-limits its application to first or second possession offenses where the schedule I controlled substance is less than fourteen grams. It also requires the consent of the defendant in order to be operative. Here, both conditions are satisfied. This was Mr. Locker's first conviction and he specifically expressed his consent in his written election to assignment into a program of treatment under NRS 176A.240. Thus, as in *Goudge*, the "Legislature has limited the district court's discretion." Stated differently, "the district court lack[ed] discretion" to not defer judgment in this case.

This legal error requires this Court to vacate the judgment below and remand for the purpose of deferring the judgment.

24. Counsel filed a written election to assignment to a program of treatment under NRS 176A.240 before the sentencing hearing.

25. This appeal does not present an issue of first impression or public interest.

26. Routing Statement: This appeal is presumptively assigned to the Court of Appeals because it is a conviction based on a guilty plea. NRAP 17(b)(1).

## VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this fast track statement complies with the page — or type — volume limitations of NRAP 3C(h)(2) because it is: Proportionately spaced, has a typeface of 14 points, a total of 2,459 words and does not exceed 16 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information

provided in this fast track statement is true and complete to the best of knowledge, information, and belief.

DATED this 3rd day of February 2022.

/s/ John Reese Petty
JOHN REESE PETTY
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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 3rd day of February 2022. 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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