

IN THE SUPREME COURT OF THE STATE OF NEVADA

REX ALVIN LAND,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
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Appeal from a Judgment of Conviction in Case Number CR20-3529
The Second Judicial District Court of the State of Nevada
Honorable David A. Hardy, District Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
STATEMENT OF JURISDICTION	2
ROUTING STATEMENT	2
STATEMENT OF THE LEGAL ISSUE PRESENTED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	9
ARGUMENT	9
The district court abused its sentencing discretion by imposing a prison term even though probation was available on Count I	9
<u>Standard of Review and Discussion</u>	9
CONCLUSION	12
CERTIFICATE OF COMPLIANCE	13
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES

Crawford v. State, 121 Nev. 744, 121 P.3d 582 (2005)	10
Jackson v. State, 117 Nev. 116, 17 P.3d 998 (2001)	10
Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987)	11
Major v. State, 130 Nev. 657, 333 P.3d 235 (2014)	10
Parrish v. State, 116 Nev. 982, 12 P.3d 953 (2000)	10, 11
Patterson v. State, 129 Nev. 168, 298 P.3d 433 (2013)	10
People v. Watkins, 613 P.2d 633 (Colo. 1980)	10
Pitmon v. State, 131 Nev. 123, 352 P.3d 655 (Nev. App. 2015)	12
Renard v. State, 94 Nev. 368, 580 P.2d 470 (1978)	10
Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976)	9, 10
Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989)	14

STATUTES

NRS 177.015	2
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NEVADA RULES OF APPELLATE PROCEDURE

Rule 4(b)	2
Rule 17(b)	2
Rule 30(c)	2

I. STATEMENT OF JURISDICTION

On July 13, 2021, the district court filed a criminal judgment of conviction. JA 49-50 (Judgment of Conviction).¹ On August 11, 2021, Appellant, Rex Alvin Land (Mr. Land), timely filed a notice of appeal from that judgment. JA 51-52 (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 based on a guilty plea.

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Whether the district court abused its sentencing discretion requiring a remand for a new sentencing hearing.

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction based on pleas of guilty. The State charged Mr. Land with one count of residential burglary, a violation of NRS 205.060(1)(a), a category B felony (Count

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

I), and one count of attempted open and gross lewdness, subsequent offense, a violation of NRS 199.330, being an attempt to violate NRS 201.210(1)(b), a category E felony. JA 1-3 (Information). Mr. Land entered a negotiated guilty plea to both charges. JA 18 (Transcript of Proceedings: Arraignment). The negotiations provided that in exchange for Mr. Land's guilty pleas the parties were free to argue for an appropriate sentence. JA 7 (Guilty Plea Memorandum) (Paragraph 7); JA 12-13 (Transcript of Proceedings: Arraignment).

At the sentencing hearing the district court imposed a sentence of 48 to 128 months in the Nevada Department of Corrections (NDOC) on Count I, and credited Mr. Land for 253 days in predisposition custody. On Count II, the district court imposed a consecutive sentence of 12 to 30 months NDOC, with zero credit for time served in predisposition custody JA 46 (Transcript of Proceedings: Sentencing); JA 49-50 (Judgment). Resulting in an aggregate sentence is 60 to 150 months NDOC. The district court also imposed statutorily required fees and assessments. *Id.* Mr. Land timely filed a notice of appeal from the district court's judgment of conviction. JA 51-52 (Notice of Appeal).

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V. STATEMENT OF THE FACTS

Background

The State charged Mr. Land with two offenses growing out of the same transaction or occurrence. First, the State charged a violation of NRS 205.060(1)(b) alleging that on November 2, 2020, Mr. Land “willfully and unlawfully ... enter[ed] or remain[ed] in the dwelling of Carol Marshall with the intent to commit the felony offense of open or gross lewdness and/or indecent or obscene exposure[.]” Second, the State charged Mr. Land with violating NRS 199.330 by attempting to violate NRS 201.210(1)(b) alleging that on that same day he “willfully and unlawfully attempt[ed] to commit an act of open or gross lewdness, in that he lifted his shirt and began rubbing his stomach before beginning to pull down his pants which cause Patricia Pierce to look away[.]” JA 1-2 (Information) (block capitalization omitted). Based on negotiations that left the parties free to argue, Mr. Land agreed to plead guilty to these offenses. JA 7 (Guilty Plea Memorandum) (Paragraph 7); JA 12-13 (Transcript of Proceedings: Arraignment).

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Arraignment

On May 17, 2021, Mr. Land appeared in court with counsel via simultaneous audio visual video. Counsel indicated that Mr. Land was prepared to entered guilty pleas and recited the negotiations. The prosecutor added only that Mr. Land would need to register as a sex offender. JA 12-13 (Transcript of Proceedings: Arraignment). The district court canvassed Mr. Land, *Id.* at 14-18, and accepted his guilty pleas finding that he “is competent to enter his plea,” there “is factual basis to accept his plea,” he “understands his rights, which he has waived,” and he “understands the nature of the charges and consequences.” *Id.* at 19. Sentencing was set for July 12, 2021. *Id.*

Sentencing

On July 12, 2021, Mr. Land appeared for sentencing with counsel via simultaneous audio visual video. JA 22-48 (Transcript of Proceedings: Sentencing). The district court first confirmed that Mr. Land will have to register as sex offender and provided a written acknowledgement of this duty to be signed by Mr. Land, which he signed. *Id.* at 24, 27-30. The court took a brief recess so the court and the parties could be provided a copy of a written statement made by Mr.

Land but inadvertently not included in the presentence report. *Id.* at 25-27, 31 (noting that the court had read Mr. Land's hand-written statement).

Given the opportunity to address the court Mr. Land expressed remorse for his conduct on November 2nd and noted his resulting shame for that conduct. *Id.* at 31-32. Mr. Land told the court that he was "appalled" by his actions and commented that they were "out of character" at least when he is sober. Mr. Land told the court that he had been "sober for quite a time" but had fallen back on "old alcoholic ways"—noting his regret "to drink alcohol and be out of control like that." He wanted to apologize to the victims and hoped that they could forgive him. *Id.* at 32-33.

Before hearing arguments of counsel the district court turned its attention to a risk assessment prepared by Dr. Molten that found Mr. Land to be a high risk to reoffend. As a speculative exercise the court observed that Mr. Land's "history" in the assessment was as "self-reported" and had not been "independently verified." *Id.* at 33-34. The court's "worry" was whether risk assessment evaluators conducting a risk assessment have access to the defendant's presentence

investigation report prior to completing the evaluation. *Id.* at 34. That “worry” though did not play out in this case because Dr. Molten’s conclusion, according to the court, “lands at the right place anyway because it indicates he is a high risk to reoffend[.]” *Id.* at 34. Later the court added, “if Dr. Molten had come up with any conclusion other than—if Dr. Molten would have concluded neutral or low risk to reoffend, I was actually going to have him called as a witness. I was going to continue this to examine him on whether his assessment included an understanding of Mr. Land’s past.” *Id.* at 35-36. Apparently, the court felt that notwithstanding Mr. Land’s statement that these events were out of character for him, based on the presentence investigation report “it appears to be within character[.]” *Id.* at 35.

Turning back to Mr. Land’s counsel, the court asked her for her “arguments.” Before doing so, however, the court framed Mr. Land’s position: “I understand that Mr. Land is connecting this conduct to a relapse of alcohol.” *Id.* at 36. Mr. Land’s counsel provided some family history, employment history, alcohol misuse, and general background information. Mr. Land hoped to move forward. *Id.* at 37-38. Counsel

summed by requesting the court to “suspend[] the sentence on the burglary charge” and impose a sentence of 12 to 36 months on the attempt charge and then be released to a treatment program during his probationary period. *Id.* at 39.²

For its part the State asked the court to impose consecutive maximum sentences on both counts. *Id.* at 39. The State argued that the offense, which occurred at an “elderly folks’ home, a retirement home,” where Mr. Land had “made his way into a private residential space” and was “effectively masturbating” when pushed out the residence, then goes to the window of a second residence and begins lifting his shirt, and his prior history supported a sentence of 48 to 120 months on Count I and a consecutive sentence of 19 to 48 months on Count II for an aggregate sentence of 67-168 months. *Id.* at 40, 41-45.

The district court, contrary to either of the parties’ recommendations (but closer to the State’s), imposed the following sentences: 48 to 120 months NDOC on Count I, and 12 to 30 months NDOC on Count II, consecutive to Count I resulting in an aggregate sentence of 60 to 150 months NDOC. *Id.* at 46-47. These sentences were

² Given the structure of her sentencing recommendations, counsel did not address concurrent sentencing.

preceded by the court's puzzling statement: "It is the judgment of this Court that Mr. Land be adjudicated of the offenses. I've chosen not to say them." *Id.* at 46

Mr. Land appeals his sentence. JA 51-52 (Notice of Appeal).

VI. SUMMARY OF ARGUMENT

This is a sentencing appeal so the court must review for abuse of discretion. A sentence should reflect a rational—not emotional—choice between sentencing alternatives that strikes a fair balance between a defendant's need for rehabilitation and society's interest in safety and deterrence. While a criminal history may make a period of incarceration attractive, it should not foreclose consideration of alternative sentences such as a structured and controlled probationary setting even if it follows a period of incarceration.

VII. ARGUMENT

The district court abused its sentencing discretion by imposing a prison sentence even though a period of probation was equally available as to Count I.

Standard of Review and Discussion

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). Generally, reviewing courts “will refrain from interfering with the sentence imposed” where the record “does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Major v. State*, 130 Nev. 657, 661, 333 P.2d 235, 238 (2014) (internal quotation marks omitted) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). An abuse of discretion can occur however, where “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. 168, 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. While a district court has wide discretion in its sentencing decision, *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), that discretion is not limitless. *Parish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

To determine whether the district court’s sentences in this case constitute an abuse of discretion this Court can narrow its focus. Here the sentences imposed are clearly within the sentencing range of the applicable statutes. Similarly, the record does not suggest that the district court impermissibly relied on extrinsic matters or suspect information when it imposed sentence.³

³ The district court’s exploration of what historical information is or is not available to those conducting risk assessments prior to making a finding on whether the defendant is a risk to reoffend, and if so, at what level, appears to have had no effect on the district court’s sentence. In the court’s view the finding of high risk was appropriate and counsel did not challenge that finding. Because Mr. Land was found to be a high risk to reoffend, probation was not available to him on Count II.

Whether the district court abused its discretion depends on a comparative analysis of what sentencing structures were recommended versus what sentence the district court ultimately fashioned, and why.⁴

A sentence should reflect a rational—not emotional—choice between sentencing alternatives that strikes a fair balance between a defendant’s need for rehabilitation and society’s interest in safety and deterrence.⁵ While a criminal history may make yet another period of incarceration attractive, it may also suggest a better alternative; namely, a controlled probationary setting. Here Mr. Land’s counsel suggested a sentencing structure that would incarcerate Mr. Land for a

⁴ As previously noted Mr. Land’s counsel did not ask for concurrent sentences and this was driven by the structure of her sentencing recommendation. As an alternative, however, concurrent sentencing was possible based on the same transaction or occurrence of the two counts where the court was inclined to incarcerate on both counts. The most common justification for consecutive sentencing is that the offenses are distinct and separate. *Cf. Pitmon v. State*, 131 Nev. 123, 130, 352 P.3d 655, 660 (Nev. App. 2015) (suggesting that “an ordinary person who chooses to commit two offenses and is convicted of both should reasonably anticipate the possibility, and perhaps even the likelihood, that he or she will have to serve consecutive sentences for each crime.”). By that metric, transactionally related offenses should (at least presumptively), receive concurrent sentences.

⁵ It is hard here to determine what to make of the district court’s election not to state the offenses—“I’ve chosen not to say them.” One count was for residential of burglary due to acts constituting the second count, attempted open or gross lewdness.

period of time and then place him on a period of supervised probation. Because counsel did not ask for concurrent sentences, under her recommendation Mr. Land would be under the watchful eyes of the executive branch for a number of years thereby satisfying the twin goals of sentencing: striking a fair accommodation between the defendant's need for rehabilitation and society's interest in safety and deterrence.

VIII. CONCLUSION

The district court abused its sentencing discretion by imposing consecutive periods of incarceration and this Court should reverse. On remand the district court should consider a mixed sentence of incarceration on Count II but probation on Count II. Alternatively, the district court should consider concurrent sentences.

DATED this 4th day of December 2021.

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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 2,820 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 4th day of December 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 4th day of December 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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