

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARRET JAMES REUBEN VIGIL, JR.,
Appellant,
vs.

No. 83551 Electronically Filed
Jan 14 2022 09:20 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA,

Respondent.

Appeal from a Judgment of Conviction in Case Number CR19-2056
The Second Judicial District Court of the State of Nevada
Honorable Kathleen M. Drakulich, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

On August 27, 2021, the district court filed a criminal judgment of conviction. JA 48-49 (Judgment of Conviction).¹ On September 26, 2021, Appellant, Garret James Reuben Vigil, Jr. (Mr. Vigil), timely filed a notice of appeal from that judgment. JA 50-51 (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 where, as here, Mr. Vigil had amply demonstrated that he was a suitable candidate for probation by his performance on pretrial release for two years before sentencing and there was no evidence that his continued presence in society created any danger.

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

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction based on a plea of guilty.

On September 17, 2019, the State charged Mr. Vigil with one count of false imprisonment, a violation of NRS 200.460, a gross misdemeanor (Count I) and one count of second degree kidnapping, a violation of NRS 200.310(2), a category B felony (Count II). JA 1-4 (Information). These charges stemmed from an event alleged to have occurred on May 7, 2019. *Id.* Approximately 19 months later, on April 27, 2021, the State filed an amended information charging one count of attempted coercion with physical force or immediate threat of physical force, constituting domestic violence, a violation of NRS 193.330, being an attempt to violate NRS 207.190(2)(a), a category C felony. JA 5-7 (Amended Information). Thereafter, Mr. Vigil, who was out of custody, entered a negotiated guilty plea to the sole count contained in the amended information. JA 29 (Transcript of Proceedings: Change of Plea).

At the sentencing hearing the district court imposed a sentence of 19 to 48 months in the Nevada Department of Corrections (NDOC) and

credited Mr. Vigil for 6 days in predisposition custody. JA 46 (Transcript of Proceedings: Sentencing); JA 48-49 (Judgment of Conviction). The district court also imposed statutorily required fees as well as attorney fees. *Id.* Mr. Vigil timely filed a notice of appeal from the district court's judgment of conviction. JA 50-51 (Notice of Appeal).

V. STATEMENT OF THE FACTS

The State initially charged Mr. Vigil with two criminal offenses growing out of an event alleged to have occurred on May 17, 2019. Mr. Vigil pleaded not guilty. Approximately a year and a half later the State amended its pleadings to charge only one count—attempted coercion with physical force or immediate threat of physical force constituting domestic battery, a probation-eligible category C felony.

Change of Plea

On April 27, 2021, Mr. Vigil, who had been out of custody since May 30, 2019, see JA 37 (Transcript of Proceedings: Sentencing), appeared in court with counsel via simultaneous audio visual video.² Counsel indicated that Mr. Vigil was prepared to enter a guilty plea and recited the negotiations, which were that the parties would be free to

² The Honorable Scott N. Freeman took Mr. Vigil's guilty plea. The Honorable Kathleen M. Drakulich imposed sentence.

argue for a sentence thought appropriate, Mr. Vigil would enter a guilty plea to a related pending misdemeanor count of domestic battery, and the State would not pursue any transactionally related charges. JA 10 (Guilty Plea Memorandum) (Paragraph 8); JA 22-23 (Transcript of Proceedings: Change of Plea). The district court canvassed Mr. Vigil, *Id.* at 23-29, and accepted his guilty plea. *Id.* at 29. The parties requested that sentencing be set out for 90 days. JA 23, 30. Sentencing was set for July 29, 2021, JA 29, but actually took place thirty days later on August 26, 2021. See JA 34-47 (Transcript of Proceedings: Sentencing).

Sentencing

Mr. Vigil appeared with counsel in open court for sentencing. After making minor corrections to the presentencing report, Mr. Vigil's counsel recommended that the court impose a sentence of 24 to 60 months NDOC and suspend the imposition of the sentence for a period of four years. *Id.* at 36-37. In support of this recommendation counsel noted that Mr. Vigil had been out of custody since May 30, 2019 and that over a two year period Mr. Vigil has "been compliant on his pretrial supervision release", has "been compliant with his check-ins", has "drug tested for the Court" and the "drug screen reflects that he's negative for

all substances.” *Id.* at 37. Counsel reported that Mr. Vigil “has taken significant steps to address not only his mental health issues, but his anger management issues[.]” *Id.* Counsel observed that documentation that had been submitted to the court indicated that Mr. Vigil had completed 15 weeks of “[domestic violence] counseling.” Counsel added that Mr. Vigil was doing “weekly therapy sessions” and he was showing “a consistent ability to control his motions [*sic*] and his behaviors.” *Id.* at 37-38. Additionally, during this time Mr. Vigil had “maintained steady employment and housing[.]” *Id.* at 38. Counsel also suggested that the victim (Ms. Krugler) in this case was supportive. *Id.* at 38-39. In sum, counsel argued that Mr. Vigil’s actions and conduct while he has been out of custody “for over two years” and “doing well”, “compliant”, accessing the “therapy he needs to do”, persuasively demonstrated that he is “on the right track.” *Id.* at 40 and 37 (arguing for probation reiterating: “And I think [Mr. Vigil has] done everything in his power to put himself in the best position to argue for probation. He’s working. He’s doing therapy. “He’s doing counseling.” He’s doing everything to change.”) (paragraph break omitted).

Mr. Vigil confirmed his counsel's representations, telling the court "I've come [*sic*] a long ways, and I'm not the same person I was before. I've learned from my therapist and I've learned from mistakes, and I'm hoping to continue moving forward[.]" *Id.* at 44. Mr. Vigil told the court that he had a good job and that he had "just bought house." Mr. Vigil said that he was in weekly counseling and was aware of his mental health issues. Mr. Vigil acknowledged the pain his past behavior has caused. *Id.* And he noted that therapy has helped him identify problems in past relationships and how to address those types of problems. *Id.* at 45.

In contrast, notwithstanding Mr. Vigil's work over the past two years the prosecutor sought to incarcerate Mr. Vigil and recommended a sentence of "24 to 60 months in prison" which is the "maximum sentence here" because, as he told the court, "when I look at this case I see conduct that simply does not warrant probation." *Id.* at 42. The prosecutor then referenced Mr. Vigil's criminal history, noting that he has "seen worse criminal histories" but not one "focused on domestic violence." *Id.* at 43. The prosecutor argued that because Mr. Vigil "is an integral part of [Ms. Krugler's) life ... it's the State's position that that

puts her in danger, necessitating his imprisonment.” *Id.* Notably, the prosecutor did not offer any facts to support or demonstrate his conjectured notion that Ms. Krugler would be placed in any danger if Mr. Vigil received a grant of probation, particularly where, as here, Mr. Vigil has been out of custody for over two years prior to the sentencing date and no signs of danger appear. Nor did the prosecutor offer any evidence showing that Mr. Vigil had failed drug tests or otherwise had not been in compliance with court services over the course of this case.

The district court said that the sentencing decision was “a tough one” because “Mr. Vigil has been out [of custody] a long time since this occurred,” and Mr. Vigil had a long criminal history. *Id.* at 45. The district court then imposed a sentence of 19 to 48 months NDOC, with credit for 6 days in predisposition custody, *Id.* at 46; JA 48-49 (Judgment of Conviction).

Mr. Vigil appeals his sentence. JA 50-51 (Notice of Appeal).

VI. SUMMARY OF ARGUMENT

This is a sentencing appeal so the court must review for abuse of discretion. In that regard, a sentence should reflect a rational choice between sentencing alternatives that strikes a fair balance between a

defendant's need for rehabilitation and society's interest in safety and deterrence. Here Mr. Vigil over a two-year period of time had been actively demonstrating a rehabilitated life through employment, counseling, therapy, drug tests. He had also demonstrated an ability to perform well under supervision by remaining in compliance with court services while the case was pending. Mr. Vigil, like many others, had a criminal history. While a criminal history may make a period of incarceration seem to be a default choice, it should not automatically foreclose consideration of alternative sentence structures such as a structured and controlled probationary setting, especially where the defendant has already demonstrated, over a significant period of time, his amiability and ability to meet expectations under supervised release. Against that there is, of course, society's interest in safety and deterrence. Here there was no evidence that Mr. Vigil had placed either society as a whole, or Ms. Krugler personally in any danger over the two plus years he had been out of custody. Nor was there evidence presented that Mr. Vigil could not comply with terms and conditions of probation. Thus the district court's decision to incarcerate Mr. Vigil (albeit for a period of time less than that sought by the prosecutor)

constituted an abuse of discretion in the circumstances. This Court must reverse and remand for a new sentencing hearing.

VII. ARGUMENT

The district court abused its sentencing discretion where, as here, Mr. Vigil had amply demonstrated that he was a suitable candidate for probation by his performance on pretrial release for two years before sentencing, and where, as here, there was no evidence that his continued presence in society created any danger.

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 sentence in this case constitutes an abuse of discretion this Court can narrow its focus. Here

the sentence imposed is 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. Whether the district court abused its discretion depends on a comparative analysis of what sentencing structures were recommended and why, versus the apparently compromise sentence the district court ultimately imposed.³

A sentence should reflect a rational 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 yet another period of incarceration an attractive default, it should not foreclose better alternatives under the circumstances; namely, a structured and controlled probationary setting. Here Mr. Vigil's counsel, drawing from over two years of empirical evidence, persuasively made the case for a grant of probation. He pointed out and argued that Mr. Vigil had been doing well, had been

³ Here Mr. Vigil sought a grant of probation while the prosecutor sought the maximum sentence. The district court's sentence of 19 to 48 months gave the prosecutor the incarceration component while giving Mr. Vigil an earlier chance to return to the liberty she has just taken away. The downside for Mr. Vigil is of course the loss of his employment and perhaps the loss of his house and other property.

compliant with court services, had been drug free, had been accessing “the therapy he needs to do” and had demonstrated that he is “on the right track.” That is, Mr. Vigil had “done everything in his power to put himself in the best position to argue for probation.” The prosecutor did not contest counsel’s argument. And given the opportunity to address the district court, Mr. Vigil confirmed his counsel’s representations.

Against demonstrative evidence of Mr. Vigil’s rehabilitation, the prosecutor offered Mr. Vigil’s criminal history and mere prosecutorial conjecture. As to Mr. Vigil’s criminal history, which as his counsel noted Mr. Vigil cannot go back and change, JA 41 (Transcript of Proceedings: Sentencing), it is what it is. But Mr. Vigil had shown change in his behavior in the present and presumably will continue going forward through therapy, counseling, and other positive steps. As for the prosecutor’s vague notion surrounding danger to Ms. Krugler’s, the prosecutor offered no evidence that Mr. Vigil had placed either society as a whole, or Ms. Krugler personally in any danger over the two plus years he had been out of custody.

The district court’s decision to incarcerate Mr. Vigil (even though it was for a period of time less than that sought by the prosecutor)

constituted an abuse of discretion in the circumstances. This Court must reverse and remand for a new sentencing hearing.

VIII. CONCLUSION

The district court abused its sentencing discretion by imposing a period of incarceration when probation was the rationale choice. This Court should reverse and remand to the district court for a new sentencing hearing.

DATED this 14th day of January 2022.

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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 2,972 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 14th day of January 2022.

/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 14th day of January 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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