IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA ALEXANDER DURAN,

Appellant,

No. 83711

v.

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:

   Kevin Naughton, Appellate Deputy. Washoe County District Attorney's Office, One South Sierra Street, Reno, Nevada 89501. (775)328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above

4. Proceedings raising same issues:

   The Respondent is unaware of any appeals or original proceedings raising these same issues.

5. Statement of facts:

Because these cases resolved via plea negotiations, the following statement of facts is drawn primarily from the presentence investigation reports ("PSI").[1] As the PSIs are not included in an appendix, citations refer to the PSIs' own pagination.

In district court case number CR21-1433, on April 30, 2021, Appellant Joshua Alexander Duran ("Duran") fled from the scene of a reported domestic battery. CR21-1433 PSI p. 9. The reported victim denied any battery occurred and no witnesses were located. *Id.*

Shortly afterwards, Reno Police Department officers responded to a report of two city employees who observed Duran push a female to the ground and strike her. *Id.* The employees stopped to check on the woman and Duran approached them with a knife in a threatening manner. *Id.* The employees retreated to their city vehicle, locked the doors, rolled up the windows, and drove away. *Id.* They followed Duran as he walked away from the area and relayed information about his whereabouts to police dispatch. *Id.*

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[1] The State has simultaneously filed a Motion to Transmit Presentence Investigation Reports.

While they were following Duran, he picked up a rock and threw it at the driver's side window, causing it to shatter. *Id.* The rock also struck the driver in the head. *Id.* The other employee took photographs of Duran approaching the vehicle with the rock in his hand. *Id.* Duran fled the area. *Id.*

Officers responded to Duran's apartment complex and confirmed his identity with the apartment complex manager. *Id.* Duran was later arrested on May 2, 2021, on two counts of Assault With a Deadly Weapon, one count of Battery With a Deadly Weapon, one count of Possession of a Controlled Substance, one count of Destruction of Property, and one count of Domestic Battery. CR21-1433 PSI p. 6. Duran was released on his own recognizance on June 23, 2021. *Id.*

In district court case number CR21-2210, Duran was arrested on July 1, 2021, after entering a Best Buy store, selecting three items, cutting off the security devices, and running out of the store without paying. CR21-2210 PSI p. 8. Two employees confronted Duran while he was exiting the store and they engaged in a brief physical struggle. *Id.* During the fracas, Duran took one of the employee's work radios off of his belt. *Id.* Duran fled the scene and was contacted a short time later, where he was found in possession of the stolen property and the employee's radio. *Id.*

At the time of sentencing in these cases, Duran had previously been convicted of two felonies, one gross misdemeanor, and six misdemeanors. PSI p. 4. Duran had also previously had his probation revoked once and his parole revoked once. *Id.*

6. Issues on appeal:

   A. Did the district court abuse its discretion by sentencing Duran to prison?

7. Legal argument:

   A. The court did not abuse its discretion by sentencing Duran to prison.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). "[A]n abuse of discretion will be found only when the record demonstrates 'prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.'" Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978) *quoting* Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The Nevada Supreme Court has long reviewed sentences for an abuse of discretion and not whether it would have imposed a different sentence under the circumstances. *See e.g.,* Houk v. State, 103 Nev. 659, 664 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in

imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion."). Moreover, the Court has held that "[u]nless the record reveals prejudice resulting from the introduction of objectionable material, we will not interfere with the sentence imposed." Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723 *citing* Silks, *supra*.

The decision to suspend a prison sentence, where not otherwise governed by statute, is a discretionary one. NRS 176A.100(1)(c) ("the court may suspend the execution of the sentence imposed and grant probation as the court deems advisable."). Neither of the charges Duran was convicted of, Battery Resulting in Substantial Bodily Harm and Burglary of a Business, has any restriction or limitation concerning probation associated with it. Therefore, it was within the discretion of the district court to suspend or impose a prison sentence.

Duran claims that the district court abused its discretion by failing to consider mitigating information in the form of a mental health evaluation. Duran concludes that, because the district court did not specifically refer to the mental health evaluation in handing down the sentence, it was not considered. Duran's argument undermines itself. Duran claims that the district court should have sentenced him to something other than prison because it had previously recognized "that there is a significant mental

health component here." JA 57. If the district court had previously acknowledged that fact, it is entirely unclear how the district court could have forgotten it by the time of sentencing. Duran cannot have it both ways. He cannot claim that the district court acknowledged that he had a mental health issue while claiming that the district court failed to acknowledge that he had a mental health issue.

His claim is also belied by the district court's own statement at the beginning of the sentencing hearing that "I saw the Mental Health Court rejection notice, but I did thoroughly read the Mental Health Court evaluation again in preparation for this this morning and the information that -- how it enhances the Presentence Investigation Report." JA 70. Although the district court did not specifically address the mental health evaluation again at the end of the hearing, the record clearly shows that the court was aware of it and considered it before passing sentence.

There is no requirement in Nevada that the sentencing court must make any specific findings when deciding whether or not to suspend a sentence. In fact, our Supreme Court has expressly rejected a claim that a district court should be required to articulate its reasons for imposing a particular sentence. Campbell v. Eighth Judicial Dist. Court, 114 Nev. 410, 414, 957 P.2d 1141, 1143 (1998).

The Nevada Supreme Court has recognized that district courts can sometimes be required to make specific findings when passing sentence. The legislature passed NRS 193.165(1) which required district courts to consider a set of factors when deciding upon the length of a deadly weapon enhancement and "state on the record that it has considered the information described in [the statute] in determining the length of the additional penalty imposed."

In Mendoza-Lobos, the Nevada Supreme Court held that the legislature violated the separation of powers when it attempted to "dictate the manner in which a sentence is pronounced" in NRS 193.165(1). 125 Nev. 634, 641, 218 P.3d 501, 506 (2009). Nevertheless, the Mendoza-Lobos Court elected to follow the legislature's lead and required district courts to adhere to NRS 193.165(1) because it served "the laudable goal of ensuring that there is a considered relationship between the circumstance in which the weapon was used -- including the defendant's history -- and the length of the enhancement sentence...." *Id*. The legislature has not seen fit to establish any similarly laudable goals requiring that district courts set forth their rationale when deciding whether or not to suspend a sentence.

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Moreover, the Court has had the opportunity to reverse its decision in Campbell several times since Mendoza-Lobos was decided and has declined to do so. *See* Campis v. State, 451 P.3d 82 (Table), 2019 WL 5681201 at *1 (October 31, 2019); Rudd v. State, 456 P.3d 254 (Table), 2020 WL 405392 at *1 (January 23, 2020); Carter v. State, 466 P.3d 938 (Table), 2020 WL 3603742 at *2 (July 1, 2020) ("Although Carter acknowledges that a sentencing court does not need to articulate its reason for imposing a sentence, *see* Campbell..., he argues that Campbell is inconsistent with our decision in Mendoza-Lobos.... We disagree.").[2]

Finally, Duran has failed to demonstrate that the district court abused its discretion. Duran does not suggest that the court impermissibly relied on any highly suspect or impalpable evidence in sentencing him. Instead, he conflates the district court's decision to allow him an opportunity to obtain treatment leading up to sentencing with the court's sentencing decision. This ignores the fundamental differences between a bail hearing and a sentencing hearing as well as the different position the defendant occupies before and after conviction. "The central thought is that

[2]All three of these cases are unpublished. The State cites them here for their persuasive value only and does not suggest that they are binding authority. NRAP 36(c)(3).

punishment should follow conviction, not precede it." Application of Wheeler, 81 Nev. 495, 499, 406 P.2d 713, 715 (1965).

The district court did not bind itself to a particular sentence by granting Duran the chance to obtain mental health treatment before sentencing. In fact, the court specifically told Duran that although he had an opportunity to start his mental health treatment before sentencing, "I haven't looked at everything at all regarding the mental health court. I don't know whether I would be inclined to allow you that opportunity or not." JA 57. The court also warned Duran that despite allowing him to seek mental health treatment, "[t]hat is no guarantee because as you just heard, the prosecutor is going to ask for prison time." *Id.*

Because Duran has failed to demonstrate that the district court abused its discretion, his sentences should be affirmed.

8. Preservation of issues:

The Respondent concurs with Duran that he has appropriately preserved the issues raised in this fast track appeal.

DATED: February 8, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
Appellate Deputy

VERIFICATION

1. 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) because this fast track response has been prepared in a proportionally spaced typeface using Word 2013 in 14 Georgia font.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 4,845 words or 462 lines. It contains 1,721 words.

3. Finally, 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 failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

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response is true and complete to the best of my knowledge, information and belief.

DATED: February 8, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 8, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jenna Garcia, Esq.

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA