

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 20 2022 11:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOSHUA ALEXANDER DURAN,)

Appellant,)

vs.)

THE STATE OF NEVADA,)

Respondent.)

Case No. 83712

FAST TRACK STATEMENT

1. Name of party filing this fast track statement: Appellant JOSHUA ALEXANDER DURAN (hereafter as "Mr. DURAN).

2. Attorney: JENNA GARCIA, Esq., Washoe County Deputy Alternate Public Defender, 350 S. Center Street, 6th Floor, Reno, Nevada, 89501, (775) 328-3975.

3. Name, law firm, address and telephone number of appellate counsel if different from trial counsel: Not applicable.

4. Judicial district, county and district court docket number of lower court proceedings: Second Judicial District Court, Washoe County, Department No. 6, Case Numbers CR21-2210 and CR21-1433.

5. Name of judge issuing the Judgement of Conviction appealed from:
The Honorable Lynne K. Simons, District Court Judge.

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last? Not applicable.

7. Conviction(s) appealed from: CR21-2210: Count I: Burglary of a Business, a violation of NRS 205.060, and CR21-1433: Count I: Battery Resulting in Substantial Bodily Harm, a violation of NRS 200.481.

8. Sentence for each count: In CR21-1433 Mr. DURAN was sentenced to imprisonment in the Nevada Department of Corrections for a minimum term of eighteen (18) to a maximum term of sixty (60) months with one hundred fifty-one (151) credit times served. In CR21-2210 Mr. DURAN was sentenced to imprisonment in the Nevada Department of Corrections for a minimum term of twelve (12) months to a maximum term of thirty six (36) months with zero days credit time served (0). The sentences in CR21-1433 and CR21-2210 are to run consecutively to one another. Joint Appendix 84-87 (hereinafter "JA"). The court further ordered an administrative assessment fee of \$25.00, DNA testing fee of \$150.00, DNA administrative assessment of \$3.00, and \$500.00 in attorney fees on each case.

9. Date district court announced decision, sentence or order appealed from: Judgment of Conviction was rendered and filed on October 8, 2021.

10. Date of entry of written judgment or order appealed from: October 8, 2021.

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court: Not applicable.

12. If the time for filing the notice of appeal was tolled by a post-judgment motion: Not applicable.

13. Date notice of appeal was filed: October 27, 2021. (JA 88)

Specify statute or rule governing the time limit for filing the notice of appeal: NRAP 4(b).

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from: NRS 177.015(3).

16. Specify the nature of disposition below: Judgment of conviction entered pursuant to guilty plea.

17. Pending proceeding in this court: None.

18. Pending and prior proceedings in other courts: Not applicable.

19. Proceedings raising same issues: None.

20. Routing Statement: This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from

a judgment of conviction based upon a plea of guilty, and challenges only the sentence imposed.

21. Relevant procedural history: Mr. DURAN was charged by Information with Battery Causing Substantial Bodily Harm. JA 10-11. He was additionally charged in a separate Information with Burglary of a Business. JA 13-14. On August 19, 2021, Mr. DURAN entered a plea of Guilty to the sole counts within each Information. JA 16-25.

On September 16, 2021 Mr. DURAN appeared for a bail hearing. At that hearing the judge ordered that Mr. DURAN was granted a release on his own recognizance in both cases with a direct transport to an inpatient program. JA 44-59

On October 8, 2021, Mr. DURAN appeared for sentencing. JA 63-82

On October 8, 2021, Mr. DURAN was sentenced in accordance with paragraph eight (8). The notice of Appeal was timely filed October 27, 2021. JA 88-

Statement of Relevant Facts:

Mr. DURAN was originally charged in case CR21-1433 with a number of charges resulting from an incident that occurred on April 30, 2021. JA 1-3.

Mr. DURAN was accused of threatening a City of Reno worker who tried to intervene in an argument between Mr. DURAN and his girlfriend. Mr. DURAN was then followed by the worker as he attempted to leave the scene. He ultimately threw

a rock at the window of the workers truck, causing the glass to break and strike the worker. Mr. DURAN was initially in custody with a bail, but on June 23, 2021 he was granted an own recognizance release. This release from custody was agreed upon so that Mr. DURAN could assist detectives in an investigation. Negotiations were that the State would agree to probation if Mr. DURAN provided the requested assistance.

During the course of his assistance Mr. DURAN was arrested on new charges for an incident where he attempted to take items from a Best Buy store. Following that arrest the parties renegotiated the case. Mr. DURAN would plead to one count of Battery Causing Substantial Harm in the first case and one count of Burglary of a Business in the second case. The parties would be free to argue for an appropriate sentence. Mr. DURAN entered his plea in both cases on August 19, 2021. JA 26-42.

On September 16, 2021 Mr. DURAN had a bail hearing. JA 44. On behalf of the Appellant, counsel submitted for consideration at the bail hearing a mental health and substance abuse evaluation from LCSW Mashal Malik. JA 49-50. That evaluation contained relevant mitigating information for the Court's consideration, specifically regarding the Appellant's mental health disorder diagnosis. The court ordered that Mr. Duran should be released to a first available in person bed stating "I've weighed everything here. And I agree...that if there's a time for intervention,

this is the time. JA 56. The court also noted that “[I]t just seems to me based on all of the circumstances that there is a significant mental health component here...” JA 57.

The Appellant appeared for Sentencing on October 8, 2021. JA 63-83. At that time Appellant still had not been accepted into an inpatient bed and remained in custody. The State argued for a prison sentence on each count consecutive. JA 77. On behalf of Appellant, counsel argued for probation with drug court as a condition. JA 71. The court followed the State’s recommendation, despite the earlier decision to release to an inpatient bed, and sentenced Mr. DURAN to consecutive prison terms. JA 81-82.

23. Issue on appeal: Whether the Trial Court abused its discretion in sentencing Mr. DURAN.

24. Summary of Argument: At Mr. DURAN’s sentencing hearing, the court abused its discretion by failing to properly weigh the mitigation evidence provided and her own decision just one month prior to allow Mr. DURAN to go to an inpatient bed and noting the serious mental health component present in the case.

25. ARGUMENT

The district court abused its discretion in sentencing MR. DURAN to a sentence of 18 to 60 months for Battery Causing Substantial Bodily Harm

consecutive to 12 to 36 months for Burglary of a Business despite compelling mitigation evidence. A new sentencing is warranted.

It is true that a Judge is allowed wide discretion in sentencing matters. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987); *see also, Deveroux v. State*, 96 Nev. 388, 610 P.2d 711 (1980).

A sentencing decision is reviewed for an abuse of discretion. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000) (a court's discretion is not limitless). An abuse of discretion occurs when prejudice to the defendant results from the fact that the sentencing court relied upon "information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks*, 92 Nev. at 94, 545 P.2d at 1161; *see also, Castillo v. State*, 110 Nev. 535, 874 P.2d 1252 (1994) (overruled on other grounds) (a new sentencing is required when a court relies upon prejudicial information at the time of sentencing).

Furthermore, while it is the function of the Legislature to set penalties and ranges, it is the judge's job to decide what penalty to impose. *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009). In deciding the appropriate sentence, a district court is required to consider mitigating factors. *See* NRS 197.163.

In pronouncing the sentence in the instant case, the court failed to address or show it had considered any of the mitigating information provided by Mr. DURAN.

JA 81-82. The Court made no specific reference to any of the mitigating evidence presented, including the mental health evaluation, which leads to the conclusion that the Court did not consider it. *Id.* This is especially apparent given the fact only one month earlier the court had specifically referenced the mental health evaluation provided to the court when it ordered that he could in fact be transported to an inpatient program. JA 56-57. The court made no mention as to what factors, if any, changed the court's evaluation of the case from the earlier bail hearing. *Id.* It appears, rather, that the Court simply applied the exact sentence sought by the State. (JA 77).

Because the court failed to properly consider and weigh this significant mitigation evidence in pronouncing the sentence in this case, Mr. DURAN should receive a new sentencing, before a different district court judge.

26. Preservation: Mr. DURAN argued at sentencing for an appropriate sentence.

27. This appeal presents no issues of first impression or public interest.

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 is prepared in a proportionally-spaced typeface, using Microsoft Word 2003 version in 14 point Times New Roman.

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2), because the argument section does not exceed fifteen (15) pages.

3. Finally, I recognize that, pursuant to NRAP 3C, I am responsible for filing a timely fast track statement and 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 my knowledge, information and belief.

DATED this 20th day of January, 2022.

/s/ Jenna Garcia, Esq.
Jenna Garcia, Esq. (#13227)
Deputy Alternate Public Defender
Washoe County Alternate Public Defender
P.O. Box 11130, Reno, NV 89520
(775) 328-3955

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of the **FAST TRACK STATEMENT** to the following:

JOSHUA ALEXANDER DURAN #1105992
NNCC
P.O. BOX 7000
CARSON CITY, NV 89702
Via U.S. Mail

CHRIS HICKS
WASHOE COUNTY DISTRICT ATTORNEY
Attn: Appellate Department
Via Electronic Mail

DATED this 20th day of January, 2022.

/s/Randi Jensen
Randi Jensen