IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EDWARD ELLISTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83217
D. Ct. Case No.

APPEAL FROM JUDGMENT OF
THE HONORABLE JAMES T. RUSSELL

FIRST JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

DAVID EDWARD ELIISTON, JR., ("Mr. Elliston") was charged by way of a criminal complaint with Trafficking in a Controlled Substance, 28 grams or more of methamphetamine, Trafficking in a Controlled Substance, 14-28 grams of heroin and Being an Ex-Felon in possession of a firearm and one count of Possession of a controlled substance for the purpose of sale. 1Appellant's Appendix (hereinafter "AA") 1- 4.

The case proceeded to preliminary hearing. After the preliminary hearing, Mr. Elliston filed a motion to suppress. 1AA 6-11. Mr. Elliston alleged that the traffic stop was extended unnecessarily to allow for a drug dog "sniff" and the resulting search of the truck was illegal. The State opposed the motion to suppress. 1AA 17-50. The suppression motion was heard by the District Court based upon the preliminary hearing transcript and no additional live witnesses were called by the parties. The District Court denied the motion to suppress. 3AA 604-612. The case was set for jury trial on April 6, 2021.

On April 2, 2021, the State filed a motion to amend the Information and add enhancement sanctions under NRS Chapter 207, habitual criminal enhancement. 3AA 619-633.

The case proceeded to jury trial on April 6, 2021. After two days of jury trial, the State and Defense entered into plea negotiations and Mr. Elliston entered a negotiated plea pursuant to *North Carolina v. Alford.* 3AA 637-649. Mr. Elliston was then sentenced by the District Court in accordance with the terms of the plea bargain. The aggregate sentence imposed upon Mr. Elliston was 72-420 months in prison. 3AA 590.

Mr. Elliston filed a timely notice of appeal on July 12, 2021.

ROUTING STATEMENT

Pursuant to NRAP Rule 17(b)(1) this case is presumptively assigned to the Nevada Court of Appeals and should not be retained by the Nevada Supreme Court for appellate litigation. This case concerns the conviction of a defendant under NRS 453.3385(b) (two counts) and NRS 202.360, Category B felony convictions. The conviction was the result of a guilty plea. While there was a partial jury trial, the case

ended by way of plea negotiation and an *Alford* plea.

JURISDICTION

This Court has jurisdiction over the direct appeal from the judgment of conviction which entered after a jury verdict of guilt. NRAP 4 (b). The judgment of conviction entered on June 15, 2021. 3AA587-588. A corrected judgment of conviction entered on October 13, 2021. 3AA 589- 590. The notice of appeal was timely filed July 12, 2021.

SUMMARY OF ARGUMENT

The District Court abused its discretion when it entered the sentenced upon Mr. Elliston. The late filing of the notice of habitual offender by the State coerced Mr. Elliston into accepting a plea offer from the State which exposed him to and netted him 420 months in prison.

STATEMENT OF THE ISSUES

The District Court abused its discretion when it imposed three consecutive prison terms upon Mr. Elliston, based upon the facts of this case, in violation of the Fifth, Sixth and Fourteenth Amendments.

STATEMENT OF FACTS

Six Carson City police officer units were conducting surveillance at the Griffin House apartments based upon a tip from a confidential source that there was high foot traffic, that traffic was all hours and there was lots of vehicle traffic at the location. Officers received a tip that a whit truck with California license plates that was a rental vehicle was involved. 1AA 236, 244-245, 255. The source texted Officer Bindley about 30 minutes before the traffic stop and stated the person was just leaving the premises.

Mr. Elliston was driving a white truck with California license plates that he had rented. Mr. Elliston's vehicle was stopped by Officer Granata, a SET Team patrol officer who was advised to stop that vehicle. 2AA 337. Officer Granata testified that she stopped the vehicle for failing to make a full traffic stop at a stop sign before she was advised to stop the car by Officer Bindley. 2AA 338, 355.

According to police, Mr. Elliston was nervous. 2AA 342. Officer Bindley testified that Mr. Elliston's demeanor changed once he was told the K-9 Unit had been called to respond. Officer Granata was working on the traffic ticket when the

K-9 Unit appeared and the dog did a "sniff" of the exterior of the truck and alerted. Mr. Elliston had an expired driver's license but officers were able to confirm his identity by way of a valid California ID card. 2AA 255-258, 3AA 340. The truck was then searched without a warrant due to the dog "alert" on the truck. 2AA 261. At no time did the officers apply for or obtain a search warrant.

Interestingly enough, Carson City officers testified that they actually use a canine unit on 80% of their traffic stops. The SET team uses a canine unit on 90% of their traffic stops. 2AA 305-306. Dog handler Pullen testified that the dog, "Blue" alerts to odors and alerted to the vehicle. 2AA 393-398.

On the passenger floorboard was a DeWalt tool cardboard box which contained a handgun. Marijuana was found in the back seat area of the truck. Cash was found in the center console. A cylinder in the center console contained methamphetamine and a small quantity of heroin. 2AA 306-315.

Mr. Elliston complained that the confidential informant set him up and repeatedly stated that the heroin and gun were not his property but were that of the informant. (3AA 558) . The informant, Mr. Waters, was on probation and was

considered by the police to be a "passive" informant. 3AA 323, 327. Admitted at trial was a jail telephone call between Mr. Elliston and his father where Mr. Elliston stated he had been set up by the informant on other stuff but admitted to knowing the methamphetamine was present. 2AA 459, 3AA 562. This evidence was not revealed to the defense until the week before the jury trial. 2AA 477-479. Officer Hennenberg listed to the jail call the Monday of trial, seeking additional evidence against Mr. Elliston. 2AA 479.

Prior to trial, the defense filed a motion to suppress the evidence and argued that officers conducted a pretext stop on Mr. Elliston and that the traffic stop was unreasonable extended by the canine "sniff". !aa 6-11. The State opposed the motion. The District Court denied the motion to suppress based upon its review of the preliminary hearing transcript. In that Order, the District Court held that 1) Officer Granata had reasonable suspicion to stop the white truck in that the vehicle committed a traffic violation; 2) since the traffic stop was reasonable, the search that followed was reasonable, even if it was a pretext stop; 3) the traffic stop was not unreasonably delayed by the canine sniff time and that since the dog alerted,

the search was lawful. 3AA 604-610.

During the trial, the testimony of officers was slightly different regarding the traffic stop, which caused the District Court to advise the State that it wanted more evidence presented on the traffic stop timing– was the stop before or after the officer was advised to stop the truck– and on the chain of custody of the evidence. 3AA 363-371, 379-382. The Court noted that it believed its ruling denying the motion to suppress was correct but that it would review that issue outside the presence of the jury. 3AA 382. During the colloquy, the State admitted the traffic stop was pretextual. 3AA 371.

After this discussion, the State and the Defendant entered into negotiations that resolved the case. Mr. Elliston agreed to plead guilty to two level (2) drug trafficking charges and the ex-felon in possession of a firearm charge, with the parties recommending sentences run consecutively on each charge but that the Court impose: 24-180 months on count one; 24-180 months on count two and 12-72 months on count three. 2AA 495-497. The habitual offender enhancement was removed by the State. 3AA 505.

During the plea, Mr. Elliston was advised that if he accepted the plea offer and entered an Alford plea that he was waiving his right to appeal defects in the case up to that point. 3AA 503. At the plea, it was noted that there was 187 grams of methamphetamine and 15.7 grams of heroin in the truck. 3AA 532. Mr. Elliston advised the court that the money in the truck was his wife's money and asked if it could be returned to her. That money was the subject of a forfeiture complaint in a civil proceeding. 3AA 507.

At the sentencing hearing, Mr. Elliston apologized to the court for being involved in this fact setting. Mr. Elliston advised the court that he was set up by Mr. Waters and that the gun was not his, nor did he know it was in the truck. 3AA 558. The defense noted that this arrest occurred just 31 days before the change in the law that reduced the available sentence to a maximum of 20 years in prison. 3AA 559. The State argued for the court to enforce the plea bargain. The District Court specifically asked about the option of running the two drug counts concurrent to each other but consecutive on the firearm charge. 3AA 564.

At sentencing, Mr. Elliston again advised the District Court that the gun

and heroin were not his items. 3AA 567, 577. Mr. Elliston advised the District Court that nothing in his criminal history or records would show him to have ever done or been involved in heroin. 3AA 567-568. The Court reminded Mr. Elliston that the trial was not going well for the defense and that the plea offer was in his best interests. 3AA 578. At the end of the day, the District Court followed the plea negotiations and imposed the three consecutive sentences agreed upon in the plea bargain. 3AA 580.

Mr. Elliston filed a timely notice of appeal from the judgment of conviction.

ARGUMENT

1. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT CONCURRENT SENTENCES ON THE CONTROLLED SUBSTANCE COUNTS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. .

Standard of Review:

A district court's sentencing decision is reviewed for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The District Court's decision will stand "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by

impalpable or highly suspect evidence." *Silks v. State,* 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). A sentence that is within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality opinion).

Argument:

It is of value to note that this fact setting occurred just 31 days prior to the Legislature's change to the sentencing scheme for drug trafficking. Had this fact setting occurred after July 1, 2020, Mr. Elliston's top end sentence on the methamphetamine would have been 20 years. The heroin possession would have been either a Category C or D felony and would not have constituted drug trafficking. While this Court has consistently ruled that ameliorative statutes are not retroactive in Nevada, see *State v. Second Judicial District Court (Pullin)*, 124 Nev. 564, 188 P.3e 1079 (2008), that does not mean the District Court could not consider the pending change in law when imposing these prison terms.

Factually, it was clear that Mr. Elliston admitted there were drugs in his truck at the time of the traffic stop. It is also abundantly clear that Mr. Elliston pled by way of *Alford* as he maintained his innocence on the possession of the heroin and the handgun.

The district court is afforded wide discretion when sentencing a defendant. *Parrish v. State*, 116 Nev. 982, 988, 12 P.3d 953, 957 (2000). Nevertheless, this discretion is not limitless. When imposing a sentence, a district court may not abuse its discretion. *Id.*

"An abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusation founded on impalpable or highly suspect evidence." *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016). see also *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The State's filing of the notice of habitual offender enhancement was just days before the jury trial. While the statute allows the filing as short set as two days prior to jury trial, that setting is coercive by nature. The stakes of the case

increased drastically and Mr. Elliston commented that he was afraid of the habitual criminal statute enhancement. 3AA 577. Notably, as of July 1, 2020, that statute changed as well and up to five prior felony convictions nets a person 5-20 years as an habitual offender while seven prior felony conviction are required to impose the most severe habitual offender enhancement. See NRS 207.010, effective 7/1/20. There is an open issue of law whether the enhancement provisions are applied from the date of the offense or from the date of the notice that the enhancement is sought.

The sentence in this particular crime is excessive, offensive and violates the Eighth Amendment prohibition against cruel and unusual punishment. See also Nev. Const. art. 1, § 6.

In the federal court system, a substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008). This sentence was in excess of that needed for society's interests. See *United States v. Rita,* 551 U.S. 338, 127 S.

Ct. 2456, 2468-69 (2007). This Court must proceed to review the reasonableness of the available sentence. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

Sentencing schemes in Nevada are not blind to rehabilitative interests and the Court is required to consider the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The goal of sentencing is to do as follows:

> (A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) To afford adequate deterrence to criminal conduct;
> (C) To protect the public from further crimes of the defendant; and
> (D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence 18 U.S.C. § 3553(a) further directs the Court to consider the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant, . . .
> (3) the kinds of sentences available; . . .
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

The goals of sentencing are to protect society, deter criminal conduct, rehabilitate the offender and punish the offender.

The Eighth Amendment does not require strict proportionality between crime and sentence, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. A sentence that is within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality opinion). Nevada's sentencing courts have "discretion . . . to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).

The bottom line is that 420 months is a severe amount of prison time to be served for the fact setting found in this case. Mr. Elliston presented as a person willing to make change, who had succeeded for a period of time in remaining

sober and abiding by the law, and a person who had a reason to get his life on track. The sentence imposed was harsh and excessive.

Counsel notes that the underlying search of the truck and the pretextual stop have not been addressed in this opening brief. Mr. Elliston was canvassed on the court record and it is noted that he waived the right to appeal defects of his case that occurred to the entry of plea (after two days of trial) and that the plea memorandum provided the same language of waiver. Appellate counsel disagrees with the appellate waiver of issues and would like to have seen the issues preserved for appeal under NRS 174.035(3). Unfortunately, the waiver was on the record and the subject of the plea canvas. Hence, issues relating to the traffic stop are not litigated on this appellate case.

CONCLUSION

This conviction must be reversed. Mr. Elliston's convictions were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments. The sentence imposed is in violation of the Eighth Amendment and is cruel and unusual. Suspect evidence was relied upon by the sentencing court.

Alternatively, this Court should grant a new sentencing hearing before an impartial court who has not seen the record of the prior sentencing hearing..

DATED this 13 day of January, 2022.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages and meets the word and line counts found in but meets the word and line counts found in the rules. It is less than 14,000 words and less than 1,300 lines of type.

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. The document was prepared in Word Perfect. There are 16 typed pages, 3,317 words in this brief and 331 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

DATED this 13 day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

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