IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS ROCCO TAGLIAMONTE, **Docket Nos. 83324/83325**

Appellant, **D. Ct. CR20-0117**
CR21-0636

vs.

THE STATE OF NEVADA,

Respondent.

APPEAL FROM JUDGMENT OF
THE HONORABLE DAVID A. HARDY

SECOND JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

NICHOLAS ROCCO TAGLIAMONTE, ("Mr. Tagliamonte") was charged by way of an Information in Case Number CR20-0117, with one count of Sale of A Controlled Substance, in violation of NRS 453.321, a category B felony for an offense that occurred on January 9, 2020. Appellant's Appendix ("AA") Volume 1, pages 1-3. The case resolved by way of a guilty plea and negotiations. The plea bargain was that the State would recommend an underlying term of 12-30 months in prison, suspend that sentence and that Mr. Tagliamonte would be placed on probation. AA 4. Mr. Tagliamonte entered a guilty plea on August 24, 2020, AA 10-21. Mr. Tagliamonte filed a petition for treatment under NRS 458.300 or NRS 176A.230 and 176A.240. AA 29-37. That petition w as granted by the court and Mr. Tagliamonte was placed on probation with a condition of treatment. AA 25-26.

Mr. Tagliamonte was charged by way of an Information in Case Number CR21-0636, with one count of Sale of A Controlled Substance, in violation of NRS 453.321 (2) (a), a category C felony for an offense that occurred on February 17, 2021. AA 75-77. Mr. Tagliamonte entered a negotiated plea to the charge on May 10, 2021. AA

95-109. The terms of the plea bargain were that the Parties were free to argue for an appropriate sentence. AA 80.

The original case was returned from Specialty Court for further proceedings. AA 110-112, The reason for return was the new charge that Mr. Tagliamonte had occurring on February 17, 2021.

Mr. Tagliamonte argued for reinstatement to the specialty court and for probation on the second case. The District Court disagreed with him, revoked his program and probation and sentenced him to 19-48 months in prison on the 2020 case and a consecutive term of 24-60 on the 2021 case. AA 159-162. The district court specifically noted that it would not impose the minimum term on the 2020 case as Mr. Tagliamonte should be punished for failing drug court. AA 156-157.

Mr. Tagliamonte was represented by retained counsel for the district court proceedings of both cases. Counsel Karla Butko was appointed to represent Mr. Tagliamonte on direct appeal. This appeal follows the imposition of consecutive prison terms. A timely notice of appeal was filed by Mr. Tagliamonte on July 30, 3021. AA 163-164.

A motion to consolidate the appeals was granted by this Court.

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 the appellate litigation. This case concerns the conviction of a defendant under NRS 453.321, sales of a controlled substance. Because of the law change in July, 2020, the earlier case is a Category B felony conviction and the 2021 case is a Category C felony conviction. The convictions were the result of guilty pleas.

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 judgments of conviction entered on June 29, 2021. AA159, 161. The notice of appeal was timely filed July 30, 2021. AA163.

SUMMARY OF ARGUMENT

The District Court abused its discretion when it entered the sentenced upon Mr. Tagliamonte. It is suspect to increase punishment because a defendant

attempts treatment through a specialty court and fails. Addiction is a medical condition that has relapse as a normal part of the fact setting. It was improper to increase the prison term on CR20-0117 because Mr. Tagliamonte failed his treatment program. The imposition of a $4,000.00 fee upon Mr. Tagliamonte to gain diversion as part of his sentence was in violation of the Eighth Amendment, and was excessive.

STATEMENT OF THE ISSUES

1. The district court relied upon suspect evidence when it believed the substance involved in the five pill sale contained fentanyl. The district court abused its discretion when it imposed a higher sentence on CR20-0117 because Mr. Tagliamonte attempted drug treatment but was unsuccessful in his efforts. The district Court abused its discretion when it imposed consecutive prison terms upon Mr. Tagliamonte, based upon the facts of this case, in violation of the Fifth, Sixth and Fourteenth Amendments.

2. The district court abused its discretion when it imposed a $4,000.00 punitive sanction in order for Mr. Tagliamonte to be granted a diversion program.

STATEMENT OF FACTS

Mr. Tagliamonte was arrested by the police on January 9, 2020. According to police, he sold five (5) pills to an undercover police officer for $100.00. AA 50. Mr. Tagliamonte pled guilty to sales of a controlled substance and the State agreed not to object to probation and to recommend an underlying term of 12-30 months in prison. Mr. Tagliamonte was free to argue for a diversion program. The State agreed to dismiss the companion possession of a controlled substance charge and dismiss a justice court case which allegedly involved a gun silencer. AA 14, 55, 59.

The State's entire argument against diversion was that because this case involved oxycodone which contained fentanyl, the sanctions should be more severe to Mr. Tagliamonte. AA 58. Mr. Viloria pointed out to the court that there was never any laboratory testing that confirmed the presence of fentanyl on the oxycodone pills that were sold by Mr. Tagliamonte to the undercover cop. AA 60. Mr. Viloria explained the fact setting involving the possible firearm and advised the court that Mr. Tagliamonte did not even know that the person who borrowed

his car left a possible gun in it. AA 61.

Mr. Tagliamonte filed a petition for diversion and treatment under NRS 458.300, which statute was in effect at the time of the offense. AA 31-32. Mr. Tagliamonte also sought treatment under NRS 176A.230 & NRS 176A.240, which became effective July 20, 2020, prior to the diversion hearing in this matter. Mr. Tagliamonte candidly provided the district court with a substance abuse evaluation that stated that Mr. Tagliamonte suffered from a severe cocaine use disorder, sever cannabis use disorder and severe stimulant use disorder requiring treatment. AA 34. Mr. Tagliamonte had never participated in a substance abuse program. AA 36.

Mr. Tagliamonte advised the district court that he was a father of two daughters, that he had a job in construction, was attending counseling and trying to get his life on track. AA 45, 62.

The State objected to the diversion request. The State argued straight out for 12-30 months in prison for this defendant. AA 49. Ultimately, the State corrected its position to recommending an underlying 12-30 months in prison,

suspending that prison term and placing Mr. Tagliamonte on formal probation. AA 52. Mr. Graham advised the court that he had a personal objection to placing a drug dealer in drug court. The State equated that to putting a gambler in a casino floor job. AA 66-67. Yet, a large portion of drug sales cases involve an addict selling the substance to support their habit.

At the time of the diversion grant, Mr. Tagliamonte had completed 20 weeks of counseling with Mr. Rubinstein. AA 50. He had also been compliant with pretrial supervision for approximately 10 months. AA 51. In spite of this, the district court imposed as a condition of diversion a $4,000.00 payment for punitive aspects of the sentence. AA 67.

The District Court admitted Mr. Tagliamonte to a program under NRS 176A.230/ NRS 176A.240 and placed him on probation for 12 months with the condition that he participated in Specialty Court through the Second Judicial District Court. AA 25. Mr. Tagliamonte was also fined the sum of $4,000.00 as a condition of specialty court and ordered to complete 40 hours of community service. AA 26, 155. Mr. Tagliamonte paid that fine in full. AA 155.

Mr. Tagliamonte continued in the diversion court until he pled guilty to the new felony count in CR21-0636. Mr. Tagliamonte did not present any urine tests which demonstrated use of a controlled substance. AA 110-111. Mr. Tagliamonte was arrested for an offense which occurred on February 17, 2021. He was accused of selling a schedule 1 controlled substance to an informant and possession of 19 grams gross weight of cocaine. AA 75-76, 150.

Mr. TAGLIAMONTE was returned from the specialty court to face sentencing on the 2020 case and the 2021 charge. He pled guilty to sales of a controlled substance, a Category C felony violation of NRS 453.321. A sentencing hearing was set at the same time as the revocation of the program hearing was to be held.

During the revocation hearing, Mr. Tagliamonte argued for reinstatement to the drug court treatment program and for probation. AA 145. The Court advised Mr. Tagliamonte that he had previously pled guilty to selling fentanyl laced drugs, probably. AA 147, The Court advised Mr. Tagliamonte that he had attended a funeral of a McQueen High School graduate, college degree, engineering degree,

who took a Fentanyl laced product on a weekend and it killed him. AA 148. This person, who the court knew and respected enough to attend a funeral during Covid, overdosed on fentanyl. AA 148. Again the State argued that Mr. Tagliamonte was selling fentanyl laced pills when he sold the oxycodone to the undercover officer. AA 149. The State argued for the maximum sentences on each count, to run consecutively to each other. AA 150.

The defense argued that the revocation case should receive a sentence of 12-36 months in prison. This was higher than the initial plea bargain and underlying sentence of 12-30 months in prison. AA 152.

The district court considered intensive residential treatment through the Salivation Army Program but was inclined to send the defendant to prison. AA 153. Ultimately, the district court imposed a sentence of 19-48 months in prison on the 2020 case, finding that it would not have imposed a 24-60 months term if Mr. Tagliamonte had been sentenced to prison in the first instance. AA 156. That sentence was ordered to be served consecutively to the 2020 case. AA 157.

The judgments of conviction entered on June 29, 2021. Mr. Tagliamonte

filed a timely notice of appeal from the judgment of conviction, by way of the prison mailbox rule.

ARGUMENT

1. THE DISTRICT COURT RELIED UPON SUSPECT EVIDENCE WHEN IT BELIEVED THE SUBSTANCE INVOLVED IN THE FIVE PILL SALE CONTAINED FENTANYL. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A HIGHER SENTENCE ON CR20-0117 BECAUSE MR. TAGLIAMONTE ATTEMPTED DRUG TREATMENT BUT WAS UNSUCCESSFUL IN HIS EFFORTS. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED CONSECUTIVE PRISON TERMS UPON MR. TAGLIAMONTE, BASED UPON THE FACTS OF THIS CASE, IN VIOLATION OF THE FIFTH, SIXTH 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). "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).

Argument:

It is of value to note that this fact setting occurred during the change in law by way of AB 236. The charge of sales of a controlled substance was reduced from a Category B felony to a Category C felony while the 2020 case was pending in court.

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. Tagliamonte sold five oxycodone pills to an undercover cop for $100.00. What is not the least bit proven is that any of those pills contained Fentanyl. It is suspect argument and evidence that the pills were laced with Fentanyl. The State had every opportunity to have the pills tested for the presence of Fentanyl, but even after 536 days or 1.5 years with the case pending, the State argued that the pills contained Fentanyl without any laboratory support for that allegation. It is clear that this allegation affected the sentence in this case because the district court judge had just attended a funeral of a family friend or relative, a local McQueen High School graduate, college degree, engineering degree, who took a Fentanyl laced product on a weekend and it killed him. AA 148.

The State argued that Mr. Tagliamonte sold Fentanyl laced products in the 2020 case without any chemical testing support for that allegation. The district court believed it. The judge said that Mr. Tagliamonte that he had previously pled guilty to selling fentanyl laced drugs, probably. AA 147. We know that allegation is about the 2020 case as the 2021 charge involved small quantity cocaine.

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 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 district court increased the sentence in the 2020 case because Mr. Tagliamonte failed his specialty court program. There will be no incentive for drug addicted persons to attend specialty court programs if they have to worry that there

will be additional punishment placed upon them solely because they failed in their treatment obligations to the court.

Mr. Tagliamonte presented as a person willing to make change, who had family support, 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.

2. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A $4,000.00 PUNITIVE SANCTION IN ORDER FOR MR. TAGLIAMONTE TO BE GRANTED A DIVERSION PROGRAM.

This record is quite clear. The district court imposed a financial sanction that it refused to term as a fine, but which constituted a fine, upon a person who had not been convicted of a crime. The diversion program was granted. The sanction of a fine occurs by statutory scheme at sentencing. NRS 453.321 provided the Court with the ability to impose up to a $10,000.00 fine at the time of sentencing, not at the grant of diversion.

A court may establish an appropriate program for the treatment of alcohol or other substance use disorders, to which it may assign a defendant pursuant to NRS

174.032, 176.015, 176.211, 176A.240, 176A.400, 453.336 or 453.3363. The assignment must include the terms and conditions for successful completion of the program and provide for progress reports at intervals set by the court to ensure that the defendant is making satisfactory progress towards completion of the program. See NRS 174A.230. Nothing in that statutory program scheme allowed the district court to impose a punitive fine. The reality is that indigent clients would not be able to gain diversion treatment of their case if paying a fine was a requirement. The money should be spent on treatment, not as punishment payable to the court.

Imposition of a hefty fine in the amount of $4,000.00 upon a defendant in order to gain diversion could result in equal protection violations as poor clients may not be able to pay for the luxury of a diversion program. This rewards a wealthy client, or a client with family who will pay fees and fines for them, and deprives another indigent client of access to the same program as their wealthier defendants.

The sum of $4,000.00 fine for a $100.00 drug deal of five pills of oxycodone was unreasonable. The fine is excessive at law. The fine is grossly

disproportionate to the $100.00 drug sale. It constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article 1, Section 6 of the Nevada Constitution.

A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 239-240 (1976); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). He may establish a prima facie case of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. at 94. Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case. "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties." Id.

The reality of imposing a $4,000.00 payment for the privilege of gaining access to diversion court is to deprive indigent defendants of rights that will be granted to others.

CONCLUSION

This conviction must be reversed. Mr. Tagliamonte is entitled to a new sentencing hearing before a different judge. The sentence imposed is in violation of the Eighth Amendment and is cruel and unusual. Suspect evidence was relied upon by the sentencing court. The fine was improperly imposed in order to be punitive but get to the diversion court setting. This constituted an abuse of discretion by the sentencing court.

DATED this 24 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 19 typed pages, 3, 889 words in this brief and 387 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 24 day of January, 2022.

By: _____

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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

X E Flex Delivery of the Nevada Supreme Court System

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