IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS ROCCO TALIAMONTE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83324/83325

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is a consolidated appeal stemming from judgments of conviction involving one category B felony and one category C felony following guilty pleas.

On August 24, 2020, Appellant Nicholas Rocco Tagliamonte (hereinafter, "Tagliamonte") pleaded guilty to one count of sale of a controlled substance, a category B felony, in Case Number CR20-0117. Appellant's Appendix ("AA"), 10, 17-18. On November 2, 2020, over the State's objection, the district court deferred Tagliamonte's sentence and ordered him to complete Specialty Court. *Id.* at 67-68. While Tagliamonte was otherwise compliant in Specialty Court, he was arrested for selling

cocaine to a confidential informant. The parties entered negotiations in the new case, and on May 10, 2021, Tagliamonte pleaded guilty to the crime of sell, transport, give or attempt to sell, transport, give a Schedule I or II controlled substance, a category C felony, in Case Number CR21-0636. *Id.* at 85, 91. On June 28, 2021, due to the new charge, the district court revoked its diversionary grant in Case Number CR20-0117 and imposed a sentence of 19 to 48 months in the Nevada Department of Corrections. *Id.* at 156, 159-160. The district court also imposed a consecutive sentence for 24 to 48 months in prison for Case Number CR21-0636. *Id.* at 156, 161-162. Tagliamonte filed notices of appeal in both cases. However, as discussed below, the assignments of error in Tagliamonte's Opening Brief ("OB") only concern one case, CR20-0117.

II. ROUTING STATEMENT

This consolidated appeal is presumptively assigned to the Court of Appeals because the judgments of conviction at issue are based on guilty pleas. NRAP 17(b)(1).

III. STATEMENT OF JURISDICTION

The judgments of conviction were filed in both cases on June 29, 2021. AA, 159, 161. The pro per notice of appeal was filed on July 30, 2021—one day after the expiration of the 30-day period discussed in NRAP

4. However, Tagliamonte's certificate of service includes the mailing date of July 22, 2021. *Id.* at 164. While Tagliamonte has not included documents proving that he delivered his notice of appeal to prison officials that day, he contends that his appeals are timely pursuant to the prison mailbox rule recognized by the Nevada Supreme Court in *Kellogg v. Journal Communications*, 108 Nev. 474, 476-477, 835 P.2d 12, 13 (1992).

IV. STATEMENT OF ISSUES

A. Whether the district court considered impalpable or highly suspect evidence, and if so, whether it abused its sentencing discretion in Case Number CR20-0117?

B. Whether the district court abused its discretion by considering Tagliamonte's nonperformance in Specialty Court when it imposed his sentence in Case Number CR20-0117?

C. Whether the district court plainly erred by imposing a fine as a condition of Specialty Court in Case Number CR20-0117?

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V. STATEMENT OF FACTS

A. Case Number CR20-0117

1. Facts.[1]

On January 7, 2020, a detective began a narcotics investigation of a Snapchat account after an individual suffered an overdose from Oxycodone M30 pills laced with fentanyl, which were purchased from the same Snapchat account. PSI, CR20-0117, pg. 4. On January 9, 2020, the detective contacted the Snapchat account and asked to purchase Oxycodone pills. The detective received a response indicating that the pills were $20.00 per pill and the response included a meeting location. *Id.* at 5.

The detective met with Tagliamonte at the prearranged gas station parking lot. *Id.* The detective entered Tagliamonte's vehicle and exchanged $100.00 of pre-recorded buy funds for five Oxycodone M30 pills. *Id.* Tagliamonte told the detective to be careful taking the pills because they "are strong." *Id.* After the controlled buy was completed, detectives with the Street Enforcement Team conducted a traffic stop on Tagliamonte's

[1] The State is contemporaneously moving to transmit both Presentence Investigation Reports ("PSI") for the underlying cases. Because the cases resolved pursuant to guilty pleas, many of the facts supporting the sentences fall outside of the record provided on appeal. The PSIs for both CR20-0117 and CR21-0636 will aid this Court when it considers whether the district court abused its sentencing discretion. The State will refer to the pagination of the original documents in the remainder of this brief.

vehicle. *Id.* A subsequent search of the vehicle revealed the pre-recorded buy money, two small baggies with .5 grams gross weight and .8 grams gross weight presumptive positive cocaine, and two baggies containing 4.4 grams gross weight presumptive positive marijuana. *Id.*

During an interview with the Division of Parole and Probation, Tagliamonte claimed that despite the separate packaging the cocaine and marijuana were for personal use. *Id.* However, Tagliamonte did admit to obtaining the Oxycodone from a friend and selling it to make money. *Id.*

2. District Court Proceedings and Diversion Program Performance.

On August 24, 2020, Tagliamonte entered a guilty plea pursuant to negotiations to one count of sale of a controlled substance, a category B felony. AA, 1-2, 18. Pursuant to negotiations, the State agreed not to object to a probation request and to recommend an underlying sentence of 12-30 months in prison. *Id.* at 6, 14. Tagliamonte was free to argue for an appropriate sentence, including diversion. *Id.* The State also agreed not to pursue a related possession of a controlled substance charge and to dismiss the separate pending case in Reno Justice Court (RCR2020-106882). *Id.*

The district court noted that Tagliamonte had continued to use marijuana after his arrest and prior to arraignment. *Id.* at 19-20. The district court ordered Tagliamonte to stop his marijuana use and to be

tested at least twice by pretrial services, one immediately before sentencing and one randomly. *Id.* at 20.

On October 14, 2020, Tagliamonte filed a petition for a diversion treatment program. *Id.* at 29-40. He also filed a mitigation letter from his sister in advance of sentencing. *Id.* at 41-45.

During the November 2, 2020 sentencing hearing, Tagliamonte argued that he should be granted an opportunity for diversion. *Id.* at 49-52, 60-66. The State opposed Tagliamonte's diversion request, but made the recommendation consistent with the plea negotiations—a suspended sentence of 12 to 36 months. *Id.* at 52-60. The district court asked each counsel several questions throughout sentencing. One line of questioning for the State focused on what type of punitive response was warranted in this case if it were to give Tagliamonte an opportunity to complete a diversion program, since he had only spent one day in jail. *Id.* at 57. As the district court explained its question focused on "balance[ing] between the hopeful future and the consequences of the moment" and noted it wanted to impose "[s]omething that helps me feel more comfortable about the diversion request, you know, some ratcheting of the punitive response, because right now it looks too easy for Mr. Tagliamonte." *Id.* at 57-58.

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The district court ultimately decided to grant Tagliamonte the opportunity to complete a diversion program. As conditions of the program, the district court imposed a $4,000.00 fine as "one way [to] speak directly to his interests" and 40 hours of community service. *Id.* at 67-68. The Court set a review hearing approximately ten months out to review the status of the fine and community service, but recognized that a review would not be necessary if, as counsel suggested, Tagliamonte completed both in advance of the hearing. *Id.* at 68-70.

Tagliamonte was represented by retained counsel, Thomas E. Viloria, during negotiations and at the arraignment and sentencing hearings in Case Number CR20-0117. *Id.* 11, 35, 38, 41, 47.

B. Case Number CR21-0636.

1. Facts.

Just three months after being sentenced to the diversion program in Case Number CR20-0117, Tagliamonte was caught selling drugs again. The investigation began on February 17, 2021, when a confidential informant for the Reno Police Department indicated that Tagliamonte was selling cocaine and that the confidential informant had previously purchased cocaine from Tagliamonte. PSI, CR21-0636, pg. 5. The confidential informant participated in a controlled buy at Tagliamonte's residence on February 17, 2021, which the confidential informant was familiar with due

to prior narcotics purchases. *Id.* The confidential informant purchased a "ball" (3.5 grams) of cocaine from Tagliamonte for $240.00. *Id.* During the purchase the confidential informant observed a small baggie of cocaine on the living room table. *Id.*

On February 22, 2021, the confidential informant contacted Tagliamonte again and requested two eight balls of cocaine for $500.00. *Id.* They agreed to meet at the mall in Reno. *Id.* When Tagliamonte drove up to the mall, detectives initiated a traffic stop and arrested Tagliamonte. *Id.* During a subsequent search, a detective noted a lump near Tagliamonte's scrotum. *Id.* Initially, Tagliamonte denied having anything there, but ultimately admitted to having cocaine in his underwear. *Id.* Tagliamonte possessed $480.00 and 7.9 grams gross weight of presumptive positive cocaine on his person. *Id.* A later search of his residence revealed 19.1 grams gross weight presumptive positive cocaine prepackaged into separate baggies for sale. *Id.*

During an interview with the Division of Parole and Probation, Tagliamonte "indicated that he was not using controlled substances, but was struggling financially and knew he could make more money selling controlled substances than in his current employment." *Id.* at 6.

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2. District Court Arraignment.

Tagliamonte and the State entered into negotiations concerning his new charge. On May 10, 2021, Tagliamonte pleaded guilty to one count of sell, transport, give or attempt to sell, transport, give a schedule I or II controlled substance, first offense, a category C felony, in exchange for the State's agreement not to pursue any other criminal charges arising out of the same transaction or occurrence. AA, 80, 85, 86-87. The parties agreed to be free to argue for the appropriate sentence. *Id.*

During the arraignment, the district court inquired into the status of the diversion case, CR20-0117, and set a hearing on that case at the same time as the sentencing in Tagliamonte's new case. *Id.* at 91-92. The district court also asked the Division of Parole and Probation to prepare a report regarding his performance in specialty court thus far. *Id.* at 92.

In advance of sentencing, Tagliamonte filed mitigation statements, as well as a second request for diversion. *Id.* at 124-135, 143-144.

Tagliamonte was represented by a retained attorney, Joe M. Laub, in case number CR21-0636. *Id.* at 82, 84, 127, 130, 133, 137, 139-140.

C. <u>The June 28, 2021 Removal Hearing and Sentencing.</u>

Due to Tagliamonte's plea in Case Number CR21-0636, he was removed from the Specialty Court program in Case Number CR20-0117 on

May 26, 2021. *Id.* at 110, 111-112. The non-technical violation report indicated that Tagliamonte was "testing clean and appeared to be sober during his time in Specialty Court" but was removed due to the new crime. *Id.* at 121.

In advance of the June 28, 2021 hearing, Tagliamonte's counsel filed character reference letters, as well as arguments in mitigation. *Id.* at 113-120, 124-135. Tagliamonte was represented at the June 28, 2021 hearing by the Alternate Public Defender's Office on Case Number CR20-0117, and by retained counsel, Joe Laub, on Case number CR21-0636. *Id.* at 138-140. Tagliamonte requested to be reinstated in drug court in Case Number CR20-0117. *Id.* at 141. In the alternative, Tagliamonte argued for a minimum sentence of 12 to 36 months in prison, if the court intended to deny his diversion reinstatement request. *Id.* at 152.

In Case Number CR21-0636, counsel argued that the new crime was a setback consistent with a man struggling with addiction and requested that the district court sentence Tagliamonte to drug court on the new offense as well. *Id.* at 142-144. Tagliamonte also spoke and requested a second opportunity at drug court. *Id.* 145, 147-148. He concluded by noting:

> I made that mistake selling drugs again and I don't have a valid reason for why I did, because there is no good reason for why someone would do that. And I do apologize for messing up the

> opportunity you gave me the first time, and I know it's a slim chance that I get another opportunity at the Specialty Courts….

Id. at 147.

The State argued for 24 to 60 months on both cases. *Id.* at 150. The State noted that Tagliamonte was not using drugs at the time of the new offense and was not selling drugs to support his own drug habit, but instead he was selling drugs because he was struggling financially. *Id.* at 148-149. The State argued that treatment was not necessary under the circumstances and that Tagliamonte was a threat to the community. *Id.* at 150.

The district court revoked Tagliamonte's diversionary status in CR20-0117 and sentenced him to 19 to 48 months in prison. *Id.* at 156, 159-160. The district court explained that a first felony generally is more likely to receive a 12 to 30 month sentence, but that Drug Court nonperformance indicated to the court that Tagliamonte "has chosen not to improve with that resource assistance" and that a 19 to 48 month sentence was more appropriate. *Id.* The court noted that the State's request for the maximum sentence on the CR20-0117 would require the court to impose consequences for a subsequent offense and it declined to do so. *Id.* However, the district court did impose a consecutive sentence of 24 to 48 months in Case Number CR21-0636. *Id.* at 156-157, 161-162.

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VI. SUMMARY OF ARGUMENT

Tagliamonte does not challenge the sentence imposed in Case Number CR21-0636 with relevant facts, argument, or authority. As such, this Court should affirm the judgment of conviction in Case Number CR21-0636.

Tagliamonte's arguments concerning the sentence imposed in Case Number CR20-0117 are without merit. The district court did not abuse its sentencing discretion and, therefore, the judgment of conviction in Case Number CR20-0117 should be affirmed as well.

VII. ARGUMENT

Tagliamonte filed his notice of appeal in both cases. However, Tagliamonte's arguments on appeal only concern Case Number CR20-0117. *See* Opening Brief ("OB"), pgs. 12 ("[w]e know that allegation is about the 2020 case as the 2021 charge involved a small quantity of cocaine"), 15 (asserting "the district court increased the sentence in the 2020 case because Tagliamonte failed his specialty court program"), 16-18 (arguing that the fine imposed in the diversion case was improper). As will be discussed below, these arguments are without merit and this Court should affirm the judgment of conviction in Case Number CR20-0117. This Court should also affirm the judgment of conviction in Case number CR21-0636

because Tagliamonte did not present facts or any cogent argument to challenge his second drug conviction, or the sentence imposed therein.[2] As such, the State will focus its analysis on the sentence imposed in Case Number CR20-0117.

A. Standard of Review.

The Nevada Supreme Court has consistently afforded district courts wide discretion in their sentencing decisions. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). Appellate Courts will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate

[2] The State notes that the first heading in the argument section of Tagliamonte's brief he asserts, among other things, that "the district court abused its discretion when it imposed consecutive prison terms upon Mr. Tagliamonte, based on the facts of this case, in violation of the Fifth, Sixth and Fourteenth Amendments." OB, 10. However, there are no facts, authority, or cogent argument in the remainder of the brief to support such an assertion. *See id.* 10-19. This issue should be considered waived. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n. 38 (2006) (declining to consider claims where the appellant "neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns"); *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) ("an appellant must present relevant authority and cogent argument; issues not so presented need not be addressed by this court") (cleaned up). Moreover, any such argument raised in Tagliamonte's Reply Brief should be rejected. *See LaChance v. State*, 130 Nev. 263, 277, n. 7, 321 P.3d 919, 929, n. 7 (2014) (noting that the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief and declining to consider such an argument). A consecutive sentence on Tagliamonte's second falls within the district court's discretion pursuant NRS 176.035(1).

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).

B. The district court did not rely on suspect evidence when it imposed its sentence in Case Number CR20-0117.

Tagliamonte first contends that the district court considered suspect argument and evidence at sentencing because it assumed that the Oxycodone pills that he sold contained Fentanyl without support for such an allegation. OB, pg. 12. Tagliamonte's argument is belied by the record.

Initially, the Fentanyl discussion occurred during the first sentencing hearing, where Tagliamonte was ultimately granted an opportunity at diversion. There, the State conceded during its sentencing argument that it did not know if the particular pills sold to the undercover detective contained Fentanyl because they were never transferred from the law enforcement agency to the laboratory for testing.[3] AA, 59-60. More

[3] The idea that the pills may have been laced with Fentanyl comes from the very facts underlying law enforcement's discovery of Tagliamonte as a local drug dealer. PSI, Case Number CR20-0117, pgs. 4-5. An individual died of a drug overdose due to Fentanyl laced pills obtained from the same social media account that belonged to Tagliamonte. *Id.* Tagliamonte told the undercover officer that the pills were "strong" when the undercover officer made his purchase. *Id.* at 5. While the pills sold to the undercover officer were not tested for presence of Fentanyl, there is some circumstantial evidence suggesting that the pills sold to the undercover officer could have also been laced with Fentanyl. Put simply, even if the district court

importantly though, the district court's comments following the parties' discussion of whether the pills contained Fentanyl demonstrate that it did not assume Tagliamonte sold Fentanyl-laced pills in this case. It noted, "[h]ere's a gentleman who sold a controlled substance of some dangerous nature based upon an anonymous solicitation over social media. That's unacceptable in our community." *Id.* at 63. Even after the Fentanyl discussion, the district court granted Tagliamonte's request for diversion. *Id.* at 67. In other words, Tagliamonte was not prejudiced by the Fentanyl discussion during the first sentencing hearing.

The same is true of the revocation hearing and sentencing in June of 2021. During that hearing, the district court began its inquiry into the State's position by noting that it had attended a funeral of a young man three weeks before who had taken a Fentanyl-laced product and it killed him. *Id.* at 148. However, Tagliamonte takes this comment out of context in an effort to assign error where there is none. The district court gave the example as part of its inquiry into how to classify Tagliamonte—as "an

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considered this possibility, it does not equate to it relying on highly suspect or impalpable information at sentencing because there is evidence in the record to support such an inference. *Cf. Goodson v. State*, 98 Nev. 493, 496, 654 P.2d 106, 1007 (1982) (finding that assertions in the PSI that the defendant was a drug trafficker was impalpable or highly suspect because it was a "bald assertion" and "unsupported by any evidence whatsoever.").

addict who needs my attention" through therapeutic intervention or "a person who enables the addict?" *Id.* When the district court actually imposed its sentence, it sentenced Tagliamonte to prison because he sold "drugs, dangerous drugs," not based on an assumption that Tagliamonte sold Fentanyl-laced pills. *Id.* at 157. As such, Tagliamonte was sentenced for the crime he committed—selling Oxycodone pills to an undercover detective. Tagliamonte has not shown that the district court relied *only on* impalpable or suspect information—specifically the fact that the pills could have been laced with Fentanyl—to enhance, or prejudice, Tagliamonte's sentence. As such, this Court should affirm the judgment of conviction. *See Silks*, 92 Nev. at 94, 545 P.2d at 1161 ("[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, this court will refrain from interfering with the sentence imposed.") (*emphasis added*).

C. The district court did not abuse its discretion by considering Tagliamonte's prior performance in drug court when it imposed his sentence in Case Number CR20-0117.

Next, Tagliamonte contends that his sentence is excessive and violates the Eighth Amendment because the district court allegedly punished Tagliamonte for failing his Specialty Court program. OB, pgs. 13-

16. Tagliamonte's argument is without merit.

Regardless of severity, "[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) (cleaned up). The sentence imposed, of 19 to 48 months in prison is within the statutory parameters of the offense at the time it was committed in January of 2020. *See* NRS 453.321[4]; *State v. Second Judicial Dist. Ct. (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008) ("[i]t is well established that under Nevada law, the proper penalty is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing."). Tagliamonte does not contend that NRS 453.321 is unconstitutional. Thus, to obtain relief, it is Tagliamonte's burden to show that the sentence in this case is so unreasonably disproportionate to the offense as to shock the conscience. He has failed to meet his burden.

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[4] The sale was categorized as a category B felony from 1999, until the recent criminal justice reform bill A.B. 236 went into effect on July 1, 2020. 1999 Nevada Laws Ch. 517 (A.B. 454); 2019 Nevada Laws Ch. 633 (A.B. 236) § 112.

Tagliamonte suggests that his sentence should have been more like a category C felony because of the implementation of A.B. 236 during the pendency of this case. The change in the law does not equate to Tagliamonte's sentence being excessive, since the sentence at the time the crime was committed controls. *Pullin*, 124 Nev. at 567, 188 P.3d at 1081.

Tagliamonte next asserts that his sentence was excessive because he was willing to change, had family support, and "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." These were arguments made and rejected by the district court below. Indeed, as the district court noted, such arguments:

> …completely ignored the fact that we did this once before. It's as if you are telling me how important your daughters are and you understand the importance of Specialty Court.
>
> But let's be clear, Mr. Tagliamonte. We had a spirited sentencing proceeding, spirited…and I gave you the privilege of Specialty Courts, and there is no more structured therapeutic help than Specialty Courts. That's the most we have. There is no Specialty Courts plus one.
> …
> You are going to have to help me understand what happened before that led to your failure which won't happen in the future, otherwise it's not good for you.

Id. at 146.

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The fact remains that those alleged mitigating factors existed when Tagliamonte was given the opportunity to attend Specialty Court in the first place, even though he was selling drugs in the community and was not an addict. The presence of a desire to change or family support did not require the district court to reimpose diversion, or a minimum sentence, when Tagliamonte's track record and behavior suggested he was more dangerous to the community than the district court originally believed.

Indeed, Tagliamonte never had a positive test in Specialty Court and was fully compliant, which initially seems to balance in his favor. AA, 121; *see also* PSI, Case No. CR21-0636, pg. 6. Yet, upon closer look, Tagliamonte's behavior in drug court is aggravating and supports the district court's decision to sentence him to 19 to 48 months in prison. Tagliamonte was given an opportunity traditionally reserved for addicts to go to Specialty Court,[5] but he was caught again selling dangerous drugs just three months after he was sentenced to Specialty Court. Tagliamonte took advantage of the system and admittedly sold controlled substances because it was an easier and faster way to make money than working at a normal job. PSI, Case No. CR21-0636, pg. 6 ("the defendant indicated he was not

[5] *See e.g.*, NRS 453.3363(1)(b) (which was repealed and replaced by different statutes when A.B. 236 went into effect, permitted a diversion program for "a person dependent upon drugs").

using controlled substances, but was struggling financially and knew he could make more money selling controlled substances than in his current employment."). In other words, Tagliamonte was not availing himself to the treatment, he was preying on other addicted members of society and thereby endangering the community to make easy money. Thus, Tagliamonte has not shown that his sentence of 19 to 48 months shocks the conscience under the facts of this case.

Moreover, Tagliamonte's contention that he was punished because he failed specialty court is equally without merit. As the district court stated, Tagliamonte's performance in Specialty Court "amplif[ied] the sentence" because "we have done our best to provide resources and that the defendant had chosen not to improve with that resource assistance and that's how I landed at 19 to 48." *Id.* at 156. It is evident that the district court also considered the facts of the offense itself in reaching its decision to impose slightly more than a minimum sentence. Indeed, it summarized the facts of Tagliamonte's cases as follows:

> The man sells drugs, dangerous drugs, and is the target of law enforcement scrutiny. He has another case involving a firearm dismissed. There is some mitigation that counsel typically talks about in camera which influences the diversion decision.
>
> While sitting in Specialty Courts testing clean, he chooses to sell drugs again for financial purposes and that must be disapproved in our community.

Id. at 157.

These observations are consistent with the record and controlling law regarding sentencing. In Case Number CR20-0117, Tagliamonte was identified by law enforcement when an individual overdosed after purchasing drugs through Tagliamonte's social media account. Tagliamonte sold 5 oxycodone pills to an undercover detective after being contacted through the same account. These facts are aggravating alone and warrant more than a minimum sentence, even ignoring Taglimonte's subsequent decision to endanger more community members to make quick and easy money.

The record reveals that the district court did not improperly punish Tagliamonte for failing Specialty Court, but instead the district court considered his performance as part of its overall evaluation of his life, characteristics, propensities, and conduct in reaching a sentence within the sentencing parameters. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("[p]ossession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment") (*citing Williams v. New York*, 337 U.S. 241, 247 (1949); *see also Williams,* 337 U.S. at 245 (approving of state sentencing policy allowing a judge to

consider any "information about the convicted person's past life, health, habits, conduct, and mental and moral propensities."). The district court's sentence in Case Number CR20-0117 falls within its statutory limits, is not based solely on highly suspect or impalpable information and does not shock the conscience. As such, this Court should affirm the judgment of conviction in Case Number CR20-0117. *Silks*, 92 Nev. at 94, 545 P.2d at 1161; *Blume*, 112 Nev. at 475, 915 P.2d at 284.

D. The district court did not plainly err by imposing a $4,000.00 fine in Case Number CR20-0117.

Tagliamonte's final assignment of error suggests that the district court did not have authority to impose a $4,000.00 fine as a condition of Specialty Court in Case Number CR20-0117. Tagliamonte did not object to the district court's imposition of the fine below on this or any other grounds. Indeed, Tagliamonte paid the fine in its entirety before he was returned from Specialty Court due to the new charge. AA, 155. Tagliamonte has not shown plain error warranting relief.

The failure to object on the grounds raised on appeal precludes appellate review of the matter unless it rises to the level of plain error. *Id.*; *see also Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (failure to object on the ground appellant now asserts on appeal generally precludes review unless appellant demonstrates plain error); *see also*

Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying pain error review to a sentencing issue). "In conducting plain error review, [the appellate court] must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Green*, 119 Nev. at 545, 80 P.3d at 95 (cleaned up). "Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.* (citation omitted).

The fine of $4,000.00 was initially imposed in Case Number CR20-0117 as a special condition of Tagliamonte's deferred judgment. As Tagliamonte conceded in his Petition for Specialty Court, the district court was vested with authority to impose "any conditions upon the election of treatment that could be imposed as conditions or probation…." AA, 31 (citing NRS 458.310(2)(a), which was repealed by A.B. 236, but was the law in effect at the time of the offense).[6] Contrary to Tagliamonte's assertion now, the district court had the authority to impose a fine as a condition of

[6] Under A.B. 236, any "assignment [to a treatment program] must include the terms and conditions for successful completion of the program and provide for progress reports." NRS 176A.230. The new statutory scheme contemplates the court similarly placing "the defendant on probation upon terms and conditions that must include attendance and successful completion of a program…." NRS 176A.240(1)(a). In other words, under either sentencing scheme, the district court has the authority to impose a fine as a condition of Specialty Court.

his treatment program because it is a common condition of probation. *See e.g.,* NRS 213.610(12) (identifying the "[f]ailure of the probation to pay all court-ordered fines…" as a relevant consideration for recommending the continuation or revocation of probation); *see also Gilbert v. State*, 99 Nev. 702, 706, 669 P.2d 699, 702 (1983) (discussing the required considerations for revoking an indigent's probation for failure to pay a fine imposed as a condition of probation). As such, Tagliamonte has failed to demonstrate that the district court erred in imposing a fine as a condition of Specialty Court.

Moreover, the district court's assessment of a fine of $4,000.00 as a condition of Specialty Court, and subsequently of Tagliamonte's sentence, did not affect Tagliamonte's substantial rights. Contrary to Tagliamonte's assertion, the fine was not excessive and did not violate the equal protection clause of the Constitution. The district court had the authority to impose up to a $20,000.00 fine as a condition of Tagliamonte's probation or sentence pursuant to NRS 453.321. He made money by selling controlled substances in the community, so the fine was tied to his crime and on the lower end of what the district court could have imposed. It was not excessive under the facts and circumstances of this case.

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Moreover, contrary to Tagliamonte's suggestion this is not a case where the district court made a fine a condition for an indigent person or attempted to revoke Tagliamonte's participation for the failure to pay a fine. Tagliamonte had retained counsel throughout this litigation (and in his subsequent case), evidencing an ability to pay a fine as a condition of his programing. *See e.g.*, AA, 11, 29, 47, 84, 96, 113, 127, 137. In fact, Tagliamonte paid his fine during his time in Specialty Court. *Id.* at 155. The district court did not increase the fine when it imposed Tagliamonte's sentence. *Id.* at 159. Thus, Tagliamonte has not shown plain error because he has not demonstrated how the fine in this case caused him prejudice or impacted his substantial rights.

Tagliamonte's concern about fines for indigent individuals entering specialty court is speculative and not grounded in the facts of this case or any other case that he has cited. The same is true of his equal protection argument. Tagliamonte has not identified a rule or policy of the court which treats similarly situated individuals differently or provided cogent argument or authority to demonstrate how an equal protection violation occurred here. Tagliamonte's failure to identify a policy at issue and to identify similarly situated individuals who were treated differently is fatal to his equal protection argument. *See e.g. Reed v. Reed*, 404 U.S. 71, 75

(1971) ("the Fourteenth Amendment does not deny to States [or the court in this circumstance] the power to treat different classes of person in different ways."); *see also Rico v. Rodriguez,* 121 Nev. 695, 703, 120 P.3d 812, 817 (2005) ("[t]he threshold question in equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons"); *Keevan v. Smith*, 100 F. 3d 644, 648 (8th Cir. 1996) ("[t]reatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause.").

The fine in this case was lawfully imposed as a condition of Specialty Court. The fine was paid, and the district court did not increase the fine when it imposed its sentence. Tagliamonte has not demonstrated that the district court plainly erred by imposing a $4,000.00 fine as a condition of his Specialty Court participation. Further, Tagliamonte does not challenge the district court's authority to impose a fine as part of his judgment in Case Number CR20-0117. Therefore, Tagliamonte has not demonstrated that the district court plainly erred or that he is entitled any relief from the judgment in Case Number Cr20-0117.

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VIII. CONCLUSION

Tagliamonte did not cogently argue or provide authority to identify an alleged issue with the judgment of conviction in Case Number CR21-0636. The issues raised with respect to Case Number CR20-0117 are without merit. Both judgments of conviction should be affirmed.

DATED: March 9, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Marilee Cate
Appellate Deputy

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 Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 9, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 9, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Karla K. Butko, Esq.

/s/ Destinee Allen
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