

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MICHAEL RAY LOPEZ,

Appellant,

**VS.**

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 83394

Appeal from Judgment of Conviction  
Second Judicial District Court of the State of Nevada  
The Honorable Kathleen Sigurdson

**APPELLANT'S OPENING BRIEF**

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## **APPELLANT'S OPENING BRIEF**

### **I. JURISDICTIONAL STATEMENT**

This is an appeal from a judgement of conviction following a plea of guilty. The accompanying judgment of conviction was filed on August 16, 2021. JA77-78. Appellant filed a timely notice of appeal on August 18, 2021. JA79-80.

### **II. ROUTING STATEMENT**

This appeal is appropriately assigned to the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction on a category B felony.

### **III. STATEMENT OF THE ISSUE ON APPEAL**

**The district court abused its discretion in denying the Appellant a suspended sentence after releasing him to in-patient treatment which he was completing successfully.**

### **IV. STATEMENT OF THE CASE**

Appellant MICHAEL RAY LOPEZ (hereinafter "Mr. LOPEZ") was charged in this case with Robbery with the Use of a Deadly Weapon, Attempted Robbery with the Use of a Deadly Weapon and Assault with the Use of a Deadly Weapon. **JA 1-3 (Justice Court Complaint, 07/09/2020)**

Pursuant to negotiations, Mr. LOPEZ agreed to plead guilty to one count of Assault with a Deadly Weapon, with both sides free to argue for an appropriate sentence. **JA4-7; 8-14**

At his initial sentencing Mr. LOPEZ, through counsel, requested a release on his own recognizance so he could participate in treatment. The Court granted an OR release with transportation to be provided by the Inmate Assistance Program to the Salvation Army. **JA32-35**

Mr. LOPEZ then had a status hearing on February 26, 2021, in which he was again encouraged by the court to continue with his compliance and participation in the program. **JA39-44**

“So I want you to have a very good program and use it to your benefit. It’s a very stringent program I understand, but this is a great opportunity for you to kind of get things back on track.” **JA42; lines 1-6**

Between this status hearing and the next, Mr. LOPEZ left the Salvation Army after suffering a mental health episode. He immediately checked in with pretrial services and was placed at Victory Outreach for continued treatment, where he appeared via Zoom for another status hearing. At that hearing Mr. LOPEZ was encouraged to continue to do well. **JA45-53**

“Mr. Lopez, I’m very proud of you. It sounds like you are doing a good job even though you are going through some rough times, so I am going to allow you to stay out, but I do want you to stay at the Victory Outreach Program. Okay. That’s very important. If that changes, then you and I change, okay?”

THE DEFENDANT: Absolutely.” **JA51, lines 22-25; JA52, lines 1-3**

Another status hearing was held on May 15, 2021, at which time, although Mr. Lopez was not present at the hearing, it was reported through a representative of pre-trial services that Mr. Lopez was compliant with the terms of his release and still at Victory Outreach. Another status hearing was set for June of 2021. **JA54-60**

At the June 23, 2021 status hearing Mr. Lopez appeared via Zoom and was doing very well in the Victory Outreach program. The Court was pleased.

“And as stated by your attorney, Pretrial Services indicates you're compliant and doing well, so that makes me very happy. When I give people this opportunity, I am taking a risk on you, so I'm so glad that you're taking advantage of this opportunity.” **JA64, lines 11-16**

Sentencing was set out for an additional two months and was held on August 16, 2021. Mr. Lopez appeared in person with counsel and a representative from Victory Outreach. Mr. Lopez was still doing great at the program and had taken full advantage of the opportunity he believed the court had afforded him. Counsel again presented argument and revisited the path of Mr. Lopez since being granted an OR release and how far he had come, believing fully at this point that he would receive a suspended sentence.

The Court, however, sent Mr. Lopez to prison and did not grant probation. **JA68-76**

Counsel for Mr. LOPEZ respectfully expressed some surprise, and the following exchange occurred:

“MR. SILVERBERG: I'm sorry, Your Honor, I'm not one to go back on -- I just thought that given the chance that he had had and how well he has done, I'm just a little bit surprised.

THE COURT: I understand that, Mr. Silverberg, and I recognize that he has done very well. I'm just concerned about him having a history and then continuing to do that. I know it hasn't been a recent history. It is exactly that, history. It's behind him. And so, I mean, I understand what you are saying that I gave him a chance and he did really well with that chance and I appreciate that greatly, sir. So thank you for doing that and not making me embarrassed that I gave you a chance, but I just, I'm concerned about the public safety. That is my number one charge is to keep the community safe as you well know, so that's where I'm coming from.

MR. SILVERBERG: Understood.

THE COURT: Thank you, Mr. Silverberg.

MR. SILVERBERG: Thank you.” **JA74, lines 5-23**

The instant appeal followed.

## V. STATAEMENT OF FACTS

The Information filed against Mr. LOPEZ alleged that on or about July 7, 2020, within the County of Washoe, State of Nevada, Mr. LOPEX willfully and unlawfully took personal property, to wit, various merchandise from the person or in the presence of MICHAEL DENT and/or RICHEL ALCABEDOS, employees of 99 CENTS ONLY STORE located at 580 East Prater Way, Washoe County, Nevada, against their will, and by means of force or violence or fear of immediate or future injury their person, and with the use of a large knife which the said defendant produced and pointed in a threatening manner towards them.



It was further alleged that Mr. LOPEZ, on or about July 7, 2020, attempted to take money from the person or in the presence of PATRICIA GEORGE, an employee of SIERRA SID'S CASINO, located at 200 North McCarran Boulevard, Washoe County, Nevada, against her will, and by means of force or violence or fear of immediate or future injury to her person, and with the use of a large knife which the said defendant produced as he demanded money, and that he placed MARC REDDING in reasonable apprehension of immediate bodily harm at 200 North McCarran Boulevard, Washoe County, Nevada, with the use of, or present ability to use, a deadly weapon, to wit: a large knife in that said defendant did charge at said victim while holding said knife and demanding money. **JA1-3**

The other facts relevant to this appeal are set for in the statement of the case above.

#### VI. SUMMARY OF ARGUMENT

The court abused its discretion in sentencing Mr. LOPEZ to prison and not granting him a suspended sentence.

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## VII. ARGUMENT

**The court erred in not granting Mr. LOPEZ a suspended sentence after releasing him prior to sentencing for treatment and after he was successful in that treatment.**

“This court will not disturb a district court's sentencing determination absent an abuse of discretion. See *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

The Court, in justifying its decision to not grant a suspended sentence was public safety. While this is certainly a valid consideration generally, in this case the Court gave Mr. LOPEZ the opportunity to show that he was not a public safety threat.

The Court as much as said so at the hearing held on June 23, 2021:

“And as stated by your attorney, Pretrial Services indicates you're compliant and doing well, so that makes me very happy. When I give people this opportunity, I am taking a risk on you, so I'm so glad that you're taking advantage of this opportunity.” **JA64, lines 11-16**

The Court made clear she was taking a risk by giving Mr. Lopez the opportunity to be supervised in the community. The court at a minimum implied that if Mr. LOPEZ continued to do well and remain in compliance that he would be granted a suspended sentence. Why else would he be let out of custody prior to sentencing to a treatment program?

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To give this chance to a defendant and set out conditions for a defendant to remain out of custody, and for a defendant to fully comply but be sent to prison anyway is clearly an abuse of discretion. There was simply no evidence that Mr. LOPEZ did not fully comply with the conditions of his release pre-sentence, and although it was never explicitly stated, the record supports the conclusion that had he continued to be in compliance as he had, he could expect that he would receive a suspended sentence. It was an abuse of discretion for the Court to do otherwise.

Regarding the applicable legal standard, the Nevada Supreme Court stated the following”

“This court will refrain from interfering with the sentence imposed “[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).

Although the undersigned has not found a case on point in this jurisdiction, an analogous situation was considered by the Mississippi Supreme Court.

“We do not revoke or disturb the principle that the imposition of sentence is within the sound discretion of the trial court, and that this Court will not reverse the sentence so imposed, if it is within the limits of the statute. *Anderson v. State*, 381 So.2d 1019 (Miss.1980); *Yazzie v. State*, 366 So.2d 240 (Miss.1979); *Ainsworth v. State*, 304 So.2d 656 (Miss.1975); *Clanton v. State*, 279 So.2d 599 (Miss.1973). However, under the peculiar facts of this case, where we do not find error which requires reversal for a new trial, but where the appellant, with the knowledge of the trial court, worked for the Mississippi Bureau of Narcotics as an undercover informant, and was promised by the Bureau and district attorney that they would recommend probation, which led appellant to believe he would be placed on probation, we hold justice

requires that the judgment of the lower court sentencing appellant to eight (8) years in the Mississippi State Penitentiary be vacated and that the case be remanded to the lower court, with instructions that appellant be placed on probation under such terms and conditions as the lower court may prescribe.” *Boyington v. State*, 389 So. 2d 485, 491 (Miss. 1980)

It is respectfully submitted that the Court in this matter should do the same. Mr. LOPEZ was as much as assured that if he remained in compliance with the terms of his pre-sentence release, he would be placed on probation. In light of the many status hearings and the repeated encouragement by the Court, it is respectfully submitted that it was an abuse of discretion for the Court to not grant Mr. LOPEZ a suspended sentence.

#### VIII. CONCLUSION

For the reasons put forth above, Michael Ray Lopez, respectfully requests that this case be remanded for a new sentencing with instructions that he be granted a suspended sentence.

DATED this 26<sup>th</sup> day of October, 2021.

MARC PICKER  
Washoe County Alternate Public Defender

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**CERTIFICATE OF COMPLIANCE**  
**(NRAP 28.2)**

1. I hereby certify that Appellant's Opening 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 the Opening Brief was prepared in a proportionally spaced typeface using Microsoft Word 2003 version in 14 point Times New Roman.

2. I further certify that Appellant's Opening Brief complies with the page or type-volume 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 the 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 the Opening 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 appropriate references 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

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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.

Dated this 26<sup>th</sup> day of October, 2021.

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## **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 **APPELLANT'S OPENING BRIEF** to the following:

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DATED this 26<sup>th</sup> day of October, 2021.

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