

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RAY LOPEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 83394

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RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

I.	ROUTING STATEMENT	1
II.	STATEMENT OF THE FACTS.....	1
III.	STATEMENT OF THE ISSUES	2
IV.	ARGUMENT	3
	A. The district court did not abuse its discretion at sentencing.....	3
	i. Standard of Review	3
	ii. Discussion	3
V.	CONCLUSION	8

TABLE OF AUTHORITIES

Pages

Cases

<u>Boyington v. State</u> , 389 So. 2d 485, 491 (Miss. 1980)	6-8
<u>Lloyd v. State</u> , 94 Nev. 167, 170, 576 P.2d 740, 742 (1978)	3
<u>Randell v. State</u> , 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)	3
<u>Silks v. State</u> , 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)	3

Statutes

NRS 176A.100(1)(c)	3
--------------------------	---

Rules

NRAP 17(b)(1)	1
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RESPONDENT'S ANSWERING BRIEF

I. ROUTING STATEMENT

This case is an appeal from a judgment of conviction based on a plea of guilty. Amended Joint Appendix (“JA”) p. 77. Therefore, it is presumptively assigned to the Court of Appeals. NRAP 17(b)(1).

II. STATEMENT OF THE FACTS

Because this case was resolved via a plea negotiation, the following facts are derived from the Presentence Investigation Report (“PSI”). The Respondent has filed a contemporaneous Motion to Transmit Presentence Investigation Report. Because the PSI is not included in an appendix, citations to the PSI refer to the PSI’s own pagination.

On July 7, 2020, Sparks Police Department officers responded to the 99cent store on a report of an armed robbery. PSI p. 6. They learned that Appellant Michael Ray Lopez (“Lopez”) had entered the store and filled

both a shopping cart and a hand basket and attempted to leave the store without paying. *Id.* Store employees tried to block Lopez’s exit and instructed him to leave the merchandise and leave the store. *Id.* Lopez responded by pulling out a large hunting knife and pointing it at the employees. *Id.* Lopez was allowed to leave the store with the merchandise. *Id.*

Shortly after the incident at the 99cent store, officers responded to another location on a report of a robbery in progress. *Id.* Officers learned that Lopez had entered a casino, approached the cage, and demanded hundreds of dollars and “free play” money. *Id.* When the cashier declined to comply with Lopez’s demands, he produced a knife, yelled at her, and then stabbed the counter before walking away. *Id.* Lopez then approached a casino patron and demanded money. *Id.* Lopez charged at the patron with a knife and demanded that he “give me money.” *Id.* Officers confronted Lopez who attempted to run away from them. *Id.* Lopez was tased and arrested. *Id.*

III. STATEMENT OF THE ISSUES

- A. Did the district court abuse its discretion by sentencing Lopez to a term of imprisonment rather than probation?

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IV. ARGUMENT

A. The district court did not abuse its discretion at sentencing.

i. Standard of Review

“A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court’s determination will not be disturbed on appeal.” Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). “[A]n abuse of discretion will be found only when the record demonstrates ‘prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.’” Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978) *quoting* Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

ii. Discussion

Lopez does not claim that the district court abused its discretion in the traditional sense, *i.e.*, by relying upon impalpable or highly suspect evidence. Instead, Lopez argues that the court abused its discretion by sentencing him to prison rather than granting him a chance at probation after he had participated in several treatment programs while pending sentencing. Lopez suggests that the court implied that Lopez would be granted probation if he did well in those programs.

The decision to suspend a prison sentence, where not otherwise governed by statute, is a discretionary one. NRS 176A.100(1)(c) (“the court

may suspend the execution of the sentence imposed and grant probation as the court deems advisable.”). Lopez was convicted of Robbery and Assault with a Deadly Weapon, neither of which have sentences that must be suspended or shall not be suspended. In other words, the decision whether to suspend Lopez’s sentence was within the discretion of the district court.

In passing sentence, the district court noted that it was “concerned about the public safety” and that “my number one charge is to keep the community safe.” JA 74. The court also pointed out that Lopez’s criminal history was concerning. JA 73-74. At the time of sentencing, Lopez had previously been convicted of 11 misdemeanors. PSI p. 3. Those convictions covered substance abuse related crimes (three convictions for driving under the influence, one for possession of drug paraphernalia), crimes involving stolen property (one conviction for buy/possess/receive stolen property), and crimes involving violation of court orders (one conviction for violating a domestic violence extended protection order and another for contempt of court). The court was concerned that despite this background of criminal activity, Lopez engaged in a series of potentially violent criminal acts involving multiple victims and a knife. JA 73-74.

Lopez claims that because he did well in the programs he attended before sentencing and had not violated any of the terms of his pre-

sentencing release, that “for a defendant to fully comply but be sent to prison anyway is clearly an abuse of discretion.” Opening Brief p. 7.

However, as Lopez also notes, there were no promises made that he would be entitled to any particular sentence by participating and attending the various programs. *Id.* The terms of Lopez’s plea agreement made it clear that the parties would be free to argue for an appropriate sentence with the State recommending that the two sentences run concurrently. JA 10-12. The record lacks any other agreement regarding Lopez’s sentence. Lopez may have believed that the district court would grant him probation if he successfully completed a program before sentencing or did not violate the terms of his pre-sentence release, but the record simply does not show that the court ever made such a promise.

Moreover, Lopez had previously entered his plea, wherein he acknowledged the limits of the plea agreement he had reached and the fact that the district court was not bound by the negotiations, before he was released to participate in a program. Lopez does not suggest that his plea was induced by any promises of a suspended sentence, implied or otherwise, and he was not released to participate in a program until his case had already proceeded to the sentencing phase.

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Lopez presents the case of Boyington v. State, a 1980 decision from the Mississippi Supreme Court, as persuasive authority in support of his premise that he “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.” Opening Brief p. 8 *citing* Boyington v. State, 389 So. 2d 485, 491 (Miss. 1980). Boyington is distinguishable and should not be applied to this case for several reasons.

First, Lopez’s contention that he was “as much as assured” that he would be placed on probation is dubious. Lopez fails to identify anywhere in the record where the district court stated that it would grant Lopez probation if he continued to do well while out of custody before sentencing. Instead, Lopez suggests that the court *implied* that Lopez could earn probation by continuing to do well because it applauded him for his compliance with the conditions of his release. Opening Brief p. 6, JA 64. To be clear, after hearing from Lopez about his participation in the Victory Outreach program, the court told Lopez:

Good. Good. 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.

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At face value, the district court told Lopez that it was happy that he was taking advantage of the program and that the court was incurring some risk by releasing him into the community. The court did not tell Lopez that if he continued to do well that he could expect any particular outcome at sentencing.

Second, the defendant in Boyington worked as an undercover informant for the Mississippi Bureau of Narcotics “after receiving a promise of lenience and probation” from the law enforcement officer who transported him back to Mississippi from Pennsylvania for prosecution. 389 So. 2d at 487-88. The prosecutor also agreed to recommend probation to the court. *Id.* There is no similar promise that the State would recommend probation upon fulfillment of any particular terms in this case. The only promise made by the State was to recommend that the sentences run concurrently. JA 10-11.

Finally, the Mississippi Supreme Court noted that at the time of the Boyington decision, Mississippi’s trial courts apparently placed an outsized level of importance on the prosecutor’s sentencing recommendation.

While, as stated above, the trial judge must control the sentencing phase of a criminal trial, it is common knowledge among courts, prosecutors, attorneys and even laymen, that a prosecutor, who represents the State, is, or should be, fully informed and knowledgeable about the case which he will present to the court, its strength or weakness, and its effect on

similar cases, more so than the trial judge himself. With that in view, *trial judges, as a rule, follow the recommendations of the prosecutor, unless they are patently contrary to the interest of the State and the people, or are unfair and unjust.* 389 So. 2d at 490-91 (emphasis added).

Here, Lopez cannot and does not suggest that the State's recommendation carried such an outweighed importance in the district court's sentencing decision. Because Boyington was based upon a system in which the prosecutor's recommendation was apparently the final decision except in rare circumstances and because Lopez complains not of prosecutorial misconduct but of a judicial abuse of discretion, it is patently distinguishable from the facts of this case and should not sway this Court's judgment.

V. CONCLUSION

The district court did not abuse its discretion by sentencing Lopez to prison rather than granting him a chance at probation. The district court did not rely on any highly suspect or palpable evidence in determining the sentence. It also never explicitly promised Lopez that he would be sentenced to probation so long as he complied with the conditions of his pre-sentence release. Any such promise existed only in Lopez's mind and was not binding upon the district court. Because the district court acted

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within the bounds of its discretion and in the interests of public safety,
Lopez's sentence should be affirmed.

DATED: November 23, 2021.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
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: November 23, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 23, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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