

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON BEST

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 83495

Appeal from a Judgment of Conviction After Guilty Plea
in Case CR20-3438A
Second Judicial District Court of the State of Nevada, Washoe County
Honorable Barry L. Breslow, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
3. Law firm appearing in the Court(s) Below:

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DATED this 1st day of March, 2022.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a guilty plea. 1 Appellant's Appendix (AA) 092. A Notice of Appeal was filed on September 9, 2021. 1 AA 092. This Court has appellate jurisdiction pursuant to NRAP 4(b)(1)(A).

ROUTING STATEMENT

This case is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(1).

STATEMENT OF THE ISSUES

Did the District Court imposed an unduly and unfairly excessive sentence in violation of Mr. Best's Eighth Amendment Right under the U.S. Constitution and under Article 1, Section 6 of the Nevada Constitution which prohibits the imposition of cruel and unusual punishment given Mr. Best's serious mental health issues, recent head trauma, and other mitigating factors?

STATEMENT OF THE CASE

On May 25, 2021 an Information was filed charging Mr. Best with Battery With the Use of a Deadly Weapon in violation of NRS 299.481(2)(e). 1 AA 001.¹

¹ On May 28, 2021 an Information was filed in CR21-0995 charging Mr. Best with Robbery With the Use of a Deadly Weapon. 1 AA 004. Certain portions of the record in CR21-0995 are included herein due to the fact Mr. Best's sentence in this matter was imposed in the same sentencing proceeding as CR21-0995, in which

On June 9, 2021, Mr. Best plead guilty and was arraigned. 1 AA 008, 015.² On August 11, 2021 Mr. Best was sentenced (1 AA 050) and convicted to a term of 4 to 10 years imprisonment. 1 AA 092.³

STATEMENT OF FACTS

On or about October 24, 2020, Mr. Best pointed a firearm at the victim's bedroom of his home, and the victim was discovered with a red circular mark to his left rib and left elbow; officers located three bullet holes on the exterior of the victim's room.⁴ On June 9, 2021 Mr. Best plead guilty to Battery With the Use of a Deadly Weapon.

Prior to his sentencing a substance abuse and mental health evaluation was performed on Mr. Best and submitted to the District Court. 1 AA 030. The

Mr. Best also plead guilty (1 AA 043) and arguments of counsel at sentencing concerning how each sentence should apply vis-a-vis the other are relevant to this appeal as well as the District Court's sentencing decision on both cases.

² The Guilty Plea Memorandum on file with the District Court contains two partial pages of the file stamped plea followed by the full guilty plea memorandum which is not file stamped. *Id.*

³ In CR 21-0995 Mr. Best was sentenced to an aggregate term of 8 to 15 years for Robbery With the Use of Deadly Weapon consecutive to the term imposed in the instant case for a total term of 12 to 30 years. 1 AA 050, 1 AA 095.

⁴ See Presentencing Investigation Report. A Motion to Submit the PSI is filed concurrently herewith.

substance abuse evaluation reported that Mr. Best, then 21 years of age, was a current user of cocaine and Xanax and was using on the day of his arrest for the instant offense. 1 AA 030, 035 paragraph 3. The evaluation noted that Mr. Best had adverse childhood experiences with substance abuse and mental health issues, and physical and sexual abuse from his foster parents. *Id.* at 036, paragraph 6. Mr. Best was diagnosed with Sedative, Hypnotic or Anxiolytic Use Disorder, severe; Cocaine Use Disorder, severe; and Cannabis Use Disorder, severe. *Id.* at 036, paragraph 4.

Mr. Best's mental health evaluation reported considerable evidence of significant mania and depression as well as anxiety. 1 AA 030. 041, paragraph 3. It was further reported that Mr. Best appeared to meet 8 of the 11 diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, for Bipolar Disorder with rapid cycling features; 8 of the 11 criteria for Stimulant Use Disorder, severe cocaine use; and 5 of the 11 diagnostic criterial for Cannabis Use Disorder. *Id.* at 042. The evaluator concluded that Mr. Best has a serious mental illness and also serious substance use disorders. *Id.*

At sentencing Mr. Best was sentenced on the instant matter and on CR21-0995, Robbery with the Use of a Deadly Weapon, and CR21-0102 (child abuse). 1 AA 050. At sentencing, the District Court noted the substance abuse and mental health evaluations, including Mr. Best's horrible childhood, history of substance abuse, and mental health issues of bipolar disorder and post-traumatic stress. *Id.* at

064-066. Mr. Best's attorney on the instant case requested that, based upon the circumstances of Mr. Best substance abuse and mental health history and his remorse, that he be given the minimum sentence of 2 to 5 years, and that it run concurrent to the ancillary cases, CR21-0995 and CR21-0102. *Id.* at 067:9-24, 068, 069:1-13. Mr. Best's attorney on the other two cases requested the minimum sentences on CR21-0995 (Robbery with a Deadly Weapon) – 24 to 60 months with 12 to 34 months enhancement consecutive by law, and 12 to 36 months on CR21-0102 (child abuse), and that they run concurrently with the sentence on the instant case. *Id.* 072:15-24, 073:1-2. On these cases Mr. Best's attorney justified the requested sentences based upon Mr. Best's desire to take responsibility for his actions, his minimal criminal history prior to the three cases which occurred close in time, his mental health and substance abuse issues, his horrific childhood, and his diagnosis of depression, anxiety, bipolar disorder, post-traumatic stress disorder, and substance abuse disorders. *Id.* at 072:19-24, 073-074. Trial counsel also informed the District Court that Mr. Best suffered brain damage from two car accidents that occurred quite recently before the crimes occurred, and that Mr. Best was off his medication at the time of the events. *Id.* at 074:24, 075:1-18. Notwithstanding, based upon the State's recommendation, the District Court sentenced Mr. Best to 4 to 10 years on the battery charge. In addition, while not the subject of this appeal, the District Court sentenced Mr. Best to 12 to 48 months on the child abuse charge

(CR 21-0102) and an aggregate sentence of 12 to 20 years for robbery with the use of a deadly weapon (CR 21-0995) to be served concurrently to the child abuse sentence but consecutive to the sentence for battery with a deadly weapon. 1 AA 050086:16-24, 087, 088:1-10.

SUMMARY OF THE ARGUMENT

Mr. Best suffers from severe mental illness and has been diagnosed with severe depression and anxiety, bipolar disorder, post-traumatic stress disorder, and substance abuse disorders which very likely arose due to his mental health issues. Mr. Best was not on his medication at the time the offense was committed and had recently suffered head trauma due to two serious car accidents.

Mr. Best's sentence of 4 to 10 years for battery is excessive and constitutes cruel and unusual punishment given significant mitigating factors including his serious mental health issues, his horrific childhood, and his remorse. Despite the mitigating factors the sentencing court did not consider running Appellant's sentence concurrent to the sentence imposed in CR21-0995 or consider probation or a suspended sentence after a minimum sentence was served (after he served his sentence in CR21-0995) but rather imposed the maximum prison sentence. Based upon the district court's abuse of discretion in sentencing Mr. Best to an unduly harsh sentence for battery, Mr. Best's conviction should be reversed and the case remanded for a new sentencing hearing.

ARGUMENT

The District Court imposed an unduly and unfairly excessive sentence in violation of Mr. Best's Eighth Amendment Right under the U.S. Constitution and under Article 1, Section 6 of the Nevada Constitution which prohibits the imposition of cruel and unusual punishment given Mr. Best's serious mental health issues, recent head trauma, and other mitigating factors.

Standard of Review.

A defendant's challenge of a sentence will be reviewed for an abuse of discretion on appeal. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

Legal Authorities.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. A sentence within the statutory limits is not cruel and unusual punishment unless 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), quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

The discretion afforded a district court in imposing a sentence enables the sentencing judge to consider a wide, largely unlimited variety of information to ensure that the punishment fits not only the crime, but also the individual defendant. *Norwood v. State*, 112 Nev. 438, 915 P.2d 277, 278 (1996); *Martinez v. State*, 114 Nev. 735, 961 P.2d 143, 145 (1998).

This Court has expressed the view that, absent a court's reliance on highly suspect evidence, it would not interfere with the district court's imposition of a sentence. *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976); *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1993). However, there is another judicial view which Mr. Best believes should be adopted by this Court under the particular facts of this case including the fact Mr. Best suffers from severe mental illness, was not on his medication at the time of the offense and had recently suffered head trauma.

In the Dissent by Justice Rose in *Tanksley v. State*, 113 Nev. 844, 944 P.2d 240 (1997) (Rose, J. Dissenting), Justice Rose opines on three important reasons for a more stringent review of sentencing decisions that a judge may legally impose: (1) the part of the criminal process that has the greatest ultimate effect on the defendant, the imposition of his sentence, is the part the high court declines to review; (2) the high court reviews every discretionary act performed by the district court but will not scrutinize the sentence imposed in felony crimes, and; (3) the failure to conduct an appellate review of the sentencing process is an abdication of the high court's inherent authority to ensure that justice is achieved in sentencing matters. *Tanksley*, 113 Nev. 852-853 (quotations omitted), *citing Sims v. State*, 107 Nev. 438, 814 P.2d 63 (1991) (Rose, J. Dissenting).

Here, although the sentence imposed on Mr. Best for shooting at the exterior of the victim's home falls within the statutory guidelines (NRS 200.481(2)(e)(1)

provides a sentencing range of 2 to 10 years), Mr. Best's conduct did not warrant a sentence at the high end of that range especially given the significant mitigating factors presented to the District Court. At the very least, Mr. Best's sentence should have been the minimum requested by his attorneys. In considering Mr. Best's serious mental illness and other mitigating factors an appropriate and fair sentence would have been to run Mr. Best's sentence concurrent with the sentence imposed in CR21-0995.

CONCLUSION

The circumstances of this case warrant serious consideration of the mitigating factors presented to the District Court regarding the Appellant as analyzed in light of the thoughtful and valid points made by Justice Rose. Mr. Best suffers from severe mental illness, was not on his medication at the time of the offense and had suffered head trauma prior to the offense. A lengthy term of imprisonment for an individual who is suffering from the life Mr. Best has experienced shocks the conscious and warrants that this case be remanded to the district court for a new sentencing hearing.

DATED this 1st day of March, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 2,396 words.

3. Finally, I certify that I have read the 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day March, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

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

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DATED this 1st day of March, 2022.

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