

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CHRISTOPHER GREEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 84087 Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from a Judgment of Conviction in Case Number CR21-2673
The Second Judicial District Court of the State of Nevada
Honorable Barry L. Breslow, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on December 13, 2021. JA 50-51 (Judgment of Conviction).¹ Appellant, John Christopher Green (Mr. Green), timely filed a notice of appeal from that judgment on January 12, 2022. JA 52-53 (Notice of Appeal). This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because it is an appeal based on a guilty plea.

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Whether the district court abused its sentencing discretion.

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction based on a plea of guilty. The State charged Mr. Green with one count of attempted robbery, a violation of NRS 193.330 and NRS 200.389, a category B felony, JA 1-3 (Information). Mr. Green entered a guilty plea to this

¹ "JA" stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1).

count. JA 15 (Transcript of Proceedings: Arraignment). The negotiations provided that in exchange for Mr. Green's guilty plea, the State would not pursue any other charges or enhancements in this case and the parties were free to argue for an appropriate sentence. JA 6 (Guilty Plea Memorandum) (Paragraph 7); JA 11 (Transcript of Proceedings: Arraignment).

At the sentencing hearing the district court imposed a sentence of 42 to 120 months in the Nevada Department of Corrections and credited him for 124 days in predisposition custody. JA 50-51 (Judgment of Convictions). The district court also imposed statutorily required fees and assessments and ordered restitution in the amount of \$194.00. *Id.* Mr. Green timely filed a notice of appeal from the district court's judgment of conviction. JA 52-53 (Notice of Appeal).

V. STATEMENT OF THE FACTS

Arraignment

The State charged Mr. Green with one count of attempted robbery alleging, that he attempted to "willfully and unlawfully take personal property [money and a cell phone] from the person or in the presence of Elizabeth Fay Kinkle against her will and by means of force or violence

or fear of immediate or future injury to her person.” JA 1-2 (Information). At his arraignment Mr. Green enter a guilty plea to this count. JA 15 (Transcript of Proceedings: Arraignment). Before accepting Mr. Green’s plea, the district court canvassed him. JA 12-15. In its canvass of Mr. Green the district court informed him that the sentencing range, “if the Court ... decides for incarceration as opposed to probation, is one to 10 years in the Nevada Department of Corrections[.]” *Id.* at 14. The district court accepted Mr. Green’s guilty plea, *Id.* at 16, and set the matter for sentencing. *Id.* at 17.

Sentencing

The district court began sentencing by recounting all of the material it had reviewed in preparation for sentencing. JA 22-23 (Transcripts of Proceedings: Sentencing). Mr. Green’s counsel then addressed the court and stated that she would be arguing for probation with any terms and conditions that court “would deem fit.” *Id.* at 24. She noted that Mr. Green had been accepted into a program at the Reno Gospel Mission, as well as the Salvation Army. *Id.* She acknowledged Mr. Green’s “lengthy criminal history” but noted that it was mainly “all stemming from an underlying issue of substance abuse.” *Id.* at 24.

Counsel noted that Mr. Green’s “substance abuse issues began at the young age of 11. She pointed out that the criminal history demonstrated that when he is sober he can succeed. And that he has benefited from rehabilitation and treatment in the past. *Id.* at 25. She argued that “his own history [tells the Court] that he could succeed on probation, with conditions that adequately help him get sober, and have those skills.” *Id.* She added that Mr. Green had been proactive while in custody and had completed substance abuse, anger management, and faith-based classes while in custody. *Id.* at 25-26.

Counsel also explained that Mr. Green and Ms. Kinkle were “not in a healthy relationship” and that Mr. Green “is ready to take responsibility for the incident.” *Id.* at 25. Counsel ended where she began, requesting the court grant Mr. Green probation. *Id.* at 26 (“Your Honor, I do think probation is appropriate. I do not think Mr. Green is beyond help. Yes, he has a history, but we have a solvable problem.”).

Mr. Green addressed the court. He told the court that he had been “in a mess of a relationship.” *Id.* at 27. Going forward he said he could do so with “God’s help.” *Id.* He told the court that he is making healthy choices now and explained himself. *Id.* at 28-30.

The State argued for a period of incarceration specifically, 36 to 120 months. *Id.* at 31. The State reasoned that notwithstanding Mr. Green's statements to the court, "looking at the facts and looking at his criminal history, unfortunately, we do need to recommend a prison sentence in this case." *Id.* But she added, "I did look at the PSI, and I noted that significant piece and period of time where he looked to be clean and sober, he didn't have that criminal history. And because of that, we are not recommending the maximum." *Id.* She told the court: "Mr. Green's criminal history, the violence that he inflicted in this case, the victim in this case, she suffered two broken ribs. He was a bully. He was a bully that was using some type of controlled substance. And because of that, he is a danger to the community." *Id.* and *Id.* at 32 (stating, "So with, you know, his criminal history, and with the violence that was inflicted, and the fact that he continuously puts himself in this situation, again, I am requesting 36 to 120 months.").

Ms. Kinkle was on her smart phone in a zoom waiting room. Because of technical difficulties, the court paused the hearing in order to give her an opportunity to come to court to make her statement. *Id.* at 32-36. When she arrived at the courthouse she was provided a

computer in order to address the court. *Id.* at 37. Ms. Kinkle told the court that she was not a saint, that she had a drug problem, that she had a record. She described their relationship, which was now over. *Id.* at 37-38 (“I could have put hands on him, like, long ago, like three years ago. But every time he came back, he was hitting on me, hitting on me.” But I’m not – I can’t take it no more. With broken bones, and now I’ve got to have my whole – my shoulder replaced.”). Counsel objected to Ms. Kinkle’s recounting of past incidents. *Id.* at 39. The court interrupted Ms. Kinkle’s narrative to ask about sentencing. *Id.* at 40 (explaining the court’s sentencing options). She answered that prison would be “a vacation” for Mr. Green and that he should pay for her injuries, which “[h]e can’t do ... by sitting in prison.” *Id.* at 40-41. Neither counsel had questions for Ms. Kinkle. *Id.* at 42.

Based on Mr. Green’s guilty plea the court adjudicated him guilty of attempted robbery. *Id.* at 43. The court acknowledged Mr. Green’s criminal history, his substance abuse problems, and that he hurts people when he is high “either on methamphetamine or something else.” *Id.* at 44, 45. The court then imposed a sentence of 42 to 120

months in the Nevada Department of Corrections, and credited Mr. Green for 124 days in predisposition custody. *Id.* at 45-46.

VI. SUMMARY OF ARGUMENT

Because this is a sentencing appeal the Court must review for abuse of discretion. An abuse of discretion exists where “the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotations and footnote omitted). An overarching principle guiding sentencing courts is that they should, best captured in the words of 18 U.S.C. § 3553(a), “impose a sentence sufficient, but not greater than necessary” to accomplish the goals of sentencing. In that regard, a sentence should reflect a reasonable choice between sentencing alternatives that strikes a fair balance between a defendant’s need for rehabilitation and society’s interest in safety and deterrence. Here, the district court abused its sentencing discretion by imposing a prison sentence greater than necessary.

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VII. ARGUMENT

The district court abused its sentencing discretion by imposing a prison sentence greater than necessary.

Standard of Review and Discussion

District court sentencing decisions are reviewed under an abuse of discretion standard. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000). Generally, reviewing courts “will refrain from interfering with the sentence imposed” where the record “does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Major v. State*, 130 Nev. 657, 661, 333 P.2d 235, 238 (2014) (internal quotation marks omitted) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). An abuse of discretion can occur however, where “the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason,” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)), or “fails to give due consideration to the issues at hand.” *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013) (citations omitted).

Sentencing by its very nature is a discretionary decision. As such, “it requires the weighing of various factors and striking a fair accommodation between the defendant’s need for rehabilitation and society’s interest in safety and deterrence.” *People v. Watkins*, 613 P.2d 633, 635-36 (Colo. 1980) (citations omitted). “[T]he discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. On the contrary, the sentencing decision should reflect a rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process.” *Id.* at 636 (italics added). Stated differently, while a district court has wide sentencing discretion, *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), that discretion is not limitless. *Parish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

An overarching principle that must guide sentencing courts is that they should—as best stated in in the words of 18 U.S.C. § 3553(a)—“impose a sentence sufficient, but not greater than necessary” to accomplish the goals of sentencing. To determine whether the district court’s sentence in this case constitutes an abuse of discretion under this principle, this Court can narrow its focus. First, it cannot go

unnoticed that that Mr. Green had pleaded guilty to one count of attempted robbery, *i.e.*, that he attempted to take Ms. Kinkle's cell phone and some money. But the State's sentencing argument centered entirely on his past criminal history and on physical injury suffered by the victim. If this Court determines that the State's sentencing argument, though not objected to, was inappropriate because it did not address the actual crime to which Mr. Green had pleaded guilty, the Court can remand for a new sentencing hearing on that basis.

Second, the sentence the district court imposed is within the sentencing range of the applicable statute, it is greater than necessary. Here the district court stated that it had considered Mr. Green's criminal history and substance abuse issues, as well as the sentencing arguments of the parties. While Mr. Green's criminal history may explain the court's implicit rejection of his request for probation (with conditions²), it alone cannot support a sentence of 42 to 120 months

² See, NRS 176A.400(1)(c) (“[i]n issuing an order granting probation ... the court may fix the terms and conditions thereof, including, without limitation: ... [a]ny reasonable conditions to protect the health, safety or welfare of the community or to ensure that the probationer will appear at all times and places ordered by the court[.]”). It appeared that Ms. Kinkle's request was for probation, albeit in order to ensure payment for her injuries.

where, based on that same history, the State reasoned that a sentence of 36 to 120 months was sufficient.

To be sure, a sentencing court is not bound by the State's sentencing recommendation and "that the matter of sentencing is to be determined solely by the Court." JA 7 (Guilty Plea Memorandum) (Paragraph 12). Yet, a sentencing court "abuses its discretion when it 'fails to give due consideration to the issues at hand.'" *Brass v. State*, 138 Nev. Adv. Op. 23, 507 P.3d 208, 216 (2022) (quoting *Patterson v. State*, 129 Nev. at 176, 298 P.3d at 439). Here the district court upped Mr. Green's minimum sentence by six months. It did so based on Mr. Green's tragic abuse of controlled substances "since a very young age." "[T]hat's informed his actions as an adult, which has led to a more-than-three-decade criminal history." And on the result of his "certainly complicated" relationship with Ms. Kinkle." JA 45. Notably, the State's recommendation also rested on both of these factors. See JA 31 ("I did look at the PSI, and I noted that significant piece and period of time where [Mr. Green] looked to be clean and sober, he didn't have that criminal history. And because of that, we are not recommending the maximum. We are recommending 36 to 120 months, though."). The

record is silent on any other factor considered by the court. Absent some other factor, the court's unilateral increase in the minimum sentence appears to be arbitrary, appears to be "greater than necessary", and appears to be an abuse of discretion.

VIII. CONCLUSION

A sentence should reflect a reasonable choice between sentencing alternatives that addresses the crime for which the defendant pleaded guilty and that strikes a fair balance between a defendant's need for rehabilitation and society's interest in safety and deterrence. For the reasons provided above, this Court should vacate the sentence entered below and remand for a new sentencing hearing.

DATED this 16th day of May 2022.

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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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 2,752 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 16th day of May 2022.

/s/ John Reese Petty

JOHN REESE PETTY

Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of May 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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