

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 15 2021 01:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

HENRY APARICIO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 80072

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

DAMIAN SHEETS, ESQ.
Nevada Bar #010755
KELSEY BERNSTEIN, ESQ.
Nevada Bar #013825
Nevada Defense Group
714 S. Fourth Street
Las Vegas, Nevada 89101
(702) 988-2600

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE(S)..... 1

STATEMENT OF THE ISSUE(S)..... 1

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

 I. ARTICLE 1, SECTION 8(A)(7) AKA “MARSY’S LAW” CAN
 BE READ BROADLY TO ENCOMPASS A VARIETY OF
 INDIVIDUALS 2

 II. SENTENCING COURTS SHOULD HAVE WIDE
 DISCRETION IN CONSIDERING LETTERS AND TESTIMONY. 5

CONCLUSION..... 14

CERTIFICATE OF COMPLIANCE..... 15

TABLE OF AUTHORITIES

Page Number:

Cases

<u>Bellon v. State,</u> 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005).....	5
<u>Deveroux v. State,</u> 96 Nev. 388, 610 P.2d 722 (1980).....	11
<u>Friedman v. State,</u> 133 Nev. 1010, 387 P.3d 219 (2017).....	10
<u>Kraemer v. Kraemer,</u> 79 Nev. 287, 291, 382 P.2d 394, 396 (1963).....	6
<u>Randell v. State,</u> 109 Nev. 5, 7, 846 P.2d 278, 280 (1993).....	10
<u>Renard v. State,</u> 94 Nev. 368, 580 P.2d 470 (1978).....	13
<u>Silks v. State,</u> 92 Nev. 91, 94, 545 P.2d 1159,1161 (1976).....	9, 10, 13
<u>Wood v. State,</u> 111 Nev. 428, 430, 892 P.2d 944, 946 (1995).....	2
<u>Wyatt v. State,</u> 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).....	5

Statutes

NRS 48	8
NRS 48.015	8
NRS 176.015	2, 6
NRS 176.015(5)(d).....	6

NRS 176.015(6).....2, 6, 8

Other Authorities

Article 1, Section 8(A)..... 3

Article 1, Section 8(A)(1)(h) 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY APARICIO,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Case No. 80072

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

STATEMENT OF THE ISSUE(S)

Whether the sentencing court properly considered letters that were submitted to it for sentencing.

STATEMENT OF THE CASE

The State incorporates, by reference, the Statement of the Case contained in the State's Answering Brief previously filed with this Court. The Court of Appeals reversed and remanded Appellant's case for a new sentencing hearing. Respondent sought rehearing from the Court of Appeals, and after the Court of Appeals denied rehearing, Respondent sought leave with the Nevada Supreme Court for review.

STATEMENT OF THE FACTS

The State incorporates, by reference, the Statement of the Fact contained in the State's Answering Brief previously filed with this Court.

SUMMARY OF THE ARGUMENT

The district court properly considered the letters that were submitted to it leading up to Appellant's sentencing. Article 1, Section 8(A)(7), commonly referred to as "Marsy's Law," allows for broad consideration as to anyone who has been affected by crime. Furthermore, even if Marsy's Law did not specifically apply to some of the letters submitted, the district court still could consider the letters under NRS 176.015(6) which allows the court to consider any other relevant and reliable evidence.

ARGUMENT

A. ARTICLE 1, SECTION 8(A)(7) AKA "MARSY'S LAW" CAN BE READ BROADLY TO ENCOMPASS A VARIETY OF INDIVIDUALS

Sentencing courts are statutorily provided with sentencing authority pursuant to NRS 176.015. Sentencing courts have wide discretion to decide what evidence it wishes to consider prior to rendering a sentence. Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995). NRS 176.015(6) allows for the sentencing court to consider "any reliable and relevant evidence at the time of sentencing."

Perhaps an initial issue is that the parties to court proceedings, both the defense but also the State of Nevada and the courts, have referred to any letter written in support of the victim as a "victim impact statement." Understandably, the use of the term implies that a "victim" is giving testimony or an opinion to a sentencing judge. While the colloquial term of "victim impact statement" has often been used,

the judicial system may be better served by substituting a more accurate description regarding what the letters actually represent.

In addition to the statutory considerations at sentencings, Article 1, Section 8(A) (commonly referred to as Marsy's Law), was rather recently added to the Nevada Constitution. Although Marsy's Law contains multiple provisions, the only two that are seemingly relevant to the analysis in this case are subsections (h) and (j). Those sections read follows:

1. Each person who is the victim of a crime is entitled to the following rights:

(h) **To be reasonably heard**, upon request, at any public proceeding, including any delinquency proceeding, in any court **involving** release or **sentencing**, and at any parole proceeding.

(j) **To provide information** to any public officer or employee conducting a presentence investigation **concerning the impact of the offense on the victim** and the victim's family and any sentencing recommendations **before the sentencing of the defendant**. (emphasis added).

Additionally, Marsy's Law defines a "victim" as "any person directly and proximately harmed by the commission of a criminal offense." Article 1, Section 8(A)(7).

Marsy's Law undoubtedly was meant to provide for and guarantee certain rights to those that fall within its definition of a "victim." The plain language of Marsy's Law defines a victim as "any person directly and proximately harmed by the commission of a criminal offense." Although, Appellant represents that the "directly and proximately harmed" language is incredibly narrow, alternatively the

definition could easily be construed quite broadly. A court could theoretically provide the protections of Marsy's Law to anyone that has been "directly and proximately harmed." Hypothetically, if in this case there was a driver of a vehicle headed to the hospital for the birth of her child, but the accident caused by Appellant stopped traffic so that she was unable to make it to the hospital. Perhaps this victim was not the kind that was originally contemplated when Marsy's Law was created, but one could make a plausible argument that the driver suffered direct and proximate harm because of Appellant's crime. Ultimately, it should be left to the district court as the gatekeeper of information at the sentencing to decide if this hypothetical driver would be awarded any of the protections as a "victim."

Considering Marsy's Law's broad definition, it certainly was not error for the district court to provide reasonable consideration of the letters that were submitted at sentencing. This is relevant because Article 1, Section 8(A)(1)(h) only requires that the sentencing court allow the "victim" to be reasonably heard. The situation here was not one where the district court allowed every individual who wrote a letter unlimited time in court to provide oral testimony against Appellant. The letters were a de minimis opportunity for the individuals to be considered and heard.

Based upon this broad definition, it was not erroneous for the district court to review and consider the letters in this case. Contrary to Appellant's Supplemental Brief, the State is not arguing that the provisions of Marsy's Law should be expanded

to all other individuals. App. Supp. Brief., p. 5. Marsy's Law does specify a class of individuals that are meant to receive its protections, so it would be error for the State or even this Court to legislatively expand its definition to "non-victims." However, here the district court used the broad definition to allow for the admittance and review of letters that were written in support of the victims' families. The letters were merely part of the district court's overall consideration.

Conversely, the district court could have denied admittance of the letters if it believed that they should not be considered under Marsy's Law. Again, the district court as the gatekeeper of information should have great deference in making this decision. However, in this case, it just so happens that the letters were given some consideration. Based on the fact that the district court admitted the letters and sentenced Appellant to a lawful sentence, the Court of Appeals Order to reverse the sentence was done in error because the district court was lawfully permitted to consider the letters.

B. SENTENCING COURTS SHOULD HAVE WIDE DISCRETION IN CONSIDERING LETTERS AND TESTIMONY

Even if this Court determines that the letters were not admissible pursuant to Marsy's Law, the district court was still permitted to consider the letters on other grounds. "[I]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal." Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970); see also Bellon v. State,

121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005) (noting that trial court's decision may be upheld if court reached right result even though it was based on incorrect grounds); Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

The district court was permitted to consider the letters because of Nevada's statutory scheme of NRS 176.015(6)'s provision of considering any other reliable and relevant evidence. Again, this case deals with a sentencing court's consideration of letters. The sentencing court did not afford all the rights that are mandated to a defined "victim."

NRS 176.015(5)(d) defines a "victim" as:

- (1) A person, including a governmental entity, against whom a crime has been committed;
- (2) A person who has been injured or killed as a direct result of the commission of a crime; and
- (3) A relative of a person described in subparagraph (1) or (2).

A "relative," however, is narrowly defined as a (1) spouse, parent, grandparent or stepparent; (2) a natural born child, stepchild or adopted child; (3) a grandchild, brother, sister, half brother or half sister; or (4) a parent of a spouse. NRS 176.015(5)(b).

The catchall provision listed in NRS 176.015(6) is incredibly important because not every person that may have an interest in speaking with the court falls under the definition of a "victim" or "relative." Even if an individual lacks status as a "victim" or "relative" pursuant to NRS 176.015, it cannot possibly mean that a court is unable to consider evidence or testimony from that individual. Take for

instance a case involving the death of a victim with a long-term same sex partner. The statutory scheme as it currently exists does not mention or provide for any status of a long-term partner. However, it was only in November of 2020 that Article 1, Section 21 of the Nevada Constitution was amended to guarantee marriage regardless of gender. Up until the passage of the amendment, there was no constitutional right to marry, thus even if a couple wanted to be married, they might not be afforded the opportunity. However, under Appellant's strict reading of the statute, this individual despite experiencing the same love and sorrow as any other individual would not be permitted to speak at sentencing, or even write a letter, simply because his or her status was not specified by statute. If this Court were to ignore NRS 176.015(6)'s provision which gives the sentencing court judicial discretion to consider anything reliable and relevant, and only allow for individuals defined specifically by statute to give an opinion at sentencing, it would lead to incredibly unfair results for individuals who at no fault of their own could not achieve the status required to address a sentencing court.

Moreover, would it consequently mean that the partner would be precluded from addressing the court in any form or fashion? Would it be reversible error for the sentencing court to receive a letter from the partner? Would it be worse if the partner urged that the maximum sentence be imposed? The rule that a court is

precluded from considering such information simply because the individual lacks a particular label leads to incredibly absurd and unjust results.

Appellant, as well as the Court of Appeals, both agree that non-victim letters should not automatically be precluded from a sentencing court's consideration. However, both argue that for a court to consider the information, it must fall within the statutory guidelines of NRS 176.015(6) that requires evidence to be "relevant and reliable."

The Court of Appeals stated in its Order that "the district court considered and specifically relied upon *dozens of non-victim letters*, each of which contained some improper content." Order, p.11. In making this broad statement, the Court of Appeals criticized the district court for not stating which evidence was relevant and reliable and for not stating with specificity what it was considering in its sentence. Order, p. 13. However, despite this criticism, the Court of Appeals itself lacked any analysis of why the letters were deemed improper or unreliable.

Appellant, and partially the Court of Appeals, then turn to traditional notions of relevant evidence under NRS 48. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Aside from the fact that Chapter 48 of the NRS has to do with general admissibility of evidence, none of the parties seem to indicate what

evidence that the sentencing court considered was not “relevant.” The letters that were written expressed a viewpoint in support of the parents of the victims. The information conveyed was relevant to try and persuade the sentencing court to give what they perceived as a just sentence. The principle is no different than a letter on behalf of a defendant that equally tries to convince the sentencing court to show leniency. Ultimately, the letters from non-victims must be deemed if nothing else relevant to conveying a point of view.

The inquiry must then turn to what is considered reliable. This Court has said that the sentencing court may not rely on “impalpable or highly suspect evidence.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159,1161 (1976). In light of the forty-six letters, what information could be considered impalpable or highly suspect? Again, the letters merely expressed a point of view in favor of the victims’ families. The mere fact that Appellant does not want the sentencing court to consider that point of view because it may impact his sentence does not in any way diminish or call into question the integrity of the information expressed. This Court should also reflect on the example previously given of the same-sex partner who was not constitutionally guaranteed the ability to marry until November of 2020. If the partner expressed that a maximum penalty should be imposed because of the detrimental impact that a crime has caused, should that perspective then be discounted as either irrelevant or unreliable? Although this is only a hypothetical, this Court should take into

consideration this possibility, along with many other possibilities, that exist for people that may not have the ultimate status of a “relative” or “victim” by statute, and the sentencing court’s ability and need to hear that perspective. It is for this reason that it is best to leave the discretion with the sentencing court to determine what if any information it wishes to consider in the rendering of a sentence.

Letters from non-victims should also not be subject to the same evidentiary scrutiny as trial. Sentencings are not subject to the full due process protections of a trial. Silks v. State, 92 Nev., at 93, 545 P.2d at 1161. Appellant cites Friedman v. State for the proposition that “a sentencing hearing provides a full adversarial proceeding and ample due process protections,” but that is not at all what Friedman (an unpublished order) refers to. 133 Nev. 1010, 387 P.3d 219 (2017). Friedman had to do with whether he could overcome procedural bars for a postconviction petition for a writ of habeas corpus based upon acts that had occurred at his sentencing. Conversely, this Court has consistently held that sentencings are not a second trial or subject to the evidentiary standards that would be used at trial. Silks, 92 Nev. at 93, 545 P.2d at 1161.

As much of the Court of Appeals’ focus was directed at the letters advocating for a particular sentence, there is no basis for claiming that such information should be considered improper, unreliable, and irrelevant. Victims are permitted to express views regarding the amount of time that a defendant should serve. Randell v. State,

109 Nev. 5, 7, 846 P.2d 278, 280 (1993). This Court held that expressing a desired sentence was permissible even though the defendant argued that the statute did not specifically permit a victim to express that view. Although the State recognizes that such an opportunity was afforded to a “victim,” there is little logic in prohibiting a sentencing court from hearing such information and giving it an appropriate amount of consideration. The long-standing principle is that a district court is capable of vetting information. “The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision.” Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980). Yet despite this recognized principle of law, the Court of Appeals deviates by assuming that the sentencing court was incapable of considering letters from non-victims.

The Court of Appeals Order is especially puzzling when considering the entirety of the sentencing court’s record. The Court of Appeals narrowly and selectively placed a great deal of weight on the portion of the district court’s statement that said “[I]’m accepting those victim impact statements and I have read each and every one of them that was submitted to me.” Order, p.11. Although the district court uttered these words, it did so in the context of considering all information that was presented to it. Prior to rendering the actual sentence, the district court more fully said:

Mr. Aparicio, this is the time for sentencing and I have considered all the information presented, not only in the PSI but also your statement

here in court. I have certainly considered the statements of the family. I've read every letter that was submitted to me and as well as the video and the pictures that were presented here in court today.¹ AA V2, 319.

The district court then went on to specifically address the factors that Appellant's counsel urged the court to follow. The district court spoke of the "nature and circumstances of the offense and history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, and to promote the respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the family from further crimes of the defendant." AA V2, 319.

When read in its entirety, the district court appropriately considered all information when rendering its sentence. Despite the emphasis from the Court of Appeals Order that the district court mistakenly believed that it was required to consider the letters and that the error in considering them was not harmless given the sentence that Appellant received, an actual reading of the context of the district court's decision shows that its decision was carefully thought out and justified. The letters were considered in the greater context of the sentencing and what the district court thought was fair.

¹ Included in the letters that the district court referenced were also letters written on behalf of Appellant.

Therefore, it was clearly not an abuse of discretion for the district court to have considered the letters in the way that it did. There was certainly no indication that the letters were given an undue amount of weight in the ultimate sentence that Appellant received. “So 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.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The Court of Appeals also held as a matter of law that any error could not be deemed harmless considering the sentence that Appellant ultimately received, which slightly exceeded what was recommended by the State. However, this Court has recognized “the discretion vested in the district court with regard to imposing sentence on the criminals before it and has heretofore held that such discretion is not abused through the imposition of sentence in excess of that recommended by the State.” See Renard v. State, 94 Nev. 368, 580 P.2d 470 (1978). Thus, despite well-established principles of law, the Court of Appeals believed that the district court could not properly place weight on the various letters, and that it did not impose a proper sentence despite the consideration of two deceased individuals.

///

///

CONCLUSION

This Court should reverse the Court of Appeals Order and reinstate Appellant's sentence. The district court properly considered all information that was presented to it, and it rendered a sentence that was statutorily permissible. Even Appellant concedes that what should be considered relevant and reliable should be left to the court's discretion. Yet when the district court made that appropriate determination in this case, it was deemed to be improper simply because Appellant ultimately received a sentence towards the higher end of his eligibility. In this case there is no indication, however, that any of the information was false or unreliable. Given the sentencing court's ability to consider a wide range of information when sentencing an individual, Appellant's sentence should be affirmed.

Dated this 15th day of June, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this 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 is either proportionately spaced, has a typeface of 14 points of more, contains 3,241 words and 14 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of June, 2021.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DAMIAN SHEETS, ESQ.
KELSEY BERNSTEIN, ESQ.
Counsel for Appellant

DEBORAH L. WESTBROOK
Clark County Public Defender

RANDOLPH M. FIEDLER
Federal Public Defender

JOHN L. ARRASCASA
JOHN REESE PETTY
KENDRA G. BERTSCHY
Washoe County Public Defender

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ J. Garcia

Employee, Clark County
District Attorney's Office

AC/jg