IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY GEORGE HENEY, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 84268

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Elizabeth A. Brown
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Appeal of Judgement of Conviction
First Judicial District Court, Carson City
The Honorable James E. Wilson, District Court Judge

Respondent's Answering Brief

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ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Court of Appeals pursuant to Nev. R. App. P. Rule 17(b)(1), as it is an appeal from a judgment of conviction based upon a plea of guilty.

I. STATEMENT OF THE ISSUE

1. Whether the District Court abused its discretion at sentencing

II. STATEMENT OF THE CASE

On February 16, 2021, Timothy George Heney, Jr. ("Appellant") was charged by way of Criminal Complaint with one count of Obtaining and Using Personal Identifying Information of Another Person (Category B Felony – NRS 205.463(3)(c) and 205.4617) and five counts of Grand Theft, Greater than $3500 (Category B Felony – NRS 205.0832 and 205.0835(4)). Appellant's Appendix ("AA") 1-5.

Pursuant to negotiations, the State filed a Criminal Information charging Appellant with one count of Obtaining and Using Person Identifying Information of Another Person and one count of Grand Theft, Greater than $3500. AA 6-17. As a part of the plea agreement, the State agreed to not oppose concurrent sentences between the counts. AA 7.

On February 15, 2022, the district court sentenced Appellant to a period of forty-eight (48) months minimum to one hundred and twenty (120) months maximum on Count I and twenty-four (24) months minimum to sixty (60) months maximum on Count II, to run consecutive to Count I. AA 57-58.

III. STATEMENT OF FACTS

The sentencing court relied on the following facts contained on page 7 of the Presentence Investigation Report at sentencing.

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On June 20, 2020, the victim filed a report of theft at the Carson City Sheriff's Office. The victim reported when she got her taxes prepared, she learned she owed the Internal Revenue Service (IRS) over $15,000.00 for the early withdraw from her 401K retirement account and when she logged in to check her account balance it was at zero dollars and the victim did not withdraw the money from this account.

The victim reported her ex-boyfriend Timothy Heney, later identified as the defendant, previously had access to all of her accounts and knew her passwords. Additionally, the victim had verification the defendant had changed the email account on her investments account and had changed the primary owner's date of birth on an additional account. The victim further reported the defendant had previously taken funds from her bank account without permission while they were actively dating.

The victim provided an account history from a Transamerica account showing five transactions listed as IRA Rollovers. The transactions were as follows: the first was $3,150.00 on April 16, 2019, the second was $4,500.00 on May 19, 2019, the third was $27,000.00 on May 15, 2019, the fourth was $28,000.00 on June 5, 2019, and the fifth one was $5,443.38 on August 20, 2019, totaling $61,793.38. Additionally, the victim provided copies of three checks that were endorsed "pay to the order of Timothy Heney" totaling $5,313.77. The victim reported she did not request the checks, nor did she endorse them.

On August 25, 2020, a deputy spoke with the defendant in reference to the fraudulent checks and withdraws from the victim's account. The defendant stated, "that's just not true." Additionally, the defendant stated he did not steal anything from the victim, and she was "crazy."

Through investigation, the deputy learned the defendant deposited the three checks into his bank account and received amounts in his

bank account that exactly matched the IRA Rollovers deducted from the victim's account.[1]

On February 15, 2022, during the sentencing hearing, the victim was sworn presented an impact statement to the court. AA 41-46. During her impact statement, the victim referenced several uncharged prior bad acts that the Defendant allegedly committed during the scope of their relationship. AA 44-45. When the district court asked trial counsel if there was any legal reason why judgment should not be entered, trial counsel raised the issue of the victim mentioning the prior bad acts during her impact statement. AA 51-52. The district court noted that it would not consider the other prior bad acts that the victim mentioned, and the district court gave trial counsel the opportunity to cross-examine the victim. AA 52. Trial counsel did not seek to cross-examine the victim. AA 52.

The district court subsequently sentenced Appellant to a period of forty-eight (48) months minimum to one hundred and twenty (120) months maximum on Count I and twenty-four (24) months minimum to sixty (60) months maximum on Count II, to run consecutive to Count I. AA 57-58. The district court further ordered Appellant to pay Restitution in the amount of $73,658.91.

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[1] Because this was an entry of a guilty plea and no preliminary hearing or grand jury transcript is available, pending before this Court is a Motion to Transmit Appellant's Presentence Investigation Report, so Respondent may reference it for both factual and argument purposes.

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IV. SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in sentencing Appellant because it did not consider the uncharged prior bad acts mentioned in the victim's impact statement.

V. ARGUMENT

A. The district court did not abuse its discretion in sentencing Appellant because it did not rely on impalpable or highly suspect evidence.

District courts are granted "wide discretion" in sentencing decisions, and sentencing decisions will not be disturbed "[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." *Allred v. State*, 120 Nev. 410, 420, 92 P.2d 146, 1253 (2004) (*quoting Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in sentencing, and, absent an abuse of discretion, the sentence will not be disturbed on appeal. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280, (1993) (*citing Deveroux v. State*, 96 Nev. 388, 610 P.2d 722 (1980)). "When a defendant pleads guilty pursuant to a plea agreement containing a sentencing recommendation, and the district court accepts the proffered guilty plea, the district court retains wide discretion in imposing sentence." *Stahl v. State*, 109 Nev. 442, 444, 851 P.2d 436, 438 (1993) (footnote omitted).

Here, Appellant argues that because the district court deviated from the joint recommended sentence, the district court relied on impalpable or highly suspect evidence in the uncharged bad acts mentioned in the victim's impact statement. However, this argument is belied by the record. The district court

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expressly stated on the record that it would not consider the uncharged bad acts that the victim mentioned. AA 52. Additionally, although the district court deviated from the stipulated sentencing recommendation of concurrent sentences, the district court retained its wide sentencing discretion. Imposing consecutive sentences was within the district court's discretion. *See* NRS 176.035(1).

Because the district court did not consider Appellant's uncharged bad acts, Appellant has failed to demonstrate the district court relied on impalpable or highly suspect evidence in sentencing. Therefore, Appellant has failed to demonstrate that the district court abused its discretion at sentencing.

VI. CONCLUSION

Based on the foregoing, this Court should deny Appellant's claim and affirm the Appellant's Judgment of Conviction.

DATED this 28th day of July, 2022.

JASON D. WOODBURY
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VII. VERIFICATION AND CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(7), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This Answering Brief has been prepared in a proportionally spaced type face using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this Answering Brief statement complies with the page limitations stated in Rule 32(a)(7)(A)(ii), because it is proportionally spaced, has a typeface of 14 points or more, and it does not exceed 30 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely Answering Brief and the Supreme Court of Nevada may sanction an attorney for failing to file a timely Answering Brief, or failing to cooperate fully with appellate counsel during the course of an appeal.

I therefore certify that the information provided in the Respondent's Answering Brief is true and complete to the best of my knowledge, information, and belief.

Dated this 28th day of July, 2022.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 28th day July, 2022. Electronic service of this document will be made in accordance with the Master Service List as Follows:

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Dated this 28th day of July, 2022.

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