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Cassinelli v. State of Nevada, 131 Nev. Adv. Op. 62 131(Aug. 27, 2015)

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CRIMINAL LAW: SENTENCING

Summary

The Court of Appeals determined that (1) the district court erred by ruling that Cassinelli was not eligible for alcohol treatment under NRS § 458.300(1)(d); (2) the district court did not abuse its discretion by denying Cassinelli's request for assignment to a program of treatment; (3) the plea agreement was not breached and the prosecutor did not engage in misconduct at sentencing; (4) the district court did not err by refusing Cassinelli an opportunity to cross-examine the victim during her impact statement at sentencing; (5) Cassinelli's sentence was illegal.

Background

Appellant Dominic Cassinelli and the victim were romantically involved from 2006 to 2012. The pair engaged in sadomasochistic sex during the course of their relationship. Initially it was consensual, but over time the sex became so violent with increased use of handcuffs and weapons, the victim no longer wanted to participate. The victim moved away and eventually reported sexual assault against Cassinelli. Prosecutors charged Cassinelli with multiple counts of sexual assault and child abuse. Ultimately, Cassinelli took a plea agreement and entered an *Alford* plea to coercion, a felony, (Count I), and preventing a person from testifying, a gross misdemeanor (Count II).² Count I did not contain any language to reflect that coercion constituted domestic violence and the parties agreed Count I would not be treated as sexually motivated. The parties were free to argue the sentence regarding Count II.

At sentencing, despite the State's recommendation that Cassinelli undergo alcohol treatment for Count I, based on his eligibility under NRS § 458.300, the district court judge sentenced Cassinelli to 14-48 months in prison for Count I. While the judge recognized Cassinelli was eligible for alcohol treatment, the judge emphasized the court's discretion in granting or denying Cassinelli's request. Additionally, the judge imposed a consecutive jail term of 364 days for Count II. The court suspended Count II's sentence and imposed a three-year probation term, to run consecutive to Count I.

Cassinelli appealed and claimed the district court failed to adjudicate his motion pursuant to NRS § 458.290 *et. seq.*, before imposing his sentence. In the jointly filed "Stipulation for Order of Remand," the parties agreed the record did not expressly reflect that the court adjudicated Cassinelli's motion for treatment before sentencing. Because the record was silent as to the district court's basis for the denial, the Nevada Supreme Court approved the stipulation and remanded the appeal to the district court to enter an order explaining its order.³

¹ By Mackenzie Warren.

² An *Alford* plea is a guilty plea in which a criminal defendant does not make an admission of guilt to the criminal act.

³ *Cassinelli v. State*, Docket N. 648811 (Order of Limited Remand, June 11, 2014).

On remand the district court reconsidered Cassinelli's eligibility for alcohol treatment and ruled the acts underlying his guilty plea constituted domestic violence as defined in NRS § 33.018. Even though Cassinelli pleaded guilty to coercion, and not associated with domestic violence, the court determined Cassinelli was not eligible to elect an alcohol treatment. The court's ruling was based on NRS § 458.3000(1)(d), which says, in relevant part, a person convicted of a crime that is "a[n] act which constitutes domestic violence" is not eligible for assignment to drug or alcohol abuse treatment. Further, the court ruled even if Cassinelli were eligible for treatment, he was not likely to be rehabilitated and was not a good candidate for treatment—thus his motion was denied. This direct appeal from Cassinelli's judgment of conviction and sentence followed.

Discussion

The district court erred by ruling that Cassinelli was not eligible for alcohol treatment under NRS Chapter 458.

NRS § 458.3000(1)(d) provides that a person convicted of a crime that is "a[n] act which constitutes domestic violence" is not eligible for assignment to drug or alcohol abuse treatment. Cassinelli argued he was convicted of coercion pursuant to NRS § 207.190, which would not preclude him from treatment. The State countered Cassinelli was ineligible because the underlying facts of his conviction constitute domestic violence as outlined in NRS § 33.018(1)(c).

Questions of statutory interpretation are reviewed de novo.⁴ While the plain language of NRS § 458.300 removes eligibility of a person convicted of a crime constituting domestic violence to elect for treatment, the Court found it is less clear what a judge may consider at sentencing to determine whether the crime constitutes domestic violence. The Court reasoned because subsection (d) of NRS § 458.200(1) uses the broader term "act," in situations where the facts of the crime fall within domestic violence, the sentencing judge may look at the acts to determine eligibility for treatment. Cassinelli argued the district court judge should only consider the crime the defendant was convicted of to determine eligibility. Since both interpretations are reasonable, the Court turned to legislative history to determine intent.

The legislative history made clear the bill that later precipitated NRS § 458.300 intended to expand the eligibility for drug and alcohol treatment programs—not limit access. However, the Nevada Legislature wanted to exclude defendants who pleaded guilty or were convicted of "battery constituting domestic violence" because these defendants had access to other programs aimed at targeting recidivism.⁵

Yet, nothing in legislative history indicated the Legislature intended for the sentencing judge to consider whether the facts of the underlying crime consisted of domestic violence for

⁴ Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011).

⁵ *Revises provisions governing placement of criminal offenders in programs of treatment for abuse of alcohol and drugs before sentencing: Hearing on A.B. 84 before the Assemb. Judiciary Comm.*, 68th Leg. (Nev., April 19, 1995) (statement of Assemb. Diane Steel, Member).

the purpose of determining treatment eligibility. Instead, the Court found the Legislature wanted eligibility to be based solely on the crime for which the defendant was charged and found guilty. Accordingly, the Legislature recognized the common occurrence of plea bargains, yet chose not to preclude plea bargains that would otherwise make an ineligible defendant eligible for a treatment program.

Thus, in considering eligibility under NRS § 458.300(1)(d), the Court held the sentencing judge is limited to considering only the delineated crime that the defendant pleaded guilty to or was convicted of, instead of considering whether underlying acts involved constituted domestic violence. Cassinelli pleaded guilty to coercion and the Court determined it was clear that Cassinelli, the State, and district court all believed his crime did not preclude him from eligibility for alcohol treatment.

This conclusion did not end the Court's inquiry because the district court alternatively denied Cassinelli's request based on the court's finding that he was not likely to be rehabilitated by treatment or that he was not a good candidate. Either basis alone is sufficient to deny treatment and this Court ultimately found the district court did not abuse its discretion by denying Cassinelli's requests on these bases.

The district court did not abuse its discretion by denying Cassinelli's request for assignment to a program of treatment.

Cassinelli claimed the district court abused its discretion by denying his request for treatment on the bases that he was not likely to be rehabilitated through such treatment or he was not a good candidate for treatment. The Court disagreed with Cassinelli's argument that the court's decision to sentence him to prison was based on prejudice of his guilty plea. The Court analyzed NRS § 458.320(2) and determined although the district court found that Cassinelli was an alcoholic, it failed to make findings whether Cassinelli was able to be rehabilitated or was not otherwise a good candidate.

The Court considered three aspects of the statute in light of the district court's findings. First, the district court reluctantly determined that Cassinelli was an alcoholic based on a facility evaluation and fact findings in the record, which was not an abuse of its discretion. Second, the district court found that Cassinelli would not likely be rehabilitated through an alcohol treatment program because he did not demonstrate remorse or humility and successful rehabilitation often depends on the defendant's state of mind. Further, Cassinelli previously told the court he did not have an alcohol problem. Thus, the Court reasoned because Cassinelli did not appear to take accountability for his alcoholism and his criminal acts surpassed the issue of alcohol abuse, the district court did not abuse its discretion in making the determination that Cassinelli was not likely to be rehabilitated from his alcohol abuse.

Third, the district court determined Cassinelli was not otherwise a good candidate for alcohol treatment in this case because the Court agreed with the district court's reasoning that his acts of abuse did not stem from alcoholism, but instead were grounded by his desire to control a woman by abuse, as evidenced in the facts of this case. This determination was not an abuse of the district court's discretion, since the record reflected graphic pictures and an event journal that

mirrored the victim's testimony of abuse at the hands of Cassinelli. Although he was not charged or convicted with a domestic violence crime, his actions involved acts of domestic violence and thus, these facts weighed against sending a presumably unsuccessful candidate like Cassinelli to treatment.

The plea agreement was not breached and the prosecutor did not engage in misconduct at sentencing.

Cassinelli argued the prosecutor committed misconduct by pushing for a jail sentence on Count II, which was harsher than the punishment sentence agreed to in the plea deal. The Court disagreed and noted Cassinelli never objected to the prosecutor's argument.

The Court determined there was no error to warrant reversal because the State did not violate the terms of the plea when it exercised its right to argue at Cassinelli's sentencing.⁶ The plea agreement provided the State would not oppose alcohol treatment for Count I, if Cassinelli was eligible. The State upheld the deal and recommended the treatment for Count I. The plea agreement pertaining to Count II, however, preserved both parties' right to argue at sentencing. The prosecutor argued the maximum sentence on Count II and asked for 364 days in jail. Not only did Cassinelli fail to object to the prosecutor's argument, but the Court determined Cassinelli failed to demonstrate any error because the prosecutor's argument on Count II did not undercut the sentencing recommendation, the State never breached the spirit of the plea agreement, and no misconduct occurred.⁷

The district court did not err by refusing Cassinelli an opportunity to cross-examine the victim during her impact statement at sentencing.

Although Cassinelli argued he was prevented an opportunity to cross-examine the victim, the record shows Cassinelli was never expressly prohibited from this cross-examination. Unobjected-to conduct is reviewed by the Court for plain error.⁸ NRS § 176.015(3)(b) governs a victim-impact statement and as the Court pointed out, generally a defendant is aware of the precise information contained in the statement and would have the opportunity for rebuttal.⁹ Here, the victim's statement was attached to the presentence investigation report, which both Cassinelli and the court were given exact copies well in advance of sentencing. Despite this, Cassinelli never objected to its content nor did he request to cross-examine the witness at sentencing or object to her testimony. Furthermore, Cassinelli never asserted on appeal that her statement went beyond the crimes involved in this case and the Court held Cassinelli failed to show any prejudice arose from his inability to cross-examine the victim. Thus, the Court found the district court did not err.

The sentence was illegal.

⁶ Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986).

⁷ Sullivan v. State, 115 Nev. 383, 389, 990 P.2d 1258, 1262 (1999); see also Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

⁸ Valdez, 124 Nev. at 1190, 196 P.3d at 477.

⁹ Busehauer v. State, 106 Nev. 890, 894, 804 P.2d 1046, 1048 (1990).

The district court sentenced Cassinelli to serve a prison term of 14-48 months on Count I and on Count II, the gross misdemeanor, sentenced him to 364 days of jail. The court then suspended Count II's sentence and placed Cassinelli on probation for three years. Because the district court ordered Count II's sentence to run consecutive to Count I, Cassinelli's jail sentence with probation could not occur until after Cassinelli was released from prison on Count I. The Court agreed with Cassinelli's argument and found the district court violated NRS § 176A.500(1)(a), which limits probation to gross misdemeanors to three years. Because there is a possibility that Cassinelli would start probation after serving his maximum four-year prison sentence, the Court found this is clearly beyond the three-year threshold and held Cassinelli's sentence on Count II is illegal.

The Nevada Supreme Court addressed a similar situation in *Wicker v. State*.¹⁰ In *Wicker*, the defendant was convicted and sentenced for several count of robbery and rape. Years after serving his prison sentence, Wicker violated his probation. Although his period of probation did not exceed the statutory limit, his period of suspension did and the court found Wicker's sentence was illegal pursuant to NRS § 176A.500(1). Since the *Wicker* decision the Legislature has changed the criminal sentencing structure, but *Wicker* is still good law. The Court found *Wicker*'s holding applied in Cassinelli's case based on its premise that a sentence is illegal, at the time it is issued, if the probationary period inevitably exceeds the statutory maximum.¹¹

Accordingly, the Court held if any portion of a defendant's criminal sentence is illegal at the time of sentencing, regardless of minimum or maximum sentence, the entire sentence is illegal. The Court remanded this case for the district court to impose a sentence on Count II that does not violate NRS § 176A.500(1)(a). The Court vacated Cassinelli's sentence on Count II and remanded this case for resentencing on Count II only.

Conclusion

Cassinelli failed to show reversible error on the majority of his claims, though the Court agreed Cassinelli's gross misdemeanor sentence for Count II is illegal under NRS § 176A.500(1). Therefore, that sentence is vacated and remanded for resentencing. The district court, however, did not err when it determined that despite Cassinelli's classification as an alcoholic, he would nonetheless be denied assignment to treatment because it was within the court's discretion. Further, the State did not breach Cassinelli's plea agreement nor did the prosecutor commit misconduct. Lastly, the district court did not err by refusing Cassinelli an opportunity to cross-examine the victim because it was not properly raised at sentencing or in his appeal at issue.

This case is remanded for resentencing on Count II only.

¹⁰ *Wicker v. State*, 111 Nev. 43, 888 P.2d 918 (1995).

¹¹ A majority of jurisdictions further hold that illegal sentences are void. See, e.g., *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) ("[I]llegal sentences are not subject to the usual requirements of error preservation and waiver. An illegal sentence is one not authorized by statute; it is void." (citations omitted)); *Summers v. State*, 212 S.W.3d 251, 256 (Term. 2007) ("A sentence imposed in direct contravention of a statute is void and illegal."); *Rodriguez v. State*, 939 S.W.2d 211, 222 (Tex. Ct. App. 1997) ("If the punishment is not authorized by law, the order imposing punishment is void.").