

7-21-2016

Blankenship v. State, 132 Nev. Ad. Op 50 (Jul. 21, 2016)

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William S. Boyd Nevada Law Journal

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Recommended Citation

Armantrout, Heather, "Blankenship v. State, 132 Nev. Ad. Op 50 (Jul. 21, 2016)" (2016). *Nevada Supreme Court Summaries*. Paper 986.

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CRIMINAL SENTENCING, PAROLE and PROBATION

Summary

The Court considered whether scoring errors in criminal defendants' Probation Success Probability (PSP) forms constituted "impalpable or highly suspect evidence," thereby adversely influencing the Division of Parole and Probation's (the Division) sentencing recommendations. The Court affirmed one criminal defendant's judgment of conviction (Docket No. 66118), but it vacated his sentence and remanded for a new sentencing hearing. It held that the district court abused its discretion and that defendant's sentence was prejudiced because the district court relied on an erroneous PSP form in reaching its sentencing decision. It affirmed the judgment of conviction and sentence of another criminal defendant (Docket 66944), concluding that the Division had a rational basis for making an upward adjustment to the defendant's recommended sentence. Further, it concluded that the sentence was not prejudiced because the district court reached an independent sentencing decision, expressly disclaiming reliance on the Presentence Investigation Report's (PSI) recommendation.

Background

Blankenship (Docket No. 66118)

Appellant Blankenship moved out of an apartment following a dispute with his landlord. The landlord subsequently inspected the apartment and discovered damages to it totaling approximately \$7,600. Blankenship was arrested and charged with a felony, destroying or injuring real or personal property of another amounting to \$5,000 or more. Upon Blankenship's guilty plea, the state agreed to concur in the Division's sentencing recommendation. The Division found that Blankenship was unemployable and had no employment history, information it used to calculate his PSP score which it then used to determine his placement on the Sentencing Scale. In its calculation, the Division failed to consider that Blankenship was unemployed with no employment history because of his mental health diagnoses, bipolar disorder and paranoid schizophrenia, for which he receives Social Security disability benefits. He received a score of 60, six points lower than a continuously employed individual, which placed him within the borderline recommendation range between prison and probation. The additional six points would have placed him within the probation recommendation range.

At sentencing, Blankenship objected, arguing that the PSP and Sentencing Scale the Division used produced palpable or highly suspect evidence by failing to consider his mental disabilities and by characterizing him as unemployed, in turn resulting in a recommendation for prison instead of probation. The district court failed to resolve Blankenship's objections, followed the PSI, and sentenced Blankenship to 12-32 months in prison.

Briones (Docket No. 66944)

¹ By Heather Armantrout

Appellant Briones was arrested for and eventually pleaded guilty to burglary. Briones had an extensive criminal history, including 11 convictions, six terms of imprisonment, one probation revocation, and ten parole revocations. His PSP score, 21, led to a Sentencing Scale calculation of 16-72 months in prison. However, the Division recommended a prison sentence of 48-120 months. At his sentencing, Briones argued that the Division unlawfully considered subjective criteria in deviating from the Sentencing Scale calculation. The district court addressed Briones's objection, but it expressly noted that it arrived at its sentencing decision independent of the PSI's recommendation.

Discussion

Both appellants argue that the Division's PSI recommendations relied on PSP calculations that constituted impalpable and highly suspect evidence.

The statutory scheme regarding the Division's sentencing recommendations

NRS 176.135(1) requires the Division to "prepare a PSI to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony[,]"² which "contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim."³ It must also contain recommendations regarding minimum and maximum terms of imprisonment, fine, or both.⁴ It may also include "any additional information" that may be helpful in sentencing.⁵

Recommendations regarding probation or prison must be based on standards which are, themselves, "based on objective criteria for determining the person's probability of success on parole or probation."⁶ These standards must be adjusted to provide for greater punishment for repeat offenders or for those who commit serious crimes.⁷

The sentencing forms

PSPs contain scores calculated by assigning points to 35 independent considerations based on 27 objective factors enumerated in NAC 213.590. None of the considerations or the factors take mental disability into account. The points are added to arrive at an overall PSP score: scores below 55 receive automatic recommendation of prison, 56-64 are considered borderline, and above 64 allow for a recommendation of probation. A Sentencing Scale is used when a PSP score warrants prison or a borderline score receives a recommendation for prison.

Defendants may object to errors as to fact or methodology, but this must occur before sentencing. The district court may then strike information based on "impalpable or highly suspect evidence."⁸ A simple error in a PSP does not constitute impalpable or highly suspect evidence; the error must be such that it taints the PSI recommendation. District courts have

² Stockmeier v. State, Bd. Of Parole Comm'rs, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011).

³ *Id.* at 248, 255 P.3d at 212-13.

⁴ Nev. Rev. Stat. 176.145(1)(g) (2015).

⁵ Nev. Rev. Stat. 176.145(2) (2015).

⁶ Nev. Rev. Stat. 213.10988(1) (2015).

⁷ Nev. Rev. Stat. 213.10988(3) (2015).

⁸ *Stockmeier*, 127 Nev. at 248, 255 P.3d at 213 (2011).

discretion with regard to sentencing, but if suspect evidence is used and a prejudiced sentence results, abuse of discretion will be found.⁹

Blankenship's sentencing forms

Blankenship's PSP and Sentencing Scale scoring mechanisms failed to address his disabilities. This had the effect of penalizing him six points for being unemployable with a nonexistent work history. Those additional six points would have justified a recommendation for probation rather than placing him in the borderline category. Blankenship's attorney timely objected to the PSP, but the district court did not rule on the objection. The Court concluded that this error tainted Blankenship's PSI recommendation, and therefore, the sentencing forms constituted impalpable or highly suspect evidence, resulting in a prejudiced sentence. Blankenship's sentence is vacated and remanded for a new sentencing hearing.

Briones's sentencing forms

Under NRS. 213.10988(3), the Division may recommend greater punishment based on repetitive criminal conduct by a defendant. The Division has discretion to deviate from Sentencing Scale calculation, provided it articulates a rational basis for doing so. Here, the Division deviated upward from the Sentencing Scale based on Briones's prior offenses, a rational basis for the deviation. Moreover, the district court specifically disclaimed relying on the PSI recommendation in reaching its sentencing determination. Therefore, the district court did not rely on impalpable or highly suspect evidence.

Conclusion

The Court confirmed Blankenship's judgment of conviction but vacated his sentence and remanded for a new sentencing hearing, requiring that the PSP, Sentencing Scale, and PSI account for his mental disability in their recommendations. The district court did not abuse its discretion in sentencing Briones, so his judgment of conviction and sentence are affirmed.

⁹ Goodson v. State, 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982); *Id.* at 495–96, 654 P.2d at 1007.