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### Newman v. State, 132 Nev. Adv. Op. 31 (April 28, 2016)

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## CRIMINAL PROCEDURE

### **Summary**

The Court reviewed two consolidated appeals involving sentencing concerns, which stemmed from a district court judgment revoking probation and a district court judgment of conviction pursuant to a guilty plea. The Court dismissed the appeal of the probation revocation because appellant did not present any cogent arguments on that issue and because she had already been released from the nine-month sentence, rendering the appeal moot. As to the judgment of conviction, the Court affirmed. The Court held that a court may consider a defendant's status as a pregnant drug addict in sentencing, especially if the status brought up by the defendant, as long as the sentence is also related to the defendant's crimes. However, the Court made clear that this decision did not imply that a court should consider this status.

### **Background**

The appellant pled guilty to conspiracy to commit grand larceny, a gross misdemeanor. The district court sentenced her to nine months in jail, but suspended the sentence and placed her on probation for a term of no more than two years on specific conditions. Mere months later, appellant was charged with and pled guilty to possession of a controlled substance, a felony. The district court then placed appellant on probation for no more than three years on specific conditions, including completion of a drug court program.

Appellant was arrested for parole violations, and the district court received reports of her discharge from drug court, possession of prescription pills for which she did not have a prescription, methamphetamine use, and difficulties with her supervision. The Division of Parole and Probation recommended revoking her probation and sentencing her to a term of 12 to 32 months.

At the violation hearing, appellant's defense counsel stated that appellant requested revocation in both criminal cases; appellant, then pregnant, had difficulty accessing obstetric care in jail and would receive better resources in prison. Counsel also requested that appellant's sentences run concurrently. The district court expressed concerns with concurrent sentences on the grounds that appellant should stay in custody long enough to deliver the child. Because credit would be applied, the district court issued consecutive sentences. The district court revoked probation in the conspiracy case, executing the original nine-month sentence with credit for time served; then, it sentenced appellant to 12 to 32 months in the possession of a controlled substance case. Appellant did not object to the sentence, nor to the fact that the court had considered her status as a pregnant addict.

### **Discussion**

First, the Court noted that even though Ms. Newman's child was born and her sentence for conspiracy had expired," this issue was not moot because her sentence for possession of a

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<sup>1</sup> By Andrea Orwoll

controlled substance had not expired. Thus, it was proper for the Court to consider the merits of the case.

When considering whether the district court plainly erred in issuing appellant's sentence, the Court observed that it may reverse an otherwise lawful sentence in four instances. These include: 1) when the defendant was prejudiced in sentencing by "impalpable or highly suspect evidence"<sup>2</sup>; 2) when the sentencing statute is unconstitutional<sup>3</sup>; 3) when the sentence is "unreasonably disproportionate" and shocks the conscience<sup>4</sup>; and 4) when the district court considers nationality or race in sentencing<sup>5</sup>—though status as an illegal immigrant may be considered when the defendant is likely to be deported and thus "ultimately avoid punishment."<sup>6</sup>

Appellant claimed that the district court plainly erred in considering that she was a pregnant addict. She claimed that this consideration violated her due process rights to be sentenced for her crime, not her status. However, the Court observed that the district court sentenced appellant as it did because she had committed two crimes and violated her probation in multiple ways. Thus, the district court based the sentence on her crimes and did not err.

In addition, appellant herself raised the issue of her status, which the district court did admittedly consider in sentencing. Ordinarily, a court should sentence a party based upon the crime they commit and not their status. However, here, "the district court properly considered Newman's status for the limited purpose of sentencing her in the most appropriate manner." Furthermore, the U.S. Supreme Court's decision in *Robinson v. California* does not prohibit a court from considering a party's status as an addict in sentencing, even if a court may not convict a party merely for being an addict.<sup>7</sup>

## **Conclusion**

In sentencing, a defendant's status as a pregnant drug addict may be considered, especially if the defendant first raises the issue. Even if the court's chief concern in issuing a sentence is the protection of an unborn child, as long as the defendant has indeed committed a crime and the sentence is related to that crime, neither Nevada nor U.S. Supreme Court precedent forbid a court from considering a party's status as a pregnant drug addict during sentencing. However, this decision was made based upon these unique facts, and "[n]othing in [this] opinion... should be construed to indicate that courts *should* consider a defendant's status as a pregnant addict when imposing a sentence."

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<sup>2</sup> *Silks v. State*, 92 Nev. 91, 93–94, 545 P.2d 1159, 1161 (1976).

<sup>3</sup> *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

<sup>4</sup> *Id.*

<sup>5</sup> *Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

<sup>6</sup> *Ruvalcaba v. State*, 122 Nev. 961, 963, 143 P.3d 468, 469, 470 (2006).

<sup>7</sup> *Robinson v. California*, 370 U.S. 660, 662, 667 (1962).