

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT PEEK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44698

**FILED**

JUN 02 2005

ORDER OF AFFIRMANCE

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of attempted lewdness with a minor under the age of 14 years. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant David Robert Peek to serve two consecutive prison terms of 60-150 months and ordered him to pay \$540.00 in restitution.

Peek's sole contention is that the district court abused its discretion at sentencing. More specifically, Peek argues that his due process rights were violated when the district court considered a psychosexual evaluation that the court previously determined was not necessary. At Peek's arraignment, the district court stated that because the parties agreed to a sentence, the psychosexual evaluation could be waived, presumably because Peek was not going to argue for probation.<sup>1</sup> The sentence jointly recommended by the parties called for the imposition

---

<sup>1</sup>NRS 176.139(1) provides that where "a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the Division shall arrange for a psychosexual evaluation of the defendant as part of the Division's presentence investigation and report to the court."

of two consecutive prison terms of 2-20 years. The district court did note, however, that a presentence investigation report was required. The Division of Parole and Probation, nevertheless, required the preparation of a psychosexual evaluation as part of the PSI, and included information from the evaluation in the PSI; the evaluation was also attached to the PSI for the district court's consideration. Peek claims that the district court departed significantly upward from the sentencing recommendation of the parties because the evaluation concluded that he represented a high risk to reoffend due to his long history of sexual deviancy. We disagree with Peek's contention.

This court has consistently afforded the district court wide discretion in its sentencing decision.<sup>2</sup> The district court's discretion, however, is not limitless.<sup>3</sup> Nevertheless, we will refrain from interfering with the sentence imposed "[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."<sup>4</sup>

In the instant case, first, we note that Peek did not object during the sentencing hearing to the district court's reference to and consideration of the evaluation. Second, the written guilty plea agreement, signed by Peek, stated that he understood that "pursuant to NRS 176.139 and my plea of guilty to a sexual offense for which the

---

<sup>2</sup>Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

<sup>3</sup>Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

<sup>4</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Lee v. State, 115 Nev. 207, 211, 985 P.2d 164, 167 (1999).

suspension of sentence or the granting of probation is permitted, the Division of Parole and Probation shall arrange for a psychosexual evaluation as part of the division's presentence investigative report to the Court." Peek has not provided this court with any support for his implied contention that the parties, along with the consent of the sentencing court, could waive the statutory requirements of the Division, or that the court's consideration of the prepared evaluation violated his due process rights.<sup>5</sup>

Further, Peek cannot demonstrate that the district court relied on impalpable or highly suspect evidence in fashioning a sentence, and Peek does not allege that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes.<sup>6</sup> At the sentencing hearing, the district court discussed the reasons for departing from the sentence jointly recommended by the parties. The district court noted Peek's significant criminal history, including already being a Tier Level 3 registered sex offender for sexually assaulting his sister, his failed attempts at counseling, and the nature of the instant offense; here, the victim was a 10-year-old developmentally-challenged male, a friend of Peek's developmentally-challenged son. Accordingly, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing.

---

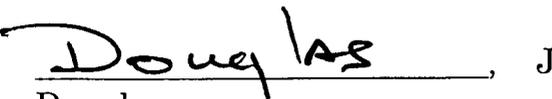
<sup>5</sup>In Dzul v. State, 118 Nev. 681, 696, 56 P.3d 875, 885 (2002), this court noted that the purpose of the psychosexual evaluation is to determine "whether a convicted sex offender represents a menace to the health, safety, or morals of others" if probation is granted.

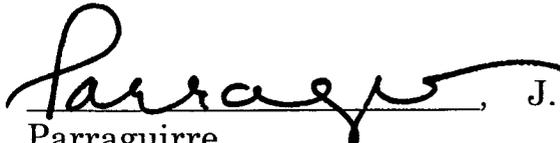
<sup>6</sup>See NRS 201.230(2); NRS 193.330(1)(a)(1) (attempt to commit a category A felony punishable by a prison term of 2-20 years).

Having considered Peek's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Jackie Glass, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk