

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS A. AREVALO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34829

FILED

JUN 12 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of attempted sexual assault of a minor.

Appellant Carlos A. Arevalo argues that the clinical psychosexual interview mandated by NRS 176.139 violates his Fifth Amendment constitutional right against self-incrimination. Arevalo also contends that the mandatory review of records relating to his previous treatment, also required by NRS 176.139, violates his constitutional right to privacy. We disagree.

First, Arevalo relies on Brown v. State,¹ where this court reversed and remanded an appellant's child sexual assault conviction upon finding that the sentencing court abused its discretion under Estelle v. Smith² by basing appellant's sentence on information obtained from his court-ordered psychological examination. In Brown, the sentencing judge improperly relied on findings in the psychological report that appellant was defensive, unwilling to acknowledge psychological problems, "immature, egocentric, moody and insecure," and lacked self-confidence to determine that he

¹113 Nev. 275, 934 P.2d 235 (1997).

²451 U.S. 454 (1981).

likely would act out sexually and that he was not falsely convicted, as he maintained he was.³

Here, the record reflects that the imposition of Arevalo's prison sentence was not conditioned on his refusal to admit guilt either during the psychosexual interview or at sentencing. Arevalo was not punished for maintaining his innocence; conversely, as the sentencing judge indicated, the factual basis for the plea established during the plea canvass indicated that the State was prepared to present more than substantial evidence of guilt at any trial.

The record reflects that when Arevalo entered his plea, the sentencing judge asked him whether he understood that he was going to be sentenced to a minimum of two years up to a maximum of twenty years, to which Arevalo responded in the affirmative. At re-sentencing, the prosecution requested that Arevalo be sentenced to a term of eight to twenty years and the Department of Probation and Parole recommended a sentence of eight years with parole eligibility after two years. The sentencing judge followed the recommendations and sentenced Arevalo to ten years imprisonment with parole eligibility after four years.

Although there was a small amount of dialogue between Arevalo and the sentencing judge regarding whether Arevalo committed the crime, we conclude that the sentencing judge did not err as the court did in Brown and Brake v. State.⁴ The record evidence also reflects that throughout the entirety of the proceedings, Arevalo had the assistance of counsel and never invoked his right against self-

³Brown, 113 Nev. at 288, 934 P.2d at 245.

⁴113 Nev. 579, 939 P.2d 1029 (1997) (sentencing court's consideration of appellant's lack of expression of remorse for committing murder violated appellant's constitutional right against self-incrimination and was abuse of discretion).

incrimination. Furthermore, prior to the instigation of the interview, Arevalo voluntarily signed the acknowledgment of psychosexual evaluation stating that the "psychosexual evaluation shall be used for recommendations regarding sentencing and/or treatment." The acknowledgment form also contained an area that Arevalo could have signed and indicated his refusal to consent to the evaluation.

We conclude that the clinical psychosexual interview during which Arevalo expressly maintained his innocence did not compromise his Fifth Amendment right against self-incrimination. Accordingly, because no violation occurred, we need not consider whether NRS 176.139 is constitutional under North Carolina v. Alford.⁵

Second, Arevalo argues that his constitutional right to privacy was violated when the psychosexual interviewer reviewed his "records relating to previous evaluations and treatment" as authorized by NRS 176.139.

The record reflects that Arevalo neither introduced evidence of previous treatment nor made reference to specific records or evaluations utilized by the interviewer in preparing his report to the sentencing court. Because the record demonstrates that the psychosexual interviewer did not use Arevalo's prior medical records in his evaluation,⁶ we

⁵400 U.S. 25 (1970); see Miller v. Ashurst, 86 Nev. 241, 244, 468 P.2d 357, 359 (1970) (stating that the court will not undertake to resolve constitutional questions involved in a statute until those issues are presented in a proper case).

⁶According to the supplemental presentence investigation report, Dr. Lea reviewed as sources of information the following documents: Clark County District Court "Judgment of Conviction (Plea)" dated February 5, 1999; Las Vegas Metropolitan Police Department "Incident Report" dated July 29, 1998, and "Arrest Report" dated July 30, 1998; and the Division of Parole and Probation "Presentence Report" dated January 6, 1999.

need not determine whether NRS 176.139 implicates Arevalo's right to privacy.⁷

Having considered Arevalo's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Attorney General, Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

⁷See Miller, 86 Nev. at 244, 468 P.2d at 359.