IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL GAESS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35682

FILED

JUL 28 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of lewdness with a child under the age of 14 (count I), attempted lewdness with a child under the age of 14 (count II), and indecent exposure (count III). The district court sentenced appellant to imprisonment for 48-120 months on count I, for 96-240 months on count II, and for 19-48 months on count III. The court ordered that the sentences for counts I and II be served consecutively and that appellant submit to lifetime supervision upon release from prison.

Appellant first contends that the district court abused its discretion in denying appellant's motion to continue sentencing so that appellant could obtain an independent psychosexual evaluation. We disagree.

It is well settled that the decision to grant or deny a request for a continuance is within the sound discretion of the district court. See Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991); McCabe v. State, 98 Nev. 604, 607, 655 P.2d 536, 537 (1982). Only if the decision was arbitrary under the circumstances is it an abuse of discretion. See Johnson v. State, 90 Nev. 352, 353, 526 P.2d 696, 697 (1974).

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The district court accepted appellant's guilty plea on July 12, 1999 and scheduled a sentencing hearing for September 20, 1999. The Division of Parole and Probation requested two continuances to arrange for a psychosexual evaluation as required by NRS 176.139.[1] The district court attempted to conduct a sentencing hearing on January 18, 2000; however, appellant failed to appear for the hearing and the court issued a bench warrant for appellant's arrest. Appellant was returned to court on the bench warrant on February 9, 2000. The district court minutes indicate that at that time, counsel for appellant asked that the matter be set for sentencing. The court scheduled a sentencing hearing for February 14, 2000. On that date, the court denied appellant's motion for a continuance to obtain a psychosexual evaluation by his own doctor.

The record in this case clearly shows that appellant had more than 7 months from the entry of his guilty plea to the date of sentencing to obtain an independent evaluation. Moreover, the relevant statute provides that the Division of Parole and Probation shall arrange for a psychosexual evaluation when one is required. See NRS 176.139(1). The statute does not require appellant to obtain an evaluation from his own doctor. Furthermore, the Division arranged for an evaluation in this case and, as the district court commented at sentencing, that evaluation is "not necessarily unfavorable to [appellant]." It is not clear what a second evaluation would have added to the proceedings. Under these

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[1]NRS 176.139(1) provides: "If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting or 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."

circumstances, we conclude that the district court did not abuse its discretion in denying the motion for a continuance.

Appellant next contends that the district court abused its discretion by refusing to consider videotape of favorable testimonials regarding appellant's character. Appellant contends that, as a result, he was prejudiced at sentencing because the district court "pointedly noted that no one had come forth to offer any commendatory comments on behalf of the Defendant."[2] We conclude that appellant's contentions lack merit.

The fast track statement fails to cite the relevant portion of the record where the district court refused to consider the videotape.[3] The district court minutes of the hearing on February 9, 2000 do not mention a videotape. At sentencing, the only mention of a videotape was by the prosecutor.[4] Appellant did not offer the videotape at

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[2]Although the fast track statement does not cite the sentencing transcript, it appears that appellant is referring to the following comment by the district court:

> This is just something that you felt you had to state to the Court to try and again weasel out of the consequences of your actions. You try and tell me that you've done all this stuff, I see absolutely no proof, you tell me about your loving family, I don't see your family here, I don't see letters from your family here.

It appears that the court was responding to appellant's claims that his family continued to support him even though he had apparently exposed himself to one of his daughters when she was a child. It is not clear whether the videotape included testimonials from any of appellant's family members.

[3]The fast track statement filed by counsel for appellant is devoid of any citations to the record in support of factual assertions in the statement. See NRAP 3C(e); NRAP 21(e). We caution counsel that failure to comply with the Nevada Rules of Appellate Procedure in the future may subject counsel to sanctions. See NRAP 3C(n).

[4]The prosecutor commented:

> This is a Defendant who continues right up to the time of sentencing to manipulate people. I received a phone call from a young woman in her early twenties sobbing to me because he had convinced her to be in some promotional videotape to show the

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sentencing and did not object to or attempt to clarify the prosecutor's comment that the defense had chosen not to use the tape. Based on this record we cannot conclude that the district court erred. See Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) ("This court can only rule on matters contained within the record."); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (appellant has burden to make proper appellate record).

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.[5]

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Gregory L. Denue
Clark County Clerk

. . . *continued*

Court as to why he's a good guy. And she later found out a number of things about him that she hadn't been told and telling me, you know, dear God, if he uses that video tape in front of the Judge I want to be there so I can explain that I did not know what this man was about. And in fact he had betrayed her trust in a number of ways, but it's my understanding that the defense has chosen not to use that videotape.

[5]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.