IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TOMAS DEL-ANGEL A/K/A TOMAS MORA DELANGEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66024

ORDER AFFIRMED IN PART AND REVERSED IN PART

This is an appeal from a judgment of conviction entered pursuant to a guilty plea to the charge of leaving the scene of an accident, a category B felony. In May 2012, appellant Thomas Del-Angel failed to remain at the scene of the accident and render assistance to a pedestrian he hit and killed with his car when the pedestrian walked into the street at night. The district court sentenced Del-Angel to serve a term of seven years with a minimum term of two years before parole eligibility. The district court further ordered Del-Angel to pay $14,273.88 in restitution.

Del-Angel asserts three issues on appeal. First, he claims the district court erred in denying his motion for election of treatment as an alcoholic in lieu of sentencing; second, he argues the district court improperly denied his motion to continue sentencing and order an amended presentence investigation report (PSI); and third, he contends the State breached the plea agreement by arguing for a sentence longer than that allowed by the agreement. The court concludes that no error occurred and affirms the judgment of conviction.

A. Procedural and Factual Background

Del-Angel entered a guilty plea pursuant to *Alford* with the assistance of an interpreter. In exchange for a guilty plea, the State agreed to argue for a sentence of two to five years imprisonment. The State, however, made its sentencing recommendation contingent upon Del-Angel interviewing with the Nevada Division of Parole and Probation (P&P). The plea agreement explained that P&P would prepare a report for the sentencing judge prior to sentencing and that if Del-Angel failed to interview, the State would have the unqualified right to argue for any legal sentence. The plea agreement was interpreted for Del-Angel and Del-Angel acknowledged his understanding that the plea agreement did not guarantee him any particular sentence and that the court had no obligation to accept the State's recommendation. Rather, the plea agreement permitted the district court to determine Del-Angel's sentence within the limits prescribed by statute, and if appropriate, order him to pay restitution to the victim.

At sentencing, the PSI indicated that Del-Angel failed to appear (FTA) for an interview with P&P. As a result, the State submitted P&P's sentence recommendation of two to seven years imprisonment. At that time, Del-Angel's counsel explained to the district court that Del-Angel had misunderstood his obligation to go to P&P, but had appeared for an interview "last week" after defense counsel received the PSI and learned of the FTA. Accordingly, Del-Angel requested the court to continue sentencing and order an amended PSI, or grant his motion for election of treatment, in which case the issue of the FTA in the PSI would be moot.

The district court entertained arguments by both Del-Angel and the State regarding whether the court should find Del-Angel "an alcoholic" for purposes of placing Del-Angel into treatment in lieu of sentencing. Thereafter, the district court denied Del-Angel's motion for election of treatment without making findings. Del-Angel then renewed his request to continue sentencing to have an amended or supplemental PSI prepared to show Del-Angel appeared for an interview. The district court denied the motion, explaining that Del-Angel did not provide a valid reason for not appearing in a timely manner. Nonetheless, at sentencing the court allowed Del-Angel to present any evidence and argument regarding his personal circumstances, work, and social history that might be included in an amended or supplemental PSI. The parties did not mention restitution at any time during the hearing. The court followed P&P's recommended sentence and imposed a sentence of two to seven years imprisonment and ordered Del-Angel to pay restitution in the amount of $14,273.88. This appeal followed.

B. Denial of the Motion to Elect Treatment

This court reviews a district court's decision to grant or deny a motion for election of treatment for an abuse of discretion.[1] The "district

[1]*See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion."); *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal."); and *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (a reviewing court will not interfere with the sentence imposed unless the record demonstrates "prejudice resulting from

continued on next page...

court's 'discretionary power is subject only to the test of reasonableness, [which] requires a determination of whether there is logic and justification for the result.'" *Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev.___, ___, 331 P.3d 862, 866 (2014) (quoting *THI Holdings, L.L.C. v. Shattuck*, 93 So.3d 419, 423) (alternation in original).

On appeal, Del-Angel argues the district court abused its discretion in denying the motion for election of treatment because (1) the district court made no findings that would disqualify Del-Angel under NRS 458.320(2), and (2) Del-Angel met all the criteria in NRS 458.320(3).

The court first addresses Del-Angel's contention that the court abused its discretion in denying the motion for election of treatment because it made no findings that would disqualify Del-Angel under NRS 458.320(2). Because NRS 458.320(2) is written in the alternative, the court need only find *either* the person is not an alcoholic, is not likely to be rehabilitated, or is not a good candidate for treatment in order to deny a motion for election of treatment. Therefore, we consider whether there is any evidence in the record to support the decision of the district court in denying the motion.

In this case, the record contains sufficient evidence to support a finding either that Del-Angel is not an alcoholic, is not likely to be rehabilitated, or is not otherwise a good candidate for treatment. First, the court could have found Del-Angel is not an alcoholic because he did not have an extensive history of alcohol abuse and had not had an alcoholic

---

...continued
consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence").

drink since the night of the accident. Second, the court could have found Del-Angel is not likely to be rehabilitated because he was simply using the notice of election statute to avoid prison and not because he truly wanted to change. Third, the court could have found Del-Angel was not a good candidate for treatment because he failed to appear for the probation interview, or because he failed to obtain any treatment during the two years between the accident and the sentencing hearing. Therefore, the record reflects a factual basis for the court's denial of Del-Angel's motion.[2]

Because the record provides a factual basis for a determination that Del-Angel does not qualify for treatment under NRS 458.320(2), the court did not abuse its discretion in denying Del-Angel's motion for election of treatment. Accordingly, the court today does not reach the issue of whether a district court is *required* to assign a person to treatment who presents evidence of each criterion in NRS 458.320(3) or state its findings.[3]

---

[2]To the extent Del-Angel argues the court did not provide any explanation as to why it denied the motion, a sentencing court is not required to state or explain its findings in granting or denying a motion for election of treatment under NRS 458.320. The statute does not require it as some statutes do. *Compare* NRS 34.830(1), and NRS 193.165(1). *See also Arizona v. Washington*, 434 U.S. 497, 516-517 (1978) (finding that were the record provides sufficient justification for a state court ruling, the court's failure to explain the ruling does not render it constitutionally defective). Nevertheless, in ruling on a motion for election of treatment under NRS 458.320, we urge trial courts to state whether an applicant is eligible or not for treatment in lieu of sentencing; and if not, which factor in NRS 458.320(2) provides the basis for the court's denial. This procedure will provide clarity to the parties and will facilitate appellate review of the decision.

[3]The case of *Attaguile v. State*, 122 Nev. 504, 134 P.3d 715 (2006) cited by appellant is inapposite because the statute at issue in the case

continued on next page...

C. Denial of the Motion to Continue

"This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion." *Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 663 (2010). If an appellant fails to demonstrate that he was prejudiced by a district court's denial of a continuance, the court's denial is not an abuse of discretion. *Higgs*, 126 Nev. at ___, 222 P.3d at 653.

On appeal, Del-Angel argues the district court improperly denied his motion to continue the sentencing hearing and order an amended PSI.[4] He claims the failure to do so was prejudicial because the PSI showed an FTA when Del-Angel actually appeared for his interview a week before sentencing. Further, Del-Angel contends that an amended PSI would not have included a recommendation for restitution, and *might* include a recommendation for a lesser sentence or probation. Del-Angel contends P&P would have learned at his interview that the victim, not Del-Angel, caused this accident by jaywalking on a dark night.

...continued

involved a different section of Chapter 458. Moreover, the legislative history of NRS 458.320 indicates a district court has discretion when determining whether to grant or deny a motion for notice of election. *See* Minutes AB 413 – 64th Session (1987).

[4]Del-Angel argues that *Stockmeier* requires the sentencing court to order an amended PSI to reflect Del-Angel's interview with P&P. *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. ___, 255 P.3d 209 (2012). However, neither *Stockmeier* nor *Sasser* provides support for this assertion. On the contrary, under *Sasser*, even if the district court finds that information in the PSI is based on "impalpable or highly suspect evidence", the district court "has the *discretion* to amend the PSI itself, return it to [the Division of Parole and Probation] for amending, or amend it in the judgment of conviction." *Sasser v. State*, ___ Nev. ___, ___, 324 P.3d 1221, 1226 (internal quotation marks omitted) (emphasis added).

First, any claim by Del-Angel that the FTA in the PSI affected his sentence is negated by the fact the district court gave Del-Angel the opportunity to verbally supplement the PSI at sentencing. *See Higgs*, 126 Nev. at ___, 222 P.3d at 653-654. Before the court sentenced Del-Angel, he explained to the court his reason for not appearing at P&P for his interview. Further, the district court was apprised Del-Angel had appeared at P&P the week prior to sentencing. Because the court afforded Del-Angel the opportunity to explain his failure to appear before rendering judgment, Del-Angel did not suffer prejudice at sentencing based on the "FTA" designation on the PSI.

Second, Del-Angel's claim that the PSI will be prejudicial to Del-Angel when he is considered for parole in the future is speculation. *See Sasser*, ___ Nev. at ___, 324 P.3d at 1224 n.6 (finding that appellant's argument that alleged inaccuracies in his PSI will affect his ability to receive parole in the future is moot based on the district court's finding that the information in the PSI was not based on impalpable or highly suspect evidence). Nevertheless, we emphasize that in this case, a handwritten amendment on the PSI or in the judgment of conviction noting Del-Angel's subsequent interview would have been appropriate.[5]

Third, Del-Angel argues the denial of a continuance was prejudicial because had he been able to explain to P&P that he did not cause the accident, the PSI would not have included a recommendation for restitution, and might have included a lesser sentence or suspended sentence with probation. Del-Angel's argument is without merit. The PSI

---

[5]*See Sasser*, ___ Nev. at ___, 324 P.3d at 1223 (finding the district court's decision to amend the defendant's PSI in the judgment of conviction was appropriate).

contains information about the facts of the accident, *including* that the victim was jaywalking. Therefore, since the PSI expressly stated that the victim was jaywalking, Del-Angel did not suffer any prejudice by not having the opportunity to explain to P&P that he did not cause the accident. Further, the State conceded at sentencing that the collision "perhaps was not [Del-Angel's] fault" and that the person jaywalking was "primarily at fault for the collision." Therefore, the court did not abuse its discretion in denying his motion for continuance.

Del-Angel also contends that the district court committed plain error in ordering restitution because Mr. Navarro is not a victim of Del-Angel's offense. Del-Angel acknowledges that he failed to object to the recommendation in the presentence report for restitution.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." NRS 178.602. This court "'has the discretion to address an error if it was plain and affected the defendant's substantial rights.'" *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (quoting *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). Under plain error review, we examine "whether there was an 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Green*, 117 Nev. at 545, 80 P.3d at 95. "The burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.*

The court shall set an amount of restitution for each victim, if restitution is appropriate. NRS 176.033(1)(c). Victim is defined as "a person who has been injured or killed as a direct result of the commission of a crime." NRS 176.015(5)(d)(2). Restitution is appropriate "for an offense that [the defendant] has admitted, upon which he has been found

guilty, or upon which he has agreed to pay restitution." *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991).

Here, Del-Angel pleaded guilty[6] to the offense of leaving the scene of the accident under NRS 484E.010.[7] Pursuant to the statute, a person engages in criminal conduct when he or she leaves the scene, or fails to take certain action *after* being involved in an accident. Accordingly, a person cannot commit the offense of leaving the scene of an accident until after an accident has occurred.

Del-Angel was not charged with causing the accident. Because Mr. Navarro was injured *before* Del-Angel committed the offense charged, the court committed plain error by ordering Del-Angel to pay restitution for acts that happened before or during the accident (the driving) and not for the crime to which Del-Angel pled guilty (leaving after the accident).[8]

---

[6]In Nevada, an *Alford* plea constitutes one of nolo contendere. *State v. Gorms*, 112 Nev. 1473, 1479 (1996). Nevertheless, a plea of nolo contendere, nonetheless, "authorizes the court for purposes of the case to treat [the defendant] as if he were guilty." *North Carolina v. Alford*, 400 U.S. 25, 35 (1970); *State v. Gomes*, 112 Nev. 1473, 1479 (1996). Because Del-Angel entered a guilty plea pursuant to *Alford* to the offense of leaving the scene of an accident, the court is authorized to treat Del-Angel as if he were guilty of the offense.

[7]NRS 176.015(5)(d)(2) states: "The driver of any vehicle involved in an accident ... resulting in bodily injury to or the death of a person shall immediately stop his or her vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until the driver has fulfilled the requirement of NRS 484E.030."

[8]We note that the written plea agreement, signed by Del-Angel, explicitly stated that "*if appropriate*, [Del-Angel] will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and

continued on next page...

D. No Violation of the Guilty Plea Agreement

"A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea." *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999).

Del-Angel argues that the State violated the plea agreement when it recommended a sentence of two to seven years in prison because the plea agreement called for a recommendation of two to five years. The written plea agreement explicitly states that "if I fail to interview with the Department (sic) of Parole and Probation . . . the State will have an unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty." Del-Angel read and signed the plea agreement acknowledging his understanding of its provisions. Further, at the arraignment, the district court ordered Del-Angel to go to parole and probation for a presentence investigation interview.

Because Del-Angel failed to timely appear for an interview, the State had the right to argue for any legal sentence. Therefore, the State did not violate the plea agreement by recommending a greater maximum sentence than that allowed by the plea agreement.

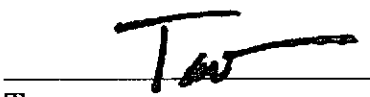
Having reviewed all of Del-Angel's contentions, we conclude that there is insufficient evidence of abuse of discretion in each area of asserted error. However, we conclude the court committed plain error in ordering restitution. Accordingly, we

---

...continued
to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement." (emphasis added).

ORDER the judgment of the district court AFFIRMED in part and REVERSED in part and REMANDED for an amended judgment of conviction to be entered.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
William S. Skupa
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk