

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID JOHN DINUNZIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74257

FILED

OCT 31 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

David John Dinunzio appeals from a judgment of conviction, pursuant to a guilty plea for second-degree murder. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Dinunzio contends his sentencing judge was biased and he is thus entitled to a new sentencing hearing before a different judge. As Dinunzio did not preserve the issue below, we review the sentencing judge's conduct for plain error. *Oade v. State*, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted).

Dinunzio argues the sentencing judge created an appearance of impropriety because his comments showed his personal bias and gave the appearance the sentencing decision was made subject to outside influence. Specifically, Dinunzio points to the sentencing judge's comments calling Dinunzio's actions "deplorable" and "one of the worst crimes," and expressing how "glad" he was the media was there to educate the

community about the “garbage” that goes on. Dinunzio has failed to demonstrate error plain from the record.

Prohibited bias is “bias against a party or a class of people.” *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1170 (1998). It does not refer to a judge’s attitude about the subject matter of a case or his views of the facts of the crime. *Id.* at 1283, 968 P.2d at 1170-71. Further, “bias” does not refer to a judge giving more weight to certain considerations, such as the violent nature of the crime or its impact on the victim, over other considerations, such as the defendant’s pleas for mercy or those made on his behalf by his friends. Nothing in Dinunzio’s claims indicate the judge had any personal bias against him. Further, the sentencing court’s expression of appreciation for media coverage of what happens in the community did not suggest the sentence was the result of outside influence. We therefore conclude Dinunzio failed to demonstrate the sentencing judge’s comments created an appearance of impropriety. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Tao


_____, J.
Gibbons


SILVER, C.J., dissenting:

Had the sentencing court limited comments to those emphasized by the majority, I would agree that the court did not exhibit

improper bias towards Dinunzio because those comments were merely the judge's general opinions about a legal or social matter relating to the case. *See Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1170 (1998). But the court made additional comments that indicated bias or prejudice and which showed the judge had "closed his . . . mind to the presentation of *all* the evidence." *Id.* at 1283, 968 P.2d at 1171 (emphasis added).

Prior to sentencing Dinunzio, the district court remarked, "[I]rrespective of what your family says, what you say, what your attorneys[] say, I would give you as much time in prison as I could give you *simply because of the nature of the offense of what you did*" (emphasis added). The court further stated, "[I]f this would have went to trial and you were found guilty of first degree murder, I would have given you as much as I could give you."

In my view, these additional statements reflect that the judge closed his mind to all other evidence and sentenced Dinunzio based solely on the charged crime without consideration of any other factors. *See Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998) (defendants have a constitutional right to "be sentenced individually, taking into account the individual, as well as the charged crime"). As a result, I believe the district court's comments amounted to plain error. Accordingly, I respectfully dissent.


_____, C.J.
Silver

cc: Hon. William D. Kephart, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk