

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD BRENT HOLLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75443-COA

FILED

MAR 13 2019

ELIZABETH M. BROWN  
CLERK OF THE NEVADA COURT  
BY  DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Richard Brent Holley appeals from a judgment of conviction, pursuant to a guilty plea, of extortion. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Holley left a note threatening to kill a prominent political figure if the politician did not vote a specific way on an issue. Holley contends the district court abused its discretion at sentencing when it repeatedly referred to criminal events unrelated to Holley or his crime when sentencing him.

The district court has wide discretion in its sentencing decision. *See Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with the sentence imposed by the district court “[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.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).


The district court considered the following information. Holley first called and threatened the victim, then “took it one step further” by

putting the threat in writing, and then “took a giant step, an action step” by breaking into the victim’s office to leave the note. The district court then went on to discuss mass shooting events throughout the country and asked, rhetorically, what clues there might have been to head off such attacks. The district court then reiterated, “[T]his just wasn’t a telephone call for Mr. Holley. This wasn’t just a letter from Mr. Holley. He took action, broke into the office, and what’s the next step? I don’t know.” The district court again came back to the mass shootings, expressing his concern that if Holley went out and shot someone, people would be questioning why the district court did not take action now. And finally, immediately before imposing sentencing, the district court referenced “the histrionics of what’s happened in our public with mass shootings” and said that, “I, as a judge, am taking [responsibility].”

The only information considered by the district court that is supported by the evidence in the record is that Holley left a threatening note. The remainder of the information considered by the district court is not supported by the record. The record does not demonstrate that Holley first verbally threatened the victim before escalating to a written threat, nor does it demonstrate that Holley broke in to the victim’s office. And nothing in the record links Holley’s threat with a mass shooting: The threat did not implicate the use of firearms, Holley did not target anyone else in the threat, and there is no evidence Holley otherwise explored or took any step toward engaging in a mass shooting. Given this record, we conclude the district court abused its discretion, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new sentencing hearing before a different judge.<sup>1</sup>

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

TAO, J., dissenting:

I respectfully dissent and would affirm the sentence imposed below. Simply put, I disagree with the way my colleagues interpret the remarks made by the district judge, imposing a requirement that every remark must have been factually “supported by the record” or else it reflects an illegitimate concern. But such a requirement makes no sense when a judge speaks rhetorically or hypothetically, explaining a larger underlying theory of sentencing, as the judge below did here.

Holley pled guilty to sending a written death threat to a U.S. Senator. In sentencing him, the court made the following observations:

[THE COURT]: I look at it and the first thing I see is this threat . . . . And arguably it may be free speech, it may not be. But Mr. Holley took it one

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<sup>1</sup>Based on our disposition, Holley’s claim that his sentence constituted cruel and unusual punishment is moot.

step further, he put it in writing. And then he took a giant step, an action step, he broke into the office of Senator Heller and slipped it under the door. And then the first question I have -- I can think of my first thoughts was the softball game or at -- in Maryland or Virginia, where the senators were playing the congressmen and some guy came in and started shooting. What were the first questions asked? Did anybody pick up clues as to what -- this was going to happen? The shooting at Mandalay Bay, what did -- were there any clues that this was going to happen? We've had other mass shootings and the questions always are, did we get any clues what was going to happen?

My colleagues express two concerns. First, they claim that no factual basis exists for the judge's remark that Holley "broke into" the Senator's office. But there is: that was precisely how the crime was described in the pre-sentence investigation report, which notes that the death threat was discovered tucked under a door after "a motion alarm signal was received from the reception area of the victim's office before business hours." Holley claimed this to be inaccurate, but we can hardly say on appeal that the judge's comment was without any basis whatsoever in the record. We can't even really say it was false based on the record we have, unless we just take Holley's word over the pre-sentence investigation report.

Second, and more important, my colleagues disapprove of the district judge's comparison of Holley to a mass shooter when the record includes no facts reflecting that Holley was either going to kill multiple victims or that he planned to do so with a firearm as opposed to another

weapon. But a fair reading of the judge's comments is that he was not falsely accusing Holley of being a mass shooter. Everyone agrees that Holley was convicted of no such thing. In discussing the current atmosphere of increasing political polarization and regular mass shootings—including shootings of other elected members of Congress—the judge expressed the belief that, in our present environment in which disasters once unimaginable have now become sadly and tragically commonplace, the making of such death threats should not be lightly dismissed as mere innocent high jinks or harmless exercises of “free speech” but rather ought to be considered serious crimes and perhaps presumptively treated as potential warnings of future danger.

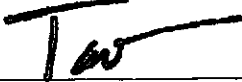
I do not view these remarks as indicating that the judge misunderstood the nature of Holley's crime. I view them as expressing something very appropriate and indeed very true. The criminal justice system ought to reflect the values of society at large, and when large segments of our society (and not a few public officials) live in fear of the possibility of mass shootings to the point where we express no surprise when metal detectors and armed guards watch over not only our public buildings but even the entrances to county fairs and children's holiday carnivals, then judges ought to take seriously things like death threats that we perhaps did not take seriously enough only a few years ago. According to researchers at Harvard University, between 1982 and 2011 a mass shooting occurred in the United States only once every 200 days, but between 2011 and 2014 that frequency tripled, with at least one mass shooting occurring every 64 days, despite a 50% drop in overall homicides

by firearm since 1993. In times like these, is it really error for a judge to acknowledge that the crime of sending written death threats to a member of Congress, delivered via burglary, may be more than a funny prank and might be a possible warning sign of catastrophe? One could go so far as to suggest, as the district judge seemed to, that such threats ought be treated more seriously even in the complete absence of intent to carry them out, simply because the threats themselves tap into our collective fears and make victims out of all of us whether or not they are ever followed through. At the very least, I don't think we can conclude that the district judge acted unreasonably or irrationally in taking this view of things.

My colleagues conclude that "nothing in the record links Holley's threat with a mass shooting." But are they sure? Is there really "nothing" at all that conceivably links a written death threat, delivered via break-in, to the possibility that the threat might have been intended to have been carried out in the future had no arrest been made? Have we so much insight into the psychology of murderers and mass shooters that we can so assuredly enunciate a conclusion like this in order to overrule another judge who saw things differently?

Ultimately, the question before us is this. Maybe Holley intended to carry out his threat, and maybe he didn't. Because he was arrested and is now in prison, we'll never know and I, for one, hope we never find out. The legal question is what the district judge was permitted to conclude in the absence of complete information or the ability to foresee the future. Is it really now illegal in Nevada—in our soft and evasive judicial jargon, "reversible error"—for a judge to express the idea that a written

death threat perhaps ought to be treated as a blaring warning sign of an underlying intention to execute the threat and sentence the threatener accordingly, rather than assume the whole thing was merely a joke and sentence the threatener lightly? Ordinarily we give great deference to district judges in imposing criminal sentences and we do not assume that they possess any bias absent strong evidence to the contrary. I see no reason to depart from that principle in this case, and I respectfully dissent.

  
\_\_\_\_\_, J.  
Tao

cc: Chief Judge, Eighth Judicial District  
Hon. Douglas Smith, District Judge  
Las Vegas Defense Group, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk