IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARILYN MARIE TOSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68530

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of seven counts of theft, three counts of forgery, and one count of embezzlement. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

First, appellant Marilyn Toston claims the district court abused its discretion by denying her motion to exclude evidence. Specifically, she claims the district court should have applied the "fruits of the poisonous tree doctrine" to exclude all documents and investigative efforts in this case because the case was based on an unauthorized disclosure of privileged information by her attorney.

We review a district court's decision to admit or exclude evidence for an abuse of discretion and "will not overturn [the district court's] decision absent manifest error." *Means v. State*, 120 Nev. 1001, 1007-1008, 103 P.3d 25, 29 (2004) (alteration in original, internal quotations marks omitted).

Under the fruit of the poisonous tree doctrine, "evidence obtained from or as a consequence of lawless *official* acts is excluded." *Osburn v. State*, 118 Nev. 323, 325 n.1, 44 P.3d 523, 525 n.1 (2002)

(emphasis added) (citing *Costello v. United States*, 365 U.S. 265, 280 (1961). Evidence will only be excluded if it is the result of *law enforcement's* unlawful actions. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (emphasis added). The objective of the fruit of the poisonous tree doctrine is to "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Taylor v. State*, 92 Nev. 158, 161, 547 P.2d 547 P.2d 674, 676 (1976) (emphasis added) (internal quotation marks omitted).

Toston's attorney was not law enforcement nor did the attorney violate a constitutional right such as the Fourth Amendment when she disclosed to the district court Toston had stolen money from the special needs trust. Thus, the district court correctly excluded the attorney's disclosures of confidential conversations or any reference to the conversations, *see Toston v. State*, Docket No. 57592 (Order of Reversal and Remand, January 12, 2012), and it correctly allowed in documents provided to the district court and information regarding the ensuing investigation. Further, we note, the district court would have most likely discovered the fraud absent the disclosure from Toston's attorney given Toston's inadequate annual disclosure regarding the trust and the fact she provided the forged district court orders to the bank. Accordingly, we conclude the district court did not abuse its discretion in denying the motion to exclude.

Second, Toston claims the district court sentenced her more harshly than she was after her first trial because the district court was

punishing her for exercising her right to appeal.[1] Specifically, she claims this statement by the district court indicated he was punishing her for appealing:

> I mean, she is the only one that says she's not guilty and two separate juries and then the first jury was overturned because some attorney-client privilege. The second one, I didn't see it. There may be issues there. But it is reprehensible what she has done and what the jury has found her guilty of.

When a defendant has been more harshly punished after retrial, a presumption of vindictiveness applies. *North Carolina v. Pearce*, 395 U.S. 711, 725, *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989). However, when the sentencing hearing is heard by a different judge than the one who sentenced the defendant after the first trial, there is no presumption of vindictiveness. *See Texas v. McCullough*, 475 U.S. 134, 140 (1986).

Here, the sentencing judge after the second trial was not the judge who sentenced Toston after her first trial. Therefore, there is no presumption of vindictiveness. Toston has failed to demonstrate any

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[1]Toston was initially convicted and sentenced to 60 to 240 months in prison. However, the Nevada Supreme Court reversed the judgment of conviction on appeal and remanded for a new trial because the district court abused its discretion by allowing Toston's counsel to testify about confidential communications. *See Toston v. State*, Docket No. 57592 (Order of Reversal and Remand, January 12, 2012). Upon retrial, Toston was again found guilty, though only on 11 counts as opposed to 13 as in the first trial, and was sentenced to 79 to 288 months in prison. In the original judgment of conviction only one count was ordered to run consecutively. In the new judgment of conviction after retrial, two counts were ordered to run consecutively.

actual vindictiveness by the sentencing judge at her second sentencing hearing and we conclude the judge was not punishing her more harshly for having exercised her right to appeal.

Third, Toston claims the district court abused its discretion at sentencing because the sentencing judge was not the trial judge and because the sentencing judge injected his own prejudice and feelings. The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). 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 found on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Toston fails to demonstrate the sentencing judge considered information or accusations only supported by impalpable or highly suspect evidence. The statement by the sentencing judge quoted above demonstrates he understood the case and Toston's criminal conduct and did not impose sentence based on his prejudice and feelings. Therefore the district court did not abuse its discretion at sentencing. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Kenneth C. Cory, District Judge
Tannery Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk