

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN CARLOS JARAMILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69272

FILED

MAY 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a controlled substance with intent to sell and sale of a controlled substance. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Juan Carlos Jaramillo first argues the district court abused its discretion at sentencing because it considered unsubstantiated conjecture when imposing sentence in violation of *Norwood v. State*, 112 Nev. 438, 440, 915 P.2d 277, 278-79 (1996) (reversing a sentence because it was based upon “highly dubious or inflammatory evidence, [] without reliance on any supporting evidence whatsoever.”). Jaramillo asserts the district court improperly discounted information Jaramillo was available to help family members because it found Jaramillo had free time after he had completed his drug sales. Jaramillo argues there was no evidence to support the district court’s conclusion. We disagree.

We review a district court’s sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). A sentencing “court is privileged to consider facts and circumstances

which clearly would not be admissible at trial.” *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). However, we “will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence.” *Denson v. State*, 112 Nev. 489, 492; 915 P.2d 284, 286 (1996). “Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment.” *Id.*

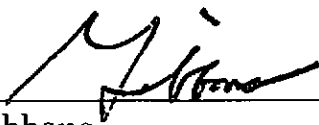
The record reveals Jaramillo presented mitigation evidence demonstrating he helped his family members during the day. The district court stated it needed “to look at the entire individual, see who he is, what he's done in his life, what he could do in his life, what he intends to do in his life.” The court stated it looked at Jaramillo's personal profile, and found, due to Jaramillo's drug issues, Jaramillo had the time to help his family members because he did not have anything else to do. The district court also noted Jaramillo had a lengthy criminal history, had been late for court proceedings on numerous occasions, and had tested positive for drug use while he awaited the sentencing hearing. The district court then imposed concurrent terms of 12 to 34 months for possession of a controlled substance with intent to sell and 24 to 60 months for sale of a controlled substance, which were within the parameters of the relevant statutes. See NRS 193.130(2)(d); NRS 453.321(2)(a); NRS 453.337(2)(a). Therefore, we conclude Jaramillo fails to demonstrate the district court abused its discretion at sentencing.


Second, Jaramillo argues his conviction for possession of a controlled substance with intent to sell is a lesser-included offense of his conviction for sale of a controlled substance and convictions for both

offenses violate the Double Jeopardy Clause. Jaramillo was convicted of possession and sale of the same controlled substance.

The Nevada Supreme Court has held that “[n]o sale of narcotics is possible without possession, actual or constructive.” *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966) (quoting *People v. Rosales*, 226 Cal.App.2d 588, 38 Cal.Rptr. 329, 331 (1964)). Jaramillo’s act of possessing a controlled substance with intent to sell was a lesser-included offense of sale of that same controlled substance. Therefore, we conclude his convictions for both offenses violate double jeopardy and we vacate Jaramillo’s conviction for possession of a controlled substance with intent to sell. See *LaChance v. State*, 130 Nev. ___, ___, 321 P.3d 919, 926-927 (2014). Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court with instructions to enter a corrected judgment of conviction.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk