IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NATHAN MICHAEL NARCHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78075-COA

ORDER VACATING AND REMANDING

Nathan Michael Narcho appeals from a judgment of conviction entered pursuant to a guilty plea of statutory sexual seduction by a person 21 years of age or older and sexually motivated coercion. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Narcho claims the district court abused its discretion at sentencing by failing to rule on his objections to the presentence investigation report (PSI). He asserts that he timely objected to the Division of Parole and Probation's scoring methodology. And he argues that the subjective nature of the Division's scoring resulted in a sentence that was based on impalpable or highly suspect evidence.

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). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "[A]n abuse of discretion [also] occurs whenever a court fails to give due consideration to the issues at hand." *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013).

"A defendant has the right to object to factual or methodological errors in sentencing forms, so long as he or she objects before sentencing."

Blankenship v. State, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016) (brackets and internal quotation marks omitted). The Nevada Supreme Court has emphasized that any objections made by a defendant to his PSI "must be resolved prior to sentencing." *Id.; Sasser v. State*, 130 Nev. 387, 390, 324 P.3d 1221, 1223 (2014); *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 250, 255 P.3d 209, 214 (2011).

Here, Narcho properly objected to his PSI prior to his sentencing and argued that the sentencing recommendation did not appear to be based on objective scoring, was partly based on impalpable or highly suspect evidence, and should have been disregarded. Narcho also presented some argument that the Division's subjective scoring may have caused the Division's overall recommendation to change from borderline to prison and thereby tainted the PSI's recommendation. The district court did not resolve Narcho's objection.

We conclude that the district court abused its discretion by sentencing Narcho without due consideration to his objection to the PSI, and therefore, his sentence must be vacated and his case remanded for resentencing. Accordingly, we

ORDER the judgment of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

During his sentencing hearing, Narcho asserted five objections, four of which were denied. He also asserted a fifth objection that is now the subject of remand: that the sentencing recommendation submitted by the Nevada Division of Parole and Probation (P&P) was excessive because P&P relied upon factors that he argues were "subjective" rather than "objective" in violation of NRS 213.10988(1). The majority concludes that the district court erred by not "resolving" Narcho's objection, and remands for such a "resolution."

But what does that mean? What, exactly, is the district court supposed to do on remand to "resolve" Narcho's objection? District courts may not rely upon factual information that is "impalpable or highly suspect" in imposing criminal sentences, *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), and a defendant may object if the court does rely on such information, *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016). But Narcho does not point to any factual assertion contained in the recommendation that could be evaluated against this standard. He does not, for example, argue that P&P misrepresented his criminal history, or miscalculated the amount of time he has already served in jail, or incorrectly represented that he is a member of a criminal gang when he was not. These are the kinds of factual errors or factual omissions that the district court can determine to be either correct or, alternatively, "impalpable or highly suspect."

What Narcho argues is something entirely different. He argues that P&P, an executive branch agency, is operating in violation of the statutory mandate set forth in NRS 213.10988(1) by employing improper criteria in issuing its sentencing recommendations, resulting in a sentencing recommendation that does not contain any false facts or

individual errors but that is wrong in its entirety because it was generated in violation of the agency's mandate. Let's parse out what this argument is really saying and not saying. Narcho does not argue that P&P deviated from its own rules, regulations, and procedures and arbitrarily used different criteria in his particular case than it uses in every other case. Rather, he argues that the agency applied the same criteria to his case that it applies to all cases, but those criteria are illegal under NRS 213.10988(1) because they are too "subjective." This is not an objection to anything contained within his particular sentencing recommendation; it's a much broader objection to the way P&P does its job not only in his case, but in every criminal case the agency has ever dealt with. It's an objection to the entire set of rules, regulations, and procedures employed by an executive branch agency. The remedy he seeks for this violation is for P&P to change its sentencing criteria and issue a new recommendation based upon entirely different criteria — indeed, his written objection includes some proposed new criteria that he suggests P&P should employ instead.

But a serious question exists whether the district court has the constitutional power to grant the remedy that Narcho requests. In Nevada, courts do not have unlimited power to do whatever they want. Quite to the contrary, the Nevada Constitution assigns and divides governmental power among the three co-equal and independent branches of government, and "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art III, §1. This division is "essential to the preservation of liberty" in order to prevent "a gradual concentration of the several powers in the same department." The Federalist No. 51, at 321

(James Madison) (Clinton Rossiter ed., 1961), quoted in *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty . . . ."; "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

Under this scheme, the court's power over executive branch agencies like P&P is quite limited. P&P operates in accordance with the statutes and administrative regulations that govern it. Statutes are written by the Legislature, and regulations are enacted in accordance with the Administrative Procedures Act, NRS Chapter 233B. *See State ex rel. Nevada Tax Comm'n v. Saveway Super Service Stations, Inc.*, 99 Nev. 626, 630, 668 P.2d 291 (1983) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law."). Courts do have some power: if an agency violates its own governing statutes or regulations in a case properly before the court, a court has inherent judicial power to strike down the agency action. Thus, had Narcho argued more narrowly that P&P's overall criteria might be acceptable but the agency improperly deviated from its own established criteria in his individual case, the court could easily order P&P to issue a new recommendation in accordance with its established procedures and regulations. But that is not what he argues. Instead he argues that the agency's criteria are themselves illegal under the governing statute.

When dealing with broader challenges to executive power like this, the judiciary's role is much more circumscribed. In interpreting the meaning, scope, and validity of an agency's regulations, courts must give considerable deference to how the agency itself interprets those statutes and regulations. In the federal judiciary, this kind of deference is known as "*Chevron*" deference when applied to agency interpretations of statutes, and

"*Auer*" or "*Brand X*" deference when applied to agency interpretations of administrative regulations. *See Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *National Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005). Of late, both types of deference have been the subject of considerable controversy. *See Baldwin v. U.S.*, 140 S.Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari) (questioning validity of *Brand X* deference); *Gundy v. U.S.*, 139 S.Ct. 2116 (2019) (Gorsuch, J., dissenting) (questioning scope of legislative delegation of power to the executive); *see also Gutierrez-Brizuela v. Lynch*, 834 F.2d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the constitutionality of *Chevron* deference as violating the principle of separation of powers); *Waterkeeper All. v. Envir. Protect. Agency*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency 'reasonableness,' textualism will be trivialized."). *Cf. Sierra Packaging & Converting LLC v. Nevada OSHA*, 133 Nev. 663, 669, 406 P.3d 522, 527 (Ct. App. 2017) (Tao, J., concurring) (questioning *Chevron* deference); *Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 178, 368 P.3d 1219, 1230 (Ct. App. 2016) (Tao, J., concurring) (noting practical problems with treating executive-branch advisory opinions as if they were judicial decisions).

But whatever ends up happening in the federal judiciary, as of today (and as of the date Narcho was sentenced), Nevada employs analogues of both forms of judicial deference to state agency actions. *See State, Div. of Ins. v. State Farm Mutual Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) ("When determining the validity of an administrative regulation, courts generally give 'great deference' to an

agency's interpretation of a statute that the agency is charged with enforcing."); *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1119, 923 P.2d 577, 581 (1996) ("An administrative agency . . . charged with the duty of administering an act, is impliedly clothed with power to construe the relevant laws and set necessary precedent to administrative action. The construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." (quoting *SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993)). Similar deference exists when an executive branch agency adjudicates administrative grievances over which it has statutory jurisdiction. *See Bisch v. Las Vegas Metro Police Dept.*, 129 Nev. 328, 338, 302 P.3d 1108, 1115 (2013).

Consequently, while Narcho argues that P&P's criteria violates its governing statutes, the court cannot assume this to be true and, indeed, must begin by presuming the exact opposite. Moreover, interpreting the validity or constitutionality of statutes and regulations presents a pure question of law that we can answer on appeal ourselves without any remand. *See Day v. Washoe Cty. Sch. Dist.*, 121 Nev. 387, 388, 116 P.3d 68, 69 (2005). But we don't even need to go that far, because where Narcho's objection really falls apart is here: while a court may conceivably strike down an individual agency action taken in violation of statutes or its own regulations, what no court can do under the Nevada Constitution is to write, by judicial fiat, new statutes or regulations that the agency must follow instead. NRS Chapter 233B sets forth strict procedures by which administrative executive-branch regulations must be enacted, and those procedures do not contemplate courts just creating such regulations from the bench from scratch. "A court can only strike down. It can only say 'This law or that law is void.' It cannot modify." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting); *see Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations,*

128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute."). Nor can the court order P&P to use different criteria just for Narcho than it normally uses for everyone else, because that would invite the very kind of arbitrary deviation from normal administrative procedure that executive branch agencies are forbidden from undertaking.

Thus, the remedy that Narcho seeks — to make P&P operate under new administrative procedures that he proposes that the court create — is not one that a district court has the power to grant. The Legislature, not courts, writes statutes, and the Executive, not courts, writes administrative regulations under the Administrative Procedures Act. The district court here lacks the constitutional power to order P&P to issue a new recommendation using the new (supposedly better and more "objective") administrative criteria that Narcho proposes. Consequently, there is nothing the district court can do with Narcho's objection on remand other than simply deny it. No remand is necessary, and respectfully I dissent.

Tao, J.

Tao

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk