

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES S. UNGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41581

FILED

JAN 28 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of battery with the intent to commit kidnapping and coercion. Prior to negotiating a guilty plea, appellant James S. Unger was charged with two counts of first-degree kidnapping with the use of a deadly weapon and three counts of sexual assault with the use of a deadly weapon for conduct directed towards his ex-girlfriend and her mother. The district court ultimately sentenced Unger to serve a prison term of 12-84 months for the battery and a concurrent prison term of 12-36 months for coercion, and ordered him to pay \$1,706.35 in restitution.

Unger contends that the district court abused its discretion and violated his right to due process by basing its sentencing decision on his ethnicity. Unger claims that the district court mistakenly believed "that the ethnic heritage of gypsy means that a person changes his names, moves from place to place and does not work normal jobs or pay taxes," and as a result, denied him probation. Unger's assignation of error stems from the following exchange:

COURT: [You] [c]laim to be a gypsy. What is a gypsy?

DEFENDANT: It's like an Egyptian race. It's hard to explain. It's a normal race.

COURT: The victim told the police Mr. Unger was a gypsy and he changes his names and moves from place to place and does not work normal jobs or pay taxes. That's what a gypsy is, from what I understand. Are you trying to kid me?

DEFENDANT: No, sir.

COURT: I'm sorry. I'm a little older than you are. My experiences have taught me a gypsy is not an Egyptian. That is what you're trying to tell me?

DEFENDANT: No. It's almost the same race as an Egyptian.

COURT: About the time you think you've heard it all something else comes down the pike more unbelievable than the last thing. Incredible.

(Emphasis added.)

Initially, we note that Unger failed to preserve this issue for appeal. Specifically, he failed to object at sentencing on the ground that consideration of his status as a gypsy would violate his constitutional rights. Failure to raise an objection with the district court generally precludes appellate consideration of an issue.¹ This court may nevertheless address alleged error if it was plain and affected the appellant's substantial rights.² We conclude that no plain error occurred in this case, and that Unger's contention is without merit.

This court has consistently afforded the district court wide discretion in its sentencing decision and will refrain from interfering with the sentence imposed “[s]o long as the record does not demonstrate

¹See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

²See NRS 178.602 (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”).

prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.”³ A district court may consider a wide variety of information, however, it violates a defendant's right to due process when a district court bases a sentencing decision on a defendant's ethnicity or nationality.⁴

In the instant case, Unger has not shown that the district court relied on impalpable or highly suspect evidence at sentencing, or that the district court's sentencing decision was based, in any part, on his ethnicity or nationality. In fact, Unger's contention is belied by the record. As quoted above, the district court did not comment on Unger's status as a gypsy, but rather questioned Unger about a statement made by the victim found in the presentence investigation report (PSI) prepared by the Division of Parole and Probation. Additionally, our review of the sentencing hearing transcript reveals that the district court based its sentencing decision on Unger's criminal behavior. The district court noted that Unger “brutalized this woman,” and “[t]his man is a danger.” During allocution, Unger informed the district court that the victim was allegedly cheating on him, and the district court stated:

You don't beat up people. You don't take a four-month old baby and then to put him in danger, or her. You don't threaten people with a knife. You don't sexually assault someone all because they don't want to be with you anymore. That's their option.

³Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

⁴See Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).


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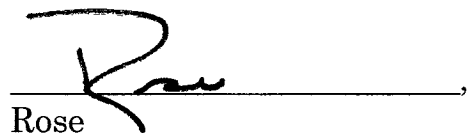
I don't know about all this boo-hoo stuff. I don't know it was kidnapping, that's minor; that's one small part of this. All this other with the knife and the threats and bizarre sexual behavior and this, this is what I'm concerned with.

The district court sentenced Unger after concluding that he was not amenable to probation based on the violent nature of the charged offense, arguments from counsel, Unger's statement of allocution, and the PSI.⁵ Accordingly, we conclude that the district court did not abuse its discretion.

Having considered Unger's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵See NRS 176A.100(1)(c)(5) (providing that the granting of probation is discretionary).