

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSENDO RODRIGUEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41582

FILED

JAN 08 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea, of one count of child abuse and neglect resulting in substantial bodily harm. The district court sentenced appellant Rosendo Rodriguez to serve a prison term of 24 to 84 months.

Rodriguez contends that the district court violated his constitutional rights to due process and equal protection by denying his request for probation based on Rodriguez's illegal immigrant status. In particular, Rodriguez notes that the district court stated, at one of the sentencing hearings, that it gave the presentence investigation report (PSI) "some credence" and argues that the PSI recommended against probation based on Rodriguez's illegal immigrant status.<sup>1</sup> We conclude that the district court did not violate Rodriguez's rights to due process and equal protection at sentencing.

This court has consistently afforded the district court wide discretion in its sentencing decisions.<sup>2</sup> "[T]his court will reverse a

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<sup>1</sup>To the extent that Rodriguez argues that the district court abused its discretion in refusing to hear defense counsel's argument involving the PSI, we reject that contention. The district court afforded defense counsel sufficient time to argue on behalf of her client, and even continued the sentencing proceeding so that it could review the written mitigating evidence offered by defense counsel.

<sup>2</sup>See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1378 (1987).

sentence if it is supported solely by impalpable and highly suspect evidence."<sup>3</sup> Although, in imposing a sentence, a district court may consider a wide variety of information, a district court violates a defendant's right to due process if it bases its sentencing decision on a defendant's nationality or ethnicity.<sup>4</sup> A mere passing reference to a defendant's ethnic status, however, does not provide sufficient grounds to disturb a district court's sentencing determination.<sup>5</sup>

In the instant case, Rodriguez has not shown that the district court violated his rights to equal protection or due process at sentencing. Our review of the record reveals no indication that the district court was biased against illegal immigrants or believed that an offense was more serious if committed by an illegal immigrant. Moreover, we disagree with Rodriguez that the district court based its sentencing decision on Rodriguez's immigrant status. At the sentencing hearing, after defense counsel questioned the validity of the recommendation contained in the PSI, the district court stated:

I will tell you, for the record, that when you injure a child who cannot defend himself, counsel, that is something this court takes very seriously. So to say -- to try to blame it on [the PSI], no, that is not at issue before the court. The issue before the court is looking at this gentleman, for having dealt with a defenseless child.

Similarly, the district court stated:

As to the matter before the court, the court is always concerned when we have infants involved.

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<sup>3</sup>Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

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

<sup>5</sup>See id.

They are not able to come forward and testify as to what happened. They are there unconditionally, seeking the love and care of their parents. When we have a small child injured, either intentionally or accidentally, it is of great concern to the court.

It is apparent from the district court's commentary at the sentencing proceedings that the district court concluded that Rodriguez was not amenable to probation based primarily on the nature of the charged offense, namely, the fact that the crime involved substantial harm to a three-month-old infant-victim.<sup>6</sup> Accordingly, we conclude that the district court did not violate Rodriguez's rights to due process and equal protection by refusing to grant probation.

Having considered Rodriguez's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.  
Becker

Agosta, J.  
Agosta

Gibbons, J.  
Gibbons

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<sup>6</sup>See NRS 176A.100(1)(c)(5) (providing that the granting of probation is discretionary).

cc: Hon. Michael L. Douglas, District Judge  
Clark County Public Defender  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk