

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR ROAN PADOAN A/K/A
EDGAR R. PADOAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42368

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EDGAR R. PADOAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42369

FILED

APR 08 2004

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

ORDER OF AFFIRMANCE

These are consolidated appeals from judgments of conviction, pursuant to guilty pleas, of one count each of felony burglary (district court case no. CR03-1478) and gross misdemeanor conspiracy to commit burglary (district court case no. CR03-1481). The district court sentenced appellant Edgar Roan Padoan to a prison term of 30-120 months for the burglary, and to a concurrent jail term of 12 months for the conspiracy. In both cases, the district court suspended execution of the sentence and placed Padoan on a term of probation – for the burglary, for an indeterminate period not to exceed 60 months; and for the conspiracy, for an indeterminate period not to exceed 36 months. The district court also ordered Padoan to pay \$250.00 in restitution within the first year of his probation.

Padoan's sole contention is that the district court erred in concluding that it could exercise its discretion for reasons other than those

provided in NRS 458.320(2) to deny Padoan's request for an alternative to a prison sentence, specifically, admission into the alcohol abuse treatment program.¹ Padoan argues that NRS 458.320(2) is clear and unambiguous, and because the district court accepted the evaluator's findings that Padoan was an alcoholic, likely to be rehabilitated, and a good candidate for treatment, he "could not be denied entry into the program." In other words, Padoan argues that once it was determined that he satisfied the statutory requirements, the district court lacked any discretion and was obligated to grant him a sentencing deferment and entry into the alcohol abuse treatment program. We disagree with Padoan's contention.

NRS 458.300 provides that, except under certain circumstances, "an alcoholic . . . who has been convicted of a crime is eligible to elect to be assigned by the court to a program of treatment for the abuse of alcohol." If the court has reason to believe that a defendant is an alcoholic, "or the person states that he is an alcoholic . . . , and the court finds that he is eligible to make the election provided for in NRS 458.300," the court must hold a hearing prior to sentencing to determine "whether or not he should receive treatment under the supervision of a state-approved facility for the treatment of abuse of alcohol."² If, after the

¹NRS 458.320(2) states: "If the court, acting on the report or other relevant information, determines that the person is not an alcoholic or drug addict, is not likely to be rehabilitated through treatment or is otherwise not a good candidate for treatment, he may be sentenced and the sentence executed."

²NRS 458.310(1).

hearing, the court concludes that the “person is entitled to accept the treatment offered pursuant to NRS 458.310, the court shall order an approved facility . . . to conduct an examination of the person to determine whether he is an alcoholic . . . and is likely to be rehabilitated through treatment.”³ Pursuant to NRS 458.320(2), the court may reject the election of treatment if, “acting on the report or other relevant information,” the court “determines that the person is not an alcoholic . . . , is not likely to be rehabilitated through treatment or is otherwise not a good candidate for treatment.” And finally, NRS 458.320(3) states that if the court determines that the defendant is eligible for a treatment program, the court may defer sentencing and place the defendant in such a program.

In the instant case, we conclude that the district court did not err in imposing a sentence and denying Padoan’s request for a deferment and entry into an alcohol abuse treatment program. First, we disagree with Padoan’s statutory interpretation because the language of NRS 458.320(2)-(3) clearly and unambiguously provides the district court with discretion in the sentencing matter. “In construing statutes, ‘may’ is construed as permissive and ‘shall’ is construed as mandatory unless the statute demands a different construction to carry out the clear intent of the legislature.”⁴

³NRS 458.320(1).

⁴Givens v. State, 99 Nev. 50, 54, 657 P.2d 97, 100 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 301, 721 P.2d 764 768 (1986).

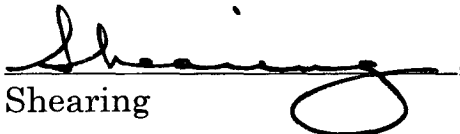
Second, although the district court did not expressly state so for the record, our review of the sentencing hearing transcript reveals that the district court did not believe that Padoan was a good candidate for treatment for several reasons. The district court noted the violent nature of Padoan's first offense, the burglary, where Padoan and an accomplice entered a residence and attacked an unsuspecting acquaintance of Padoan's. Padoan committed the second offense while out of custody on bail for the first offense. Prior to imposing sentence, the district court referred to the persuasive arguments of the prosecutor. The prosecutor discussed the premeditated nature of the instant offenses and Padoan's violent criminal history, and argued that Padoan should not have his criminal conduct excused through a sentencing deferment and potential setting aside of his convictions. A representative of the Division of Parole and Probation noted the violent nature of Padoan's offense and argued against the granting of probation.

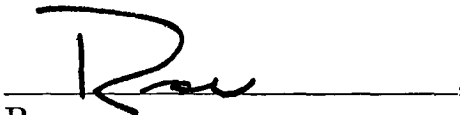
Finally, we conclude that Padoan was not eligible for assignment into a treatment program after his second conviction in district court case no. CR03-1481. In the second case, Padoan pleaded guilty to conspiracy to commit a burglary while criminal proceedings were still pending in district court case no. CR03-1478. In the first case, Padoan pleaded guilty to felony burglary. Although this issue was not addressed by the parties or district court, it is clear that Padoan was not eligible for assignment into a treatment program for the second case

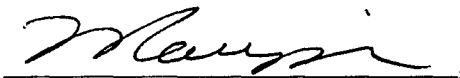
because "criminal proceedings alleging commission of a felony" were still pending.⁵

Accordingly, having considered Padoan's contention and concluded that it is without merit, we

ORDER the judgments of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Jerome Polaha, District Judge
Martin H. Wiener
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁵NRS 458.300(5).