

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY S. JOHNSON A/K/A TROY
STEPHEN JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49280

FILED

APR 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to an Alford¹ plea, of one count of driving while under the influence of a controlled substance (DUI) causing death. Eighth Judicial District Court, Clark County; Elizabeth Halverson, Judge. The district court sentenced appellant Troy Johnson to serve a prison term of 7 to 20 years.

Johnson was originally charged with two counts of reckless driving, one count of involuntary manslaughter, and two counts of DUI causing death or substantial bodily harm arising from a traffic accident occurring on March 8, 2002. Johnson was driving at an excessive speed in a construction zone and failed to stop at a red traffic signal. He collided with two vehicles stopped in the construction zone, hit a female transportation worker who was controlling traffic, and then collided with another vehicle in an intersection. As a result of the accident, the female

¹North Carolina v. Alford, 400 U.S. 25 (1970).

transportation worker died and the driver of the vehicle in the intersection sustained physical injuries. Police officers who responded to the scene believed that Johnson was under the influence of a controlled substance. Subsequent tests indicated that Johnson had prohibited levels of Xanax, Morphine, and Methadone in his blood or urine.

On November 26, 2003, the district court convicted Johnson, pursuant to an Alford plea, of one count of DUI causing death. The district court sentenced Johnson to serve a prison term of 7 to 20 years. No direct appeal was taken. On November 19, 2004, Johnson filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court declined to appoint counsel to represent Johnson. After conducting an evidentiary hearing, the district court denied Johnson's petition. Johnson appealed, and this court affirmed the district court in part, reversed in part, and remanded the case to the district court with instructions that Johnson be afforded the Lozada remedy.²

After Lozada briefing and hearing arguments from counsel, the district court found that the prosecutor engaged in misconduct at sentencing and granted Johnson a new sentencing hearing. A new sentencing hearing was conducted on July 10, 2007, and an amended judgment of conviction was entered imposing the same prison sentence that Johnson received in the original judgment of conviction. Johnson filed this timely appeal.

²See Johnson v. State, Docket No. 45089 (Order Affirming in Part, Reversing in Part and Remanding, September 16, 2005) (citing Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994)).

Johnson contends that the prosecutor engaged in misconduct at the resentencing hearing by making statements unsupported by the evidence.³ In particular, Johnson argues that the prosecutor misrepresented the amount of controlled substances Johnson ingested and “failed to appreciate the differences between urine and blood drug concentrations and also the difference between a drug and its metabolite.” In a related argument, Johnson alleges that the district court imposed an excessive sentence based on misinformation about the amount of controlled substances found in Johnson’s blood and urine. Finally, Johnson contends that he is entitled to a new sentencing hearing “due to possible prejudice” resulting from the sentencing judge’s “personal problems.”⁴

“A prosecutor may not argue facts or inferences not supported by the evidence.”⁵ However, we have held that in order for prosecutorial misconduct to constitute reversible error, the misconduct must be prejudicial.⁶ Further, we have repeatedly declined to interfere with a

³Johnson also argues that defense counsel was ineffective at the resentencing hearing for failing to file a motion to withdraw the guilty plea and file a notice of appeal. We decline to consider his arguments. Claims of ineffective assistance of counsel are more appropriately raised in the district court in the first instance by way of a petition for post-conviction relief. See Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981).

⁴Johnson alleges that a defamation lawsuit and allegation of judicial misconduct involving “traffic ticket fixing” had been filed against the sentencing judge.

⁵Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1998).

⁶Sherman v. State, 114 Nev. 998, 1010, 965 P.2d 903, 912 (1998).

sentencing determination when the sentence is legal, within the statutory limits, and not supported solely by impalpable and highly suspect evidence.⁷

We note that the sentence imposed here is legal and within the parameters provided by the relevant statute.⁸ Nothing in the record indicates that the district court imposed sentence based on the prosecutor's argument about the specific amount of controlled substances in Johnson's blood. To the contrary, the district court explained that the sentence was based on its belief that Johnson was impaired while driving:

I want you to know, sir, that while there has been an awful lot of discussion about the amount of controlled substances that was in your system at the time that this offense took place, you should know that whether it was 10 times, 25 times, or whatever the medical records suggest it was, is only in part what I consider.

....

The fact of the matter is whether you only had prescribed medication and any combination thereof in your system, the record clearly reflects that at the time the incident took place, you were under the influence of something, some substance or substances, that would keep you from being appropriately behind the wheel, and I don't think there's any question about that.


⁷See Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

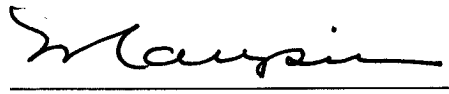
⁸See NRS 484.3795(1)(f) (providing for a prison term of 2 to 20 years).

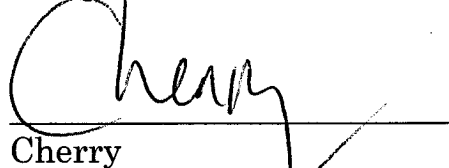
We conclude that the sentencing determination is properly supported by reliable and admissible evidence, and that any prosecutorial misconduct at sentencing was harmless beyond a reasonable doubt.

Having considered Johnson's contentions and concluded that they lack merit, we

ORDER the amended judgment of conviction
AFFIRMED.⁹


_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

cc: Eighth Judicial District Court Dept. 23, District Judge
Potter Law Offices
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Clark County District Attorney David J. Roger
Eighth District Court Clerk
Troy S. Johnson

⁹Because Johnson is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents that Johnson has submitted to this court in this matter.