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IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, A-99-1314

Appellee,

vs. **PETITION FOR FURTHER REVIEW**

BRENDA A. NOVAK,

Appellant.

COMES NOW Brenda A. Novak, appellant herein, by and through her attorney, Kirk E. Naylor, Jr., and pursuant to Rule 2F of the Nebraska Supreme Court and the Nebraska Court of Appeals hereby petitions for further review by the Nebraska Supreme Court of the Order of this Court, date July 14, 2000, affirming appellant's sentences imposed by the District Court of Lancaster County, Nebraska, and subsequently upheld by the Nebraska Court of Appeals. In support of this petition, appellant states and alleges:

1. Appellant was convicted, on September 3, 1999, in the District Court of Lancaster County, Nebraska, of the crimes of manslaughter and use of weapon to commit a felony, following appellant's pleas of no contest, to said charges. Further, on October 15, 1999, appellant was sentenced to a term of imprisonment of not less than ten (10) years nor more than twenty (20) years on each count of conviction, said sentences to be served consecutively.

2. Appellant appealed, as excessive, the sentences imposed by the District Court of Lancaster County, Nebraska.

3. Assignment of error: The decision of the Nebraska Court of Appeals, granting summary affirmance pursuant to Rule 7B (2) was in error for the reason

that the issues regarding excessiveness of sentence were not unsubstantial and were worthy of argument before the Court.

WHEREFORE, appellant prays that her petition herein be granted and the sentences of imprisonment herein be modified as excessive and disproportionate to the severity of the offenses of conviction when considered in light of the facts of the case, appellant's age, background and prior record.

JURISDICTIONAL STATEMENT

This is an appeal of sentences imposed upon appellant following her convictions and sentencing by the District Court of Lancaster County, Nebraska. Jurisdiction for the appeal of this Court of the sentences imposed is specifically authorized by Neb. Rev. Stat. § 29-2301 (Reissue 1995), which authorizes review by this Court of final judgements entered in criminal cases by the district court, and by Neb. Rev. Stat. § 29-2308 (Reissue 1995), which specifically authorizes this Court to reduce or otherwise modify sentences imposed upon a defendant by the district court.

Appellant was sentenced by the District Court of Lancaster County, Nebraska on October 15, 1999. Appellant filed her notice of appeal on November 15, 1999, together with her request for leave to appeal in forma pauperis and request for appointment of counsel, with supporting affidavit executed by appellant, filed that same date. An order of the district court was entered on November 16, 1999 granting defendant leave to appeal in forma pauperis and appointing counsel to represent appellant on appeal. This Court has jurisdiction to review the decision of the Nebraska Court of Appeals pursuant to Rule 2F of the rules of this court.

STATEMENT OF FACTS

As previously stated, appellant was charged with the crimes of manslaughter and use of weapon to commit a felony, these charges relating to the death of Christopher Rucker on May 10, 1998. (T4). The factual basis for these charges is accurately summarized in a written exhibit introduced when appellant entered her pleas of no contest to the charges contain in the amended information on September 3, 1999. (E10:17,18). The information in that exhibit essentially reflects that five persons, the same being appellant, Jerrold McCleod, Lester Wagner, Ronald O'Neill and Angela VonSeggern entered into a plot to rob Christopher Rucker of his quantity of cocaine. On May 10, 1998, Angela VonSeggern drove Ronald O'Neill, Lester Wagner, and Jerrold McCleod to several locations where they obtained firearms for use in the robbery. Around 9:00 p.m. on that date, Angela VonSeggern drove Ronald O'Neill and Lester Wagner to appellant's residence where they picked up appellant and her boyfriend, Jerrold McCleod. The five parties then proceeded in the vehicle, driven by Angela VonSeggern, to a location near a residence at 2820 R Street, Lincoln, Nebraska, where Christopher Rucker was staying. Ronald O'Neill, Lester Wagner, and Jerrold McCleod then went to the residence. After these three individuals entered the residence, Jerrold McCleod and Ronald O'Neill discharged firearms within the residence killing Christopher Rucker and wounding two other persons present in the residence.

On October 15, 1999, appellant was sentenced to a term of imprisonment of not less than ten years nor more than twenty years on each of the convictions, said sentences to be served consecutively. Appellant was given credit for 519 days in custody pending disposition of her case in the trial court. (T11). The record reflects that at the time of the

offenses of conviction appellant was 19 years of age. (26:8-10). Appellant did not intend death or serious bodily injury to result from the abortive robbery in which she participated. (17:25-21).

For purposes of considering this appeal, the parties have entered into a joint motion requesting that this Court consider the appellate record in the case of the co-defendant, Angela VonSeggern, which appears as case number A-99-1314. As a result, reference will now be made to the transcript and bill of exceptions in that matter.

The record in that matter reflects that Ms. VonSeggern was ultimately charged in an amended information with the crimes of manslaughter and use of weapon to commit a felony in connection with the death of Christopher Rucker. (T4). On September 24, 1999, Ms. VonSeggern appeared before the court to enter pleas to the charges in the amended information. (22:21-22). Ms. VonSeggern entered no contest pleas to each of the charges. (25:6-12).

On December 1, 1999, Ms. VonSeggern was sentenced to a term of imprisonment of not less than 10 years nor more than 20 years on the manslaughter charge, and further sentenced to a term of imprisonment of not less than 5 years nor more than 10 years on the weapons charge, said sentences to be served consecutively. Ms. VonSeggern was further given credit for 238 days in custody pending disposition of her case in the trial court. (T23).

At the time of Ms. VonSeggern's sentencing, the sentencing judge, the Honorable Karen Flowers, who previously sentenced appellant herein, stated as follows:

> Your participation is obviously less than that of Mr. O'Neill or Mr. McCleod, but I told the parties when I did Ms. Novak's sentencing that the

nuances of the distinction in the participation among those who did not fire any weapons as subtle, at least, to me. (55:12-16).

The trial court, in imposing the sentences upon Ms. VonSeggern, did note Ms. VonSeggern's cooperation with authorities after apprehension. (23:55: 23-24). The court did note her age, which was 17 at the time of the crimes, but the court further noted that her age was not an excuse for her conduct. (52:15; 56:2-3).

ARGUMENT

I

THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING CONSECUTIVE SENTENCES OF IMPRISONMENT OF NOT LESS THAN 10 YEARS NOR MORE THAN 20 YEARS UPON APPELLANT AND BY ORDERING THAT SAID SENTENCES BE SERVED CONSECUTIVELY.

This Court has the authority and responsibility to correct and reduce any sentence imposed by the trial court which in the opinion of this Court is excessive. Neb. Rev. Stat. § 29-2308 (Reissue 1995) specifically provides, in relevant part, as follows:

> In all criminal cases that now are or may hereafter be pending in the Court of Appeals or Supreme Court, the appellate court may reduce the sentence rendered by the district court against the accused when in it's opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in it's opinion may be warranted by the evidence.

Appellant herein is aware of the general rule that a sentence imposed within statutory limits will not be set aside as excessive absent and abuse of discretion. See,

State v. Nevels, 235 Neb. 39, 453 N.W. 2d 579 (1990). However, the Supreme Court has recognized that a sentence ought not to be longer than is necessary for rehabilitation of the defendant, the gravity of the offense and protection of society. See, State v. Suggett, 200 Neb. 693, 698, 214 N.W. 2d 876 (1978). Further, it is the minimum protection of an indeterminate sentence which measures its severity. As stated by the Supreme Court in State v. Haynie, 239 Neb. 478, 476 N.W. 2d 905 (1991):

> This court has no ouija board, nor do we possess any degree of prescience beyond that of sentencing judges. However, we do have the benefit of examination of sentences from many courts throughout this State for a variety of crimes and under diverse circumstances, in which no opinions are written or published. Realizing, as we have stated, that a sentence ought not be longer than is necessary for rehabilitation and protection of society and that it is the minimum portion of an indeterminate sentence which measures its severity, we find that a minimum sentence of 68 years is substantially more than is necessary for rehabilitative purposes, is an obstacle so as to discourage the defendant from attempting rehabilitation, and is more than is necessary for the protection of society. To that extent the sentences constitute an abuse of discretion.
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> Id at 492-93.

In the case at hand, the appellant herein was involved in an ill-conceived plan to rob Christopher Rucker of controlled substances which Rucker represented he possessed and which he was prepared to sell to appellant and her companions. At the time of the events resulting in the criminal charges against appellant, she was 19 years of age.

It is clear that appellant did not intend physical harm to Rucker, or anyone else, as a result of the intended robbery. Further, appellant was not present within the residence when Rucker was tragically shot and killed and other persons present were wounded.

There is nothing in the record to suggest that appellant intended that firearms be used in the robbery. There is no evidence to suggest that appellant even knew that firearms would be involved in the robbery until shortly before the shootings occurred when she and her boyfriend, Jerrold McCleod, were picked up by Angela VonSeggern, Ronald O'Neill and Lester Wagner. Angela VonSeggern then drove the parties to a location near the residence where the shootings occurred. Appellant and VonSeggern remained in the vehicle while McCleod, O'Neill and Wagner went to the residence where Rucker was staying.

The sentences imposed upon appellant will require, that appellant serve at least 10 years in confinement before she can even be considered for parole. Certainly the terms of imprisonment imposed by the trial court far exceed the length of sentences necessitated by appellant's actual offense conduct, the rehabilitative needs of appellant, or the protection of society. The sentences imposed upon appellant constitute an abuse of discretion by the trial court.

II

THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING LONGER SENTENCES OF IMPRISONMENT UPON APPELLANT THAN WERE IMPOSED UPON A CO-DEFENDANT WHO WAS CONVICTED OF THE SAME OFFENSES AND WHO WAS EQUALLY CULPABLE IN THE

COMMISSION OF THOSE OFFENSES, THERE BEING NO OTHER EVIDENCE IN THE RECORD WHICH WOULD JUSTIFY LONGER SENTENCES BEING IMPOSED UPON APPELLANT THAN WERE IMPOSED UPON HER CO-DEFENDANT.

This Court has before it the appeal of Angela VonSeggern, a co-defendant in this matter, Ms. VonSeggern was sentenced on December 1, 1999, approximately a month and a half after appellant was sentenced, by the same district court judge who sentenced appellant. Both appellant and VonSeggern were convicted of identical crimes arising out of the death of Christopher Rucker. While both defendant and VonSeggern received the same sentence of imprisonment for the offense of manslaughter, appellant received a consecutive sentence of imprisonment of 10 to 20 years on the weapons charge while VonSeggern received only a consecutive sentence of 5 to 10 years on the weapons charge.

As the Supreme Court has recognized, it is the minimum portion of an indeterminate sentence which measures its severity. See, State v. Spotted Elk, 227 Neb. 869, 420 N.W. 2d 707 (1998); State v. Sianouthai, 225 Neb. 62, 402 N.W. 2d 316 (1987). VonSeggern received a minimum sentence on the weapons conviction, which is half of the minimum sentence imposed upon appellant for commission of the exact same crime. Neither appellant or VonSeggern ever handled any firearms involved in this case, nor were appellant or VonSeggern present within the residence when the shootings took place.

According to the prosecutions factual basis for acceptance of appellant's pleas of no contest, offered as an exhibit at the time of appellant's plea hearing, VonSeggern

drove all of the parties involved in the robbery plot to the residence where Christopher Rucker was staying. Appellant was simply a passenger in that vehicle and neither VonSeggern or appellant went into the residence where the shootings occurred.

Further, the facts clearly indicate that Ms. VonSeggern actively participated in assisting Jerrold McCleod and Ronald O'Neill in obtaining the firearms used in the killing of Christopher Rucker and the wounding of other persons. Appellant was not so involved, and there is no indication appellant planned on firearms being involved in the robbery.

As stated by the Supreme Court in State v. Shonkwiler, 187 Neb. 747, 194 N.W. 2d 172 (1972):

> At least as early as 1905, this court expressed its view that where two or more defendants are convicted of the same offense and different penalties are inflicted, and it appears from the evidence of the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced. See, Keeler v. State, 73 Neb. 441, 103 N.W. 64. The law still continues to strive for evenhanded justice.
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> Id at 751.

In State v. Nix, 215 Neb. 410, 338 N.W. 2d 782 (1983), the Nebraska Supreme Court, in applying the principal enunciated in Shonkwiler, Supra, reduced the sentence of the appellant to that which was imposed on a co-defendant who was equally culpable in the commission of the crimes of conviction. In so doing, the court stated as follows:

"Under the circumstances of this case we conclude that the disparity of sentences accorded these two men for the involvement in identical offenses is impermissible and embodies an abuse of discretion". Id at 412.

It is clear, as noted by the sentencing court, that the culpability of appellant herein and Angela VonSeggern is essentially the same in the present case. Both appellant and VonSeggern were extremely young at the time of the commission of these offenses. The fact that VonSeggern apparently cooperated with law enforcement, following her apprehension in this matter, does not justify the disparity in the sentences imposed upon appellant and VonSeggern.

CONCLUSION

The sentences imposed upon appellant in the present case simply exceed those necessary by virtue of her criminal conduct in this matter. Moreover, the record simply does not support a greater sentence for appellant on the weapons charge than was imposed upon Angela VonSeggern, an equally culpable co-defendant. Appellant respectfully requests that this Court grant further review in this case and reduce the sentences imposed upon her in the instant case.

RESPECTFULLY SUBMITTED this 31 day of August, 2000.

BRENDA A. NOVAK, Appellant

BY: _____

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	)	
vs.	)	
	)	
BRENDA A. NOVAK,	)	
	)	
Defendant.	)	

PROOF OF SERVICE

The undersigned hereby certifies that he caused the original Petition for Further Review to be served upon the Supreme Court of Nebraska, State Capitol Building, Lincoln, Nebraska, 68509 by personal delivery this 7th day of August, 2000 and two copies to be served to the office of the Attorney General of the State of Nebraska, State Capitol Building, Lincoln, Nebraska, by personal delivery this 7th day of August, 2000.

BRENDA NOVAK, Appellant

BY: _____

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