STATE OF NEBRASKA, APPELLEE, V. RYAN KING, APPELLANT.

807 N.W.2d 192

Filed December 20, 2011. No. A-10-982.

1. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory parameters, even at the maximum of the parameters, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.
2. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
3. **Statutes: Sentences.** Neb. Rev. Stat. § 29-2260 (Reissue 2008) is a directive to the trial court as to the factors to be considered by the trial court in imposing a sentence, and it is clear that the statute is to serve as a guideline for the court but is not mandatory.
4. **Sentences: Appeal and Error.** While Neb. Rev. Stat. § 29-2260 (Reissue 2008) lists grounds to be considered by the sentencing court, it does not control its discretion. The failure of the trial court to make specific findings cannot be error or grounds for reversal.
5. ____: ____. Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Deborah D. Cunningham for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Ryan King appeals the sentence imposed upon his plea to a charge of criminal conspiracy to commit murder in relation to the April 2009 homicide of Brian Carson in Douglas County, Nebraska. King asserts on appeal that the sentence imposed was excessive. We affirm.

II. BACKGROUND

The events giving rise to this case occurred in April 2009. At that time, Brian was killed by his son, Ryan Carson (Carson),

in Douglas County, Nebraska, by blunt force trauma to the head. As a result of the homicide and subsequent attempt to hide the crime, criminal charges were brought against a number of individuals, including Carson; Carson's mother, Teresa Carson; Carson's sister; Carson's girlfriend; Colton Novascone; King; and two other individuals. King ultimately entered a plea in this case.

In April 2009, Omaha Police Department officers received a call about a possible burglary at a residence in Douglas County. When they responded, they spoke with Teresa, who reported discovering a "red stain" on some carpet in the residence, various items removed or relocated in the residence, and a missing automobile. The automobile was discovered, and Brian's body was found in the trunk. An autopsy resulted in a conclusion that the cause of his death was blunt force trauma to the head.

The investigation into Brian's death included interviews of a number of suspects and potential witnesses. One of those interviews resulted in police being informed that Carson and two other individuals, eventually identified as King and Novascone, had traveled together to Omaha, Nebraska, from Mississippi immediately prior to the homicide of Brian.

An Omaha Police Department officer traveled to Lewisburg, Mississippi, where he interviewed King. King initially indicated that he, Novascone, and Carson traveled to Omaha; that he did not converse with the others during the trip; that upon arriving in Omaha, Carson provided them with money; and that he and Novascone immediately turned around and returned to Mississippi. Upon further questioning, King acknowledged that Carson had previously made threats and statements about wanting to kill his father, Brian, for sleeping with Carson's girlfriend and acknowledged going to Teresa's residence while in Omaha, but again maintained that he and Novascone immediately returned to Mississippi.

Upon further questioning, King gave a third statement to the officer. In his third statement during this single interview, King indicated that Carson had asked for King and Novascone to help "in killing [Carson's] dad." He indicated that the three drove from Mississippi to Omaha and that Carson spoke to his

mother, Teresa, on the telephone during the trip; King believed Teresa became aware that they were coming to Omaha to kill Brian. He indicated that they traveled to Teresa's residence, that they met Teresa and Carson's sister, and that Teresa left "because she didn't want to be there for the killing."

King indicated that they remained at Teresa's residence for a couple of hours and that at one point, Carson's sister called Brian to find out when he would be coming to the residence. A short time later, Brian arrived at the residence. King indicated that he and Novascone hid in the basement of the residence, while Carson hid in the garage. According to King, he was holding a "fireplace poker" at the time, Novascone was holding a steel pipe wrench, and Carson was holding "a shovel." King indicated that when Brian opened the door, Carson struck him and the two fell to the ground. Carson yelled to King and Novascone to assist him in striking Brian. King indicated that he observed Novascone strike Brian in the head with the pipe wrench at least twice, but that King did not strike Brian. King maintained that he heard Carson's sister upstairs in the residence crying, and he went upstairs to check on her. When he returned downstairs, he observed Carson and Novascone "putting Brian . . . into the garage."

King indicated to police that he then assisted Carson and Novascone in attempting to clean the house, using towels, bleach, and a steam cleaner. He indicated that after attempting to clean the house, he and Novascone were eventually given money and drove Carson's vehicle back to Mississippi. King informed police where the clothes he had been wearing on the night of the homicide were located, signed a permission form to search his belongings, signed a permission form to submit to DNA testing, and submitted to a buccal swab of his mouth.

On May 14, 2009, King was charged by information with criminal conspiracy and murder in the first degree. In the information, the State alleged that King had made plans to travel to Omaha with coconspirators, traveled to Omaha from Mississippi, went to a specified location for the purpose of killing Brian, and did kill Brian. The State also alleged that King

"purposely and with deliberate and premeditated malice" had killed Brian.

On November 20, 2009, King appeared before the district court and entered a plea of guilty to the charge of criminal conspiracy and, in exchange, the State dismissed the first degree murder charge. The court ordered preparation of a presentence report and set a date for sentencing.

On February 16, 2010, King returned to court for sentencing. At the sentencing hearing, King's counsel argued for a "midrange" sentence and pointed to King's lack of a prior criminal record. King's counsel argued that his research concerning prior conspiracy cases in Nebraska revealed a variety of adult defendants convicted of conspiracy and receiving sentences most often ranging up to 15 years' imprisonment. King's counsel noted that he had located only one conspiracy case since 1979 where a defendant was sentenced in excess of 20 years' imprisonment.

King's counsel also argued that the presentence report reflected that King was willing to cooperate with the State, was willing to give depositions or testify at trial if necessary, and did cooperate with the State from his initial contact with police. Counsel pointed to King's minimal involvement in the actual homicide, the fact that he never actually struck Brian during the homicide, the unusual nature of the crime and the involvement of a large number of other individuals charged with crimes related to the homicide, and the charges they were allowed to plead to. For example, counsel argued that Carson's mother, Teresa, was potentially more involved in the crime than King, left the scene knowing what was going to happen, was allowed to plead to being an accessory, and was sentenced to 18 to 20 years' imprisonment. He argued that Carson's sister's case was transferred to juvenile court, despite her having "lured her own father over to the house before this whole incident occurred."

The State acknowledged that King did cooperate and that he retreated when Brian arrived at Teresa's residence. The State argued that his cooperation was reflected in the State's reduction of the charges to only a conspiracy charge.

At sentencing, the court indicated that it had "considered the entire presentence investigation that was prepared," as well as the arguments of counsel. The court imposed a sentence of 40 to 45 years' imprisonment. This appeal followed.

III. ASSIGNMENT OF ERROR

The only assignment of error is that the sentence imposed by the district court was excessive and did not reflect consideration of relevant mandatory sentencing factors.

IV. ANALYSIS

King asserts on appeal only that the sentence imposed by the district court was excessive. He argues that consideration of relevant mandatory sentencing factors, such as his lack of prior criminal record, his age, his mentality, his education, and his role in the underlying criminal act, demonstrates that the sentence imposed was an abuse of discretion. We affirm the sentence imposed.

[1,2] Recently, the Nebraska Supreme Court again set forth the governing principles of law in this jurisdiction concerning excessive sentence appeals. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). When a trial court's sentence is within the statutory parameters, even at the maximum of the parameters, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown. *Id.* When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id.*

King entered a plea to criminal conspiracy, a Class II felony offense. See Neb. Rev. Stat. § 28-202(4) (Reissue 2008). The statutory parameters provide that a Class II felony offense is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). As such, the sentence imposed upon King is within the statutory parameters.

King admitted to having used alcohol and marijuana and to having "experimented with mushrooms" on one or two

occasions and OxyContin on three to four occasions. These acts apparently never resulted in convictions. In addition, there is no dispute that the underlying offense leading to King's plea and conviction, the homicide of Brian, was a severe and violent offense. The district court indicated that it reviewed the entire presentence report before imposing sentence.

[3,4] The dissenting opinion correctly acknowledges that the district court was not required to pronounce specific findings. In *State v. Hunt*, 214 Neb. 214, 215, 333 N.W.2d 405, 406 (1983), the Nebraska Supreme Court emphatically rejected the argument that the "trial court was obligated to make specific findings before imposing the sentence," explaining that Neb. Rev. Stat. § 29-2260 (Reissue 2008) is "a directive to the trial court as to the factors to be considered by the trial court in imposing the sentence" and that "[i]t is clear that the statute is to serve as a guideline for the court but is not mandatory." These rules, the *Hunt* court further explained, derived from the court's earlier interpretation in *State v. Machmuller*, 196 Neb. 734, 246 N.W.2d 69 (1976), that while § 29-2260 lists grounds to be considered by the sentencing court, "it does not control its discretion." 196 Neb. at 738, 246 N.W.2d at 72. It naturally follows that the failure of the trial court to make specific findings cannot be error or grounds for reversal. This rule has been consistently followed. See, *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991); *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984).

[5] Nonetheless, the dissenting opinion would effectively reweigh the sentencing factors and come to a different subjective result—a function allocated to the district court under our statutes and case law. Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011). This allocation of responsibility dictated that the district court exercise its responsibility to weigh the sentencing factors applicable to King. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and

circumstances surrounding the defendant's life. *Id.* Thus, the exercise of this subjective judgment is the proper function of the district court. This court's function, on the other hand, is to determine whether the district court's sentence constituted an abuse of its discretion.

The State correctly argued that the presentence report assessed King as a high risk to reoffend. According to the presentence report summary, the results of the "Substance Abuse Questionnaire" scored King in the "maximum risk range for [a]ggressiveness and in the problem risk area for [a]lcohol, [d]rugs, [v]iolence, [a]ntisocial, and [s]tress [c]oping." The presentence report also includes the results of the "Level of Service/Case Management Inventory (LS/CMI)," a "validated risk/need assessment tool that is designated specifically to determine the degree of risk that the offender presents to the community and the risk to recidivate." As the presentence report summarizes:

> The LS/CMI scored in the very high risk range for [a]lcohol/[d]rug [p]roblems. The LS/CMI scored in the high risk range for [e]ducation/[e]mployment. [King] scored in the medium risk range on the LS/CMI for [l]eisure/[r]ecreation, [c]ompanions, [p]rocriminal [a]ttitude/[o]rientation[,] and [a]ntisocial [p]attern. Overall, . . . King scored a 22 on the LS/CMI[,] which places him in the high risk category (a score of 20 to 29 is considered a high risk).

The district court appropriately imposed a sentence, the State contends, sufficient to enable the Department of Correctional Services to ensure that the aggressiveness and alcohol and drug problems are addressed.

The State also persuasively argued that King participated in a murder. At oral argument, the State summarized that King "agree[d], with several others, to spend a couple of days on the road and joined in the planning and killing of another human being." He helped cover up the crime, helped "stuff" the victim's body in the car, and helped facilitate the disposal of the body by parking the car. Thus, we conclude that King was not a mere bystander who happened to be present at the commission of a violent crime.

We find justification in the record for the sentence imposed. We conclude that there was no abuse of discretion. As such, we affirm the sentence.

V. CONCLUSION

We find no abuse of discretion in the sentence imposed, which is within statutory limits. We affirm the sentence.

AFFIRMED.

IRWIN, Judge, dissenting.

I. INTRODUCTION

Ryan King was 17 years of age at the time of the underlying crime in this case, and 18 years of age at the time of sentencing. He was sentenced to very nearly the maximum allowable sentence when the lower court sentenced him to 40 to 45 years' imprisonment, despite a complete lack of any prior criminal record, his age, and a lack of indication in the record that he was actively involved in the planning or carrying out of the underlying homicide. The record suggests that King was physically present in the residence, but retreated when the crime occurred, and that he assisted in cleaning up after the homicide.

The following table contains the sentences of the most relevant involved parties:

Name	**Convicted of/Pled to**	**Sentence Received**
Ryan Carson	Second degree murder	60 to 80 years
Colton Novascone	Conspiracy	45 to 50 years
	Second degree assault	3 to 5 years
Ryan King	Conspiracy	40 to 45 years
Teresa Carson	Accessory	18 to 20 years
Ryan Carson's sister	Transferred to juvenile court	

I write separately because I find the sentence imposed on King to be particularly harsh in light of the entire record and the circumstances in this case. I find the sentence especially severe in light of the myriad factors the Nebraska Supreme Court has iterated to guide the lower court's sentencing decision. I believe that the district court's sentence, which I conclude to be significantly more severe than warranted by the record and the circumstances of King's background and involvement in the underlying homicide, is an abuse of discretion. Therefore, the

sentence should be reversed and the matter remanded for a new sentencing hearing before a different district court judge.

II. BACKGROUND

As the majority notes, the investigation into Brian Carson's death included interviews of a number of suspects and potential witnesses. Those interviews resulted in police being informed that Ryan Carson (Carson) and two other individuals, eventually identified as King and Colton Novascone, had traveled together to Omaha from Mississippi immediately prior to the homicide of Brian.

Because King ultimately entered a plea in this case, the record presented on appeal is primarily composed of the presentence report, which is 14 volumes in length and in excess of 1,300 pages. The vast majority of the presentence report concerns the police investigation into the homicide of Brian and includes numerous interviews with a variety of other suspects and potential witnesses, but is largely unconcerned with King himself. Indeed, there are entire volumes of the presentence report where King is barely or never mentioned. The entire presentence report contains a single recorded interview of King, and my review of the presentence report suggests that this is most likely because King was cooperative and his account of his involvement was not contradicted by any other suspects or witnesses.

The entire interview of King is approximately seven pages in length. During that interview, King acknowledged traveling to Omaha with Carson and Novascone, acknowledged being physically present in the residence when Carson killed Brian, acknowledged witnessing Novascone strike Brian at least once, but did not indicate any participation in the planning or actual carrying-out of the homicide. He did acknowledge helping Carson and Novascone attempt to clean after the homicide. This interview is the only interview of King in the entirety of the 14-volume presentence report in his case. A review of the multiple interviews of other suspects and potential witnesses reveals no contradiction to King's statements about his level of involvement in the homicide or the events that occurred; in his interviews, Novascone repeatedly denied

any involvement or knowledge of what happened, but never implicated King to any greater extent than King's own statement to police.

At King's sentencing, his counsel argued that research concerning prior conspiracy cases in Nebraska revealed a variety of adult defendants convicted of conspiracy and receiving sentences most often ranging up to 15 years' imprisonment. King's counsel cited one case involving an adult gang member with a criminal record convicted of conspiracy in a homicide case where the defendant, similarly to King, had not committed the actual murder and where the defendant received a sentence of 7 to 10 years' imprisonment on the conspiracy conviction. King's counsel noted that he had located only one conspiracy case since 1979 where a defendant, despite age and criminal records, was sentenced in excess of 20 years' imprisonment.

King's counsel also argued that the presentence report reflected that King was willing to cooperate with the State, was willing to give depositions or testify at trial if necessary, and did cooperate with the State from his initial contact with police. Counsel pointed to King's minimal involvement in the actual homicide, the fact that he never actually struck Brian during the homicide, the unusual nature of the crime and the involvement of a large number of other individuals charged with crimes related to the homicide, and the charges they were allowed to plead to. For example, counsel argued that Carson's mother, Teresa Carson, was potentially more involved in the crime than King, left the scene knowing what was going to happen, was allowed to plead to being an accessory, and was sentenced to 18 to 20 years' imprisonment. He argued that Carson's sister's case was transferred to juvenile court, despite her having "lured her own father over to the house before this whole incident occurred."

The State acknowledged that King did cooperate and that he retreated when Brian arrived at Teresa's residence. The State did not assert that King had been any more involved than suggested. The State argued that his cooperation was reflected in the State's reduction of the charges to only a conspiracy charge.

Although the court indicated that it had "considered the entire presentence investigation that was prepared," as well as the arguments of counsel, the court did not indicate what in the presentence report justified a near-maximum sentence of 40 to 45 years' imprisonment, when the maximum that could have been imposed was 50 years. In fact, the record contains no specific written or oral statements by the court explaining why the court was imposing this particular sentence on King. While I understand such remarks are not required by Nebraska statute or jurisprudence, some explanation of King's sentence may have aided in review of this sentence on appeal.

III. ANALYSIS

King asserts on appeal only that the sentence imposed by the district court was excessive. He argues that consideration of relevant mandatory sentencing factors, such as his lack of prior criminal record, his age, his mentality, his education, and his role in the underlying criminal act, demonstrates that the sentence imposed was an abuse of discretion. I agree.

In the present case, the sentence imposed is within the statutory limits, albeit near the maximum end of the limits. King entered a plea to criminal conspiracy, a Class II felony offense. See Neb. Rev. Stat. § 28-202(4) (Reissue 2008). The statutory limits provide that a Class II felony offense is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). As such, the sentence imposed upon King, 40 to 45 years' imprisonment, is within the statutory limits and can be disturbed only upon a finding that the trial court abused its discretion.

The Nebraska Supreme Court has iterated a number of factors that the lower court is to consider when imposing a sentence. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id.*

In this case, most of the factors to be considered by the trial court in imposing a sentence mitigate in favor of a sentence not approaching the maximum allowable sentence. King was only 17 years of age at the time of the offense, was still a student in school and had not yet graduated, and had not had an opportunity to gain any meaningful work experience. King had been held back at least 1 year in school and was still in 10th grade. King told the probation officer who prepared the presentence report that some of his friends had gang affiliations, but King denied personally having any such affiliations and indicated that these acquaintances did not get into trouble—and there is nothing in the record to suggest otherwise.

It is true that King admitted to having used alcohol and marijuana and to having experimented with other substances on three or four occasions. However, despite these instances of experimentation, King had never had any prior encounter with law enforcement. He had no prior record whatsoever. Moreover, although the substance abuse questionnaire resulted in a finding that King was in the "maximum risk" category for aggressiveness, his complete lack of a prior criminal record, the lack of any indication in the presentence report about prior disciplinary problems at school, and the fact that the record unequivocally demonstrates that in the present case, he retreated from, rather than participated in, the violent homicide of Brian belie the notion that a sentence this severe was necessary to ensure that his aggressiveness and alcohol and drug problems are addressed.

There is no dispute that the underlying offense leading to King's plea and conviction, the homicide of Brian, was a violent offense. However, the record establishes without contradiction that King did not personally take part in the attack of Brian, did not strike Brian, and actually retreated from the scene when Brian was attacked by Carson and Novascone. While the underlying offense involved violence, it did not involve violence on the part of King. King told the probation officer preparing his presentence report that he did not really believe that they were going to kill Brian when he accompanied Carson and Novascone from Mississippi. Despite the State's characterization at oral argument, quoted

by the majority, that King "agree[d], with several others, to spend a couple of days on the road and joined in the planning and killing of another human being," there is no indication in the record that King had any knowledge of Carson's plan to kill Brian until the parties were somewhere between Mississippi and Nebraska late at night. There is no indication that King played an active role in any planning of the crime, and although he assisted Carson and Novascone with attempting to clean up the scene afterward, he did not "join in the . . . killing" and his involvement in the underlying offense was largely a matter of being present when it happened.

In addition to all of the factors set forth by the Supreme Court, the record in this case demonstrates that King was generally cooperative with law enforcement. His presentence report includes only one interview of King, and although he was hesitant to admit his involvement, during the course of that single interview, he cooperated and acknowledged his involvement. There is nothing in the interviews of other suspects or potential witnesses to suggest that King was less than truthful in the statement he ultimately gave to police during that interview, and the vast majority of the more than 1,300 pages of presentence report in this case do not even concern King.

The district court indicated that it reviewed the entire presentence report before imposing sentence, but the court gave no insight or indication of anything contained in the report that would suggest the need for King to be subject to a near-maximum period of imprisonment, beyond the underlying offense that King was present for the commission of. Nonetheless, the court sentenced King to 40 to 45 years' imprisonment.

As noted, there were a number of other individuals who were charged with various offenses related to the homicide of Brian. Novascone entered pleas to charges of criminal conspiracy and second degree assault for his role in accompanying Carson and King from Mississippi and actually striking Brian in the head multiple times with a pipe wrench; he was sentenced to 45 to 50 years' imprisonment on the conspiracy conviction and 3 to 5 years' imprisonment on the assault conviction, and his

appeal challenging those sentences is dealt with by this court in a memorandum opinion filed today, *State v. Novascone*, No. A-10-472. Carson's mother, Teresa, entered a plea to a charge of being an accessory to a felony and was sentenced to 18 to 20 years' imprisonment. Carson's sister had her case transferred to juvenile court on the State's motion and entered admissions to charges of criminal conspiracy and being an accessory to a felony. Carson ultimately entered a plea to a charge of second degree murder and was sentenced to 60 to 80 years' imprisonment. He appealed in case No. A-10-473, which we summarily affirmed.

I conclude that King's lack of any prior criminal record, his age and mentality, his cooperation with law enforcement, and his minimal involvement in the underlying homicide all weigh heavily in favor of a sentence more lenient than that imposed by the district court. While I do not suggest to minimize the circumstances underlying this offense or suggest that a significant sentence would be inappropriate, I cannot find justification in the record for the severity of the sentence imposed.

I recognize that attempts to reverse or modify sentences as excessive have not been favorably received in Nebraska appellate jurisprudence. In *State v. Reynolds*, No. A-91-403, 1992 WL 215386 (Neb. App. Sept. 8, 1992) (not designated for permanent publication), this court reviewed sentences imposed on a 34-year-old woman who had completed only the fourth grade, was disabled and unemployed, was in poor health, and had a history of drug and alcohol abuse. We concluded that the sentences imposed, which were very near the maximum allowable sentences, were excessive and contrary to the well-established sentencing goals of deterring others from criminal acts, rehabilitating the defendant, and providing protection for society. The State successfully sought further review, and the Nebraska Supreme Court reversed our finding. See *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993). The Supreme Court held that this court had failed to articulate sufficient reasons why a severe sentence constituted an abuse of discretion, recognized that sentencing limitations are matters for the Legislature, and iterated that imposing a sentence within those limits is within the discretion of the trial court.

In *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), this court reversed a district court's finding that a sentence imposed by a county court was excessive. In so doing, we recognized that appellate courts have extremely limited review of sentences and that sentences within statutory limits are uniformly and routinely affirmed despite the appellate court's opinion of their severity. We noted that a sentence being within statutory limits nearly universally means that there has been no abuse of discretion. The dissenting opinion in *State v. Ruisi, supra*, recognized that, in the then 8 years of existence of this court, not a single criminal sentence had met the definition of abuse of discretion set forth in excessive sentence precedence, but concluded that the Nebraska Supreme Court had left the door ajar, however slightly, to finding such an abuse of discretion. The Nebraska Supreme Court, in *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001), disapproved of the majority's suggestion in *State v. Ruisi, supra*, that sentences within statutory limits can never be an abuse of discretion. Nonetheless, I have found only one Nebraska appellate case, decided in the decade since, finding that a sentence lawfully imposed within statutory limits constitutes an abuse of discretion and is excessive. See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). But see, *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001); *State v. Hatt*, 16 Neb. App. 397, 744 N.W.2d 493 (2008); *State v. Brown*, No. A-05-1417, 2006 WL 2669410 (Neb. App. Sept. 19, 2006) (not designated for permanent publication), *petition for further review overruled* 272 Neb. xxxi (Nov. 15, 2006); *State v. Prater*, No. A-05-1544, 2006 WL 1889169 (Neb. App. July 11, 2006) (not designated for permanent publication), *petition for further review overruled* 272 Neb. xxxi (Aug. 30, 2006); *State v. Charles*, 13 Neb. App. 305, 691 N.W.2d 567 (2005); *State v. Chrisman*, No. A-03-1271, 2004 WL 2032767 (Neb. App. Sept. 14, 2004) (not designated for permanent publication), *petition for further review overruled* 268 Neb. xxxiv (Nov.

10, 2004) (all finding sentence imposed by lower court to be excessively *lenient*).

In *State v. Iromuanya*, the Nebraska Supreme Court noted that the sentence imposed "should fit the offender and not merely the crime." 272 Neb. at 216, 719 N.W.2d at 295. The Supreme Court reduced the minimum portion of a sentence imposed upon an individual convicted of committing second degree murder, based largely on the defendant's lack of criminal history. In so doing, the Supreme Court noted that the trial court "could not have imposed a more severe minimum term . . . on a hardened criminal with a lengthy history of violent felony convictions." *Id.* The current case is similar in that respect; the trial court here could scarcely have imposed a more severe sentence on a hardened criminal with a lengthy history of violent felony convictions.

Contrary to the characterization of the majority opinion, I would not advocate reaching a subjective result of what sentence is appropriate. While the majority rightly notes that the exercise of judgment in imposing a sentence is properly the function of the district court, and the exercise of judgment in reviewing a sentence for an abuse of discretion is properly the function of this court, my conclusion that the district court did abuse its discretion does not infringe on the proper allocation of responsibilities between the district court and this court any more than this court's finding that a district court abused its discretion in imposing an excessively lenient sentence does. The functions of the district court and this court are precisely the same whether it is a defendant alleging the sentence to be excessively severe or whether it is the State alleging the sentence to be excessively lenient, and in both cases, our responsibility is to review the same sentencing considerations the district court is supposed to consider, as set out and discussed above. See *State v. Charles, supra* (reviewing same sentencing considerations to conclude sentence was excessively lenient). My conclusion that the sentence here was objectively excessive is no more violative of the allocation of responsibilities than in any of the cited cases where the appellate courts have concluded that sentences imposed were excessively lenient, despite

being within statutory limits and having been an exercise of the district court's subjective discretion. As in those cases, I would simply find that the court abused its discretion in this case. See *id.*

Despite the unfavorable reaction to prior attempts by this court to recognize the constraints of the standard of review in considering sentences, I find that the district court's sentence was significantly more severe than warranted by the record and the circumstances of King's background and involvement in the underlying homicide and that it was an abuse of discretion. Therefore, the sentence should be reversed and the matter remanded for a new sentencing hearing before a different district court judge.

In re Interest of Marcos S.A. and Andres S., children under 18 years of age. State of Nebraska, appellee, v. Marcos A., appellant.

807 N.W.2d 794

Filed December 20, 2011. No. A-11-335.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
4. **Due Process.** Parties whose rights are to be affected are entitled to be heard.
5. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
6. **Due Process: Notice.** To satisfy procedural due process requirements, notice must be reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.