

2003 WL 24840568 (Mont.Dist.) (Trial Motion, Memorandum and Affidavit)

District Court of Montana,
Thirteenth Judicial District Court.
Yellowstone County

State of Montana, Plaintiff,

v.

Pamela VERNES, Defendant.

Case No. DC 02-523.
December 18, 2003.

Defendant's Reply to State's Sentencing Memorandum

Judge: [Gregory R. Todd](#).

COMES NOW the Defendant, by and through counsel, and submits the following Reply to the State's Sentencing Memorandum filed on December 16, 2003.

SENTENCE ENHANCEMENT

Counsel for Defendant agrees with the State of Montana in its sentencing Memorandum filed with the Court that the State of Montana did not properly plead the weapon enhancement as required by [Section 46-1-401, M.C.A.](#) For this reason, counsel for Defendant amends her recommendation to reflect this fact. On Count I, Attempted Deliberate Homicide, Defendant's recommendation is that she be committed to the Montana Women's Prison for a term of forty (40) years with twenty (20) of those years being suspended. On Count II, Attempted Deliberate Homicide by Accountability, Defendant recommends that She be sentenced to the Montana Women's Prison for a term of ten (10) years to run concurrently with the sentence on Count I.

RESTITUTION

The amount of restitution indicated by the State in the amended total amount of \$23,525.70 to be paid jointly and severally between Pamela and Richard Vernes is the correct amount of restitution owed. As noted in the State's Memorandum, the State has "eliminated" a significant portion of the restitution that was originally claimed by Travelers Insurance. This portion was eliminated because the expenses claimed by Travelers were unrelated to this case and were not pecuniary losses, (ie. the events of this case occurred in the victim's upstairs living room; thus costs to clean and repaint her upstairs hallway, bedroom, kitchen, bathroom and downstairs bathroom, hallway, kitchen, and living room, although claimed by Luella Loga and paid for by Travelers, is not part of the restitution in this case).

Although Defendant agrees that \$23,525.70 is the amount of restitution owed, Defendant does ask this Court in making its decision regarding restitution in this case to consider the Defendant's ability to pay as required by [Section 46-18-244, M.C.A. \(2001\)](#). "The Court shall specify the total amount to be paid and the method and time of payment and may permit payment in installments. In determining the amount, method, and time of each installment payment, the court shall consider the financial resources and future ability of the offender to pay" [Section 46-18-244 \(1\) \(2\) \(2001\)](#).

SENTENCING ISSUES

The State in its sentencing Memorandum alleges that the defense “mischaracterizes” the sentences received by Kevin Schmalz and Floyd Tapson because the sentences which Defendant referred to were the final sentences that the Defendants received and not the original sentences that were given by the trial Court and then reversed by either the Montana Supreme Court or the Sentence Review Division. (State's Mem. at 6). The Defense in its sentencing Memorandum clearly stated that after Tapson's conviction was reversed and remanded that he pled guilty and was then sentenced by this Court to 75 years imprisonment. Def.'s Mem. at 4. In the case of Mr. Schmalz, the original sentence he received from the District Court is no longer in the computerized records of the Clerk of the District Court, which are the records primarily relied upon by the Defense in writing its Memorandum. Additionally, since his original sentence was reversed and amended by the Sentence Review Division, (see attached Decision and Amended Judgment and Commitment), it is appropriate for this Court to consider the sentence that was actually imposed.

In discussing the sentence received by Mr. Schmalz originally, the State argues that the original sentence imposed by the District Court was forty years on the count of Attempted Deliberate Homicide plus ten years for the use of a weapon and seventeen years on the charge of Aggravated Assault to run concurrently. However, the State does not mention that when this original sentence was pronounced, Judge Baugh also made the recommendation that Mr. Schmalz be considered for the boot camp program, which would have allowed the Court to reduce its sentence upon successful completion of the program. After the sentence was amended by the Sentence Review Division, the District Court, upon motion of Defendant's attorney and the concurrence of the State, issued a further Order concurring with Defendant's recommendation that he go to boot camp and recommending that Mr. Schmalz not be incarcerated in any facility where he could not obtain mental health treatment. (See Attached).

The State notes that some of the reasons Judge Baugh gave regarding the sentence he originally imposed in the Schmalz case was that the victims had fully recovered and sought no retribution and that Mr. Schmalz was only eighteen years old at the time of sentencing. However, Judge Baugh also noted that Mr. Schmalz had a lengthy juvenile record, including five convictions which would have been felonies if he had been an adult, and that he was already on probation when he committed the offense against his mother and father. The Court further considered the Defendant's mental health issues and at the initial sentencing went as far as to Order that Mr. Schmalz not be incarcerated at an institution where psychological counseling was not available. Pamela Vernes on the other hand has no significant criminal history. Like Mr. Schmalz, she does have significant mental health issues that need to be addressed, and those issues were a primary factor that led to commission of her crimes. This Court has full authority to consider those factors in sentencing. See [State v. Collier](#), 277 Mont. 46, 63, 919 P.2d 376, 387 (1996).

The State further argues that Mr. Tapson, who was originally sentenced to life, received his seventy-five year sentence as a result of changing his plea and that by doing so he accepted responsibility and did not put the victim through another trial. While these things may have been a factor in the State's recommendation in that case as well as in the Court's sentencing, the fact that Mrs. Vernes exercised her Constitutional right and went to trial as opposed to pleading guilty does not mean that she hasn't accepted any responsibility for her actions. Pamela Vernes has always acknowledged that she committed a crime. However, as the defense argued at trial, Mrs. Vernes believed that she was guilty of an assault and not attempted homicide. Had any plea offer been extended to her other than to plead guilty to what she was charged with, Pamela Vernes too would have entered a plea as opposed to going to trial. Further, Mrs. Vernes should not be punished for exercising a constitutional right. [State v. Kelly](#), 265 Mont. 298, 301, 876 P.2d 641, 644 (1994).

The State also argues that the Tapson case is the most similar to the present case. Defendant strongly disagrees as the facts of Mr. Tapson's case are very different than those at issue here. First, Mr. Tapson was charged with aggravated kidnapping and rape in addition to the attempted homicide charge. Additionally, although the victim in the Tapson case was mentally handicapped and the victim in Mrs. Vernes' case is **elderly**, Mr. Tapson **abused** a position of trust in order to perpetrate the crime upon his victim. Mr. Tapson used his position as an employee in the group home and the victim's knowledge of him through his employment there to commit the crime. Pamela Vernes did not **abuse** a position of trust. Also, there was no evidence that Mr. Tapson suffered from any mental illness at the time of his crime or that he was under the influence of any medication. He simply shot his victim twice and left her to die. Mr. Tapson pled guilty to both aggravated kidnapping and attempted homicide

in exchange for dismissal of the rape charge with a 1(B) recommendation for seventy-five years each, concurrent. The facts of that case are totally unlike those involved here.

The State asks this Court to disregard the other cases cited by the defense as similar or like cases based on the fact that none of those cases went to trial as attempted deliberate homicide cases. The State argues that neither the Court nor defense counsel should try to ascertain why the charges were amended and that attempts to do so is “wrought with peril.” State's Mem. at 7. However, the Defense has not asked this Court to try to figure out why the charges were amended nor has the Defense tried to do so. To the contrary, the reason those cases were cited was that those individuals were originally charged with attempted deliberate homicide, and the facts of those cases were useful for comparison purposes to this case. This Court is sentencing a person not a statute, and in considering what sentence to impose, the cases cited by Defendant are useful. (See Attached charging documents for relevant facts). Neither the fact that the jury in this case did not find Mrs. Vernes guilty of a lesser included offense nor the fact that other cases were amended to some other charge prevents this Court from looking at sentences imposed in other factually similar cases.

The State argues in its conclusion that Mrs. Vernes maintains her anger toward Luella Loga, and that she has a limited likelihood of appropriate and successful rehabilitation back into society. This is simply untrue. While Pamela Vernes does not deny that she was and is upset with Luella Loga over things that happened between them that lead up to the events of this case, Pamela Vernes has a very good likelihood of being rehabilitated and once again being a productive member of our society. Mrs. Vernes worked and functioned in society as a law abiding citizen for fifty years. The events of this case were a tragic isolated incident that have little to no likelihood of every occurring again. Although she had been placed on several different medications, Pamela Vernes was not under the proper care and treatment of a psychiatrist at the time this crime occurred. She had in fact never been fully psychologically evaluated or her exact condition diagnosed. With proper mental health treatment and addressing medication issues, Mrs. Vernes can once again be successful in the community. Appropriate mental health management and supervision will be sufficient to ensure that Mrs. Vernes remains on track and does not pose any danger to herself or to the community.

CONCLUSION

For the above stated reasons, Defendant asks that this Court reject the sentencing recommendation proposed by the State and give Pamela Vernes the best chance at rehabilitation by sentencing her on Count I to forty (40) years in the Montana Women's' Prison with twenty of those years to be suspended and on Count II to ten years in the Montana Women's' Prison to run concurrently with the sentence in Count I.