Jerry Rousel [ms-0404.009.005.006]
236 5381

To: Ms. Ruth Rushen, Director
California Department of Corrections
3001 "E" Street
Sacramento, California 95814

Attention: Dave Escoto

RE: Kenneth Ray Rose (C-06152)
P.O. Box 600
Tracy, California 95376

(CR 46273)

Request to Recall Sentence Pursuant to PC § 1170(f)

I. The sentence should be recalled by the California Department of Corrections where the sentence imposed was disparate.

A. The defendant was sentenced to 9 years for violations of Penal Code Section 211, 12022.5 and 207, 12022.5. The total sentence of nine years should be recalled by the Department of Corrections where:

(1) The defendant was 23 years old at the time the offenses were committed.

(2) The defendant had never served any substantial period of custody. He pled guilty on 7-16-76 to attempted burglary and received 90 days in custody as a condition of probation. This is his only known criminal record.

(3) The defendant cooperated fully with law enforcement authorities at the time of his arrest in February, 1979 and admitted his involvement in the offenses.

(4) There was no physical harm inflicted on any victims; although Mr. Rose was armed with a firearm he did not shoot, hit or otherwise attack anyone.

(5) The codefendant, DEBORAH ROSE (Mr. Rose's sister) received a substantially lighter sentence of 4 years state prison even though her involvement was

similar to Mr. Rose's with the exception of a robbery charge which Mr. Rose participated in without his sister.[1]

B. The defendants' current status warrants reconsideration of the sentence.

Since 8-79 the defendant has been housed at Deuel Vocational Institution where he is confined to a maximum security wing which is frequently "locked down". (I have contacted several administrators regarding the classification manual and I have been informed the defendant must serve 1-2 more years at D.V.I. before being considered for transfer to a medium facility.)

II. The sentence should be reduced to 7 years (5 years mid term plu two years for 12022.5 enhancement).

In order to maintain consistency and to promote uniformity of sentencing, the sentence should be recalled. 5 years has been determined to be the maximum punishment that an inmate can receive before he becomes "warehoused". The defendant must serve a total of six years prior to parole.

Encl.

---

[1] The median term for second degree murder, voluntary manslaughter and rape were less than the defendants' median term (as of 6-30-78).

". . . 'An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. A reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate, and, if there is some evidence to support the information, the court will not inquire into its sufficiency. Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.' Finally, although there must be some showing as to the existence of each element of the charged crime such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate." [Citations omitted.]

The record before the court more than adequately meets the above criteria.

356 12-12-78

II

DEFENDANT DEMONSTRATES NO COMPELLING REASON OR PLAUSIBLE JUSTIIICATION FOR A PHYSICAL EXAMINATION AND PHOTOGRAPHY OF MS. MULLEN.

Under California law, criminal discovery is governed by the common law as set forth by judicial opinion rather than by the rules of civil discovery. Pitchess v. Superior Court, 11 Cal. 3d 531, 536-537 (1974). However, as is required in civil discovery, some showing of good cause or plausible justification is required in criminal discovery. Joe Z. v. Superior Court, 3 Cal. 3d 797, 804 (1970); People v. Superior Court [Dean], 38 Cal.App.3d 966, 969 (1974). As is set forth in Hill v. Superior Court, 10 Cal.3d 812, 817 (1974), the requirements appear to be as follows :

. . . . .

. . . . .

"An accused, however, is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause. '. . .[T]he court has discretion to deny discovery in the absence of a showing which sets aside the material sought and furnishes a "plausible justification" for inspection. [Citations.]' '"A showing, however, that the defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist in preparing his defense. . . ." [Emphasis in the original.] [Citations.]'. . . ."

Defendant seeks discovery of Ms. Mullen's present physical condition in order to defend against the great bodily injury allegations attached to Counts Five and Six of the Information. He provides no shread of authority sanctioning such discovery. The People's research has failed to reveal any controlling authority.

In People v. Vick, 11 Cal.App.3d 1058 (1970), the court was concerned with the release and cremation of a homicide victim before the accused's expert could examine the remains. The court noted there is a clear distinction between the examination of physical evidence, such as fingerprints, blood samples, photographs or written statements and the body of a human being. Clearly, the former items are susceptible of examination with no likelihood of outrage to the emotional feelings of the living. 11 Cal.App.3d at 1064. The same cannot be said about an examination of a living human being.

In Ballard v. Superior Court, 64 Cal.2d 159 (1966), the court recognized the trial judge has the authority to order the complaining witness in a sex crime case to submit to a psychiatric examination, but the movant must present a compelling reason for

such an examination. Such a necessity or compelling reason normally arises when there is little or no corroboration supporting the charge and there is a possibility of a mental or emotional condition affecting his veracity. 64 Cal.2d at 176-177. The court further recognized the trial judge should not and realistically cannot force the complaining witness to submit to the examination. Failure to submit would justify a comment during trial on that refusal. 64 Cal.2d at 177.

An important distinction exists between the instant defendant's request and a Ballard motion. A Ballard motion is designed to explore a latent condition, usually concealed or unrecognized by a trier of fact, affecting the witness's credibility. Without the examination and testimony of results, the potentially vital area of impeachment cannot be approached. In the instant case, a physical examination would not serve to impeach the complaining witness, and ample alternative means are available to defendant to satisfy his avowed desires.

Defendant seeks a physical examination with photographs to rebut the People's allegation of great bodily injury. The attack and beating took place in excess of nine weeks ago. The present state of Ms. Mullen's physical condition is irrelevant to the great bodily injury allegation. Her present condition is a function of her general health and rate of healing as well as the severity of the significant or substantial injury inflicted on her on October 8, 1978. Ms. Mullen has testified to the extent of her injuries and the manner in which they were received. Photographs were taken shortly after the wounds were inflicted. Presumably,

medical records were maintained by the examining physician. All of this information is available to defendant and any medical expert he may retain to testify on the issue.

With the information existing and available to defendant, there is no compelling reason or plausible justification presented by defendant to support his request. Surely an order requiring a victim of crime to submit to the indignity of a physical examination by a stranger for non-medical purposes should require as great or greater a showing of cause than a psychiatric examination. Defendant adds to that indignity by requesting Ms. Mullen be further examined by a photographer, presumably someone other than the examining physician. To date, defendant has been directly responsible for three violations of Ms. Mullen's privacy, personal space and bodily integrity. He personally did so at the time of the attack and directly generated the violation by the doctor to whom Ms. Mullen went for treatment and the violation by police officers in her reporting defendant's criminal conduct. The two additional violations sought by defendant should not be judicially sanctioned on the current state of the record.

. . . . .

. . . . .

. . . . .

. . . . .