IN THE SUPREME COURT OF THE STATE OF NEVADA

SANTIAGO GIL ALMEIDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42947

FILED

JUL 29 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubash
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a controlled substance. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Santiago Gil Almeida to serve a prison term of 12-36 months to run consecutively to the sentence imposed in district court case no. C161524.

First, Almeida contends that his trial on two separate offenses constituted prejudicial joinder.[1] Almeida was charged by way of a criminal information with one count each of robbery with the use of a deadly weapon and possession of a controlled substance. The jury found Almeida not guilty of the robbery. Although Almeida admits that he did not object to the joinder of the charges below, he argues on appeal that the robbery and possession charges were wholly unrelated and being tried for

[1]See NRS 173.115; NRS 174.165.

both at the same trial amounted to plain error.[2] Almeida claims that "[d]ue to the nature of the evidence related to the robbery charge, defendant's counsel was forced at trial to concede defendant's guilt of possession of a controlled substance," and therefore, his trial was unfair because he was unable to present a viable defense to the possession charge. We disagree with Almeida's contention.

Initially, we note that Almeida's bare allegation amounts to mere speculation; he has not articulated with the requisite factual specificity how he would have defended the possession charge, or what additional evidence would have been presented in his defense that was strategically precluded by the joined robbery charge.[3] Additionally, Almeida has failed to demonstrate that he was prejudiced by the joinder of the charges. "'The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.'"[4] The joinder of charges is reversible only if the simultaneous trial of the offenses has a "'substantial and injurious effect or influence in determining the jury's verdict.'"[5] In

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[2]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[3]See generally Hargrove v. State, 100 Nev. 498, 686 P.2d 222, (1984).

[4]Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)).

[5]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990) (quoting United States v. Lane, 474 U.S. 438, 449 (1985)).

reviewing the issue of joinder on appeal, this court will consider the quantity and quality of the evidence supporting the individual convictions.[6]

Here, the jury found Almeida not guilty of the robbery charge, and on appeal, Almeida does not challenge the sufficiency of the evidence with regards to the guilty verdict for possession.[7] Moreover, the jury's split verdict proves that they understood the district court's limiting instruction and were able to compartmentalize the evidence.[8] Almeida failed to demonstrate that there was any "spill-over" effect from the State's unsuccessful robbery prosecution which contributed to the possession conviction. Accordingly, we conclude that the district court did not commit plain error by refusing to sua sponte sever the two charges.

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[6]See, e.g., Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (1998) (overwhelming evidence of guilt, along with other factors, supported joinder); Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (no error in joining charges where, inter alia, sufficient evidence supported convictions); Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989) (joinder did not have substantial and injurious effect where, inter alia, convincing evidence supported each conviction).

[7]Cf. Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003) (finding prejudice where defendants found guilty of multiple improperly joined counts).

[8]See id. at 304, 72 P.3d at 591. Jury instruction no. 3 provided in part: "[e]ach charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged."

Second, Almeida contends that the sentence constitutes cruel and unusual punishment in violation of the United States and Nevada constitutions because the sentence is disproportionate to the crime.[9] The extent of Almeida's argument, without support, is that "it is likely the court was thinking of the robbery evidence when it sentenced defendant." We disagree with Almeida's contention.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[10] This court has consistently afforded the district court wide discretion in its sentencing decision.[11] The district court's discretion, however, is not limitless.[12] Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[13] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is

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[9]Almeida primarily relies on Solem v. Helm, 463 U.S. 277 (1983); see also U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

[10]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[11]Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[12]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

[13]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (emphasis added).

constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[14]

In the instant case, Almeida cannot demonstrate that the district court relied only on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, Almeida concedes that the sentence imposed was within the parameters provided by the relevant statutes.[15] Finally, Almeida was on parole at the time of the instant offense, and, prior to announcing the sentence, the district court noted Almeida's drug-related criminal history and three previous convictions as reflected in the presentence investigation report. Therefore, we conclude that the district court did not abuse its discretion at sentencing, and that the sentence imposed is not disproportionate to the crime and does not constitute cruel and unusual punishment in violation of either the federal or state constitution.

Having considered Almeida's contentions and concluded that they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Almeida was convicted pursuant to a guilty plea. The judgment of conviction should have stated

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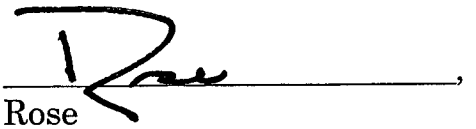
[14]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[15]See NRS 453.336; NRS 193.130. It is not clear from the appellate record whether Almeida was convicted and sentenced for a category D or E felony.

that Almeida was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for the limited purpose of correcting the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court as noted above.



_____, J.
Rose

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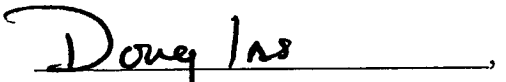

_____, J.
Douglas

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk