

IN THE SUPREME COURT OF THE STATE OF NEVADA

TY NELSON ELLIOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43312

FILED

NOV 15 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 guilty plea, of one count each of burglary (count I), resisting and obstructing a public officer with a dangerous weapon (count II), and robbery with the use of a deadly weapon (count III). Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Ty Nelson Elliot to serve a prison term of 35 to 156 months for count I, a consecutive prison term of 19 to 48 months for count II, and a consecutive prison term of 72 to 180 for count III, with an equal and consecutive term for the use of a deadly weapon.

Elliot first contends that the district court abused its discretion at sentencing. Specifically, Elliot argues that the sentence imposed is too harsh given that he: (1) was a decorated war veteran who had served in two wars; (2) accepted responsibility for his actions; and (3) had a long history of drug addiction, mental illness and post-traumatic stress disorder caused by the trauma of war. Citing to the dissent in

Tanksley v. State,¹ Elliot asks this court to review the sentence to see that justice was done. Additionally, Elliot argues that the district court relied on impalpable and highly suspect "bald supposition" in imposing sentence, namely, its erroneous belief that Elliot "chose to continue to be mentally ill." We conclude that Elliot's contention is without merit.

This court has consistently afforded the district court wide discretion in its sentencing decision and 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."² Regardless of its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.³

In the instant case, we conclude that the district court did not rely on impalpable or highly suspect evidence. In fact, prior to imposing sentence, the district court noted that the crime involved "extraordinary

¹113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

²Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

³Blume 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)).

danger and violence" and that Elliot had an extensive criminal history. Further, we note that Elliot does not allege that the sentencing statutes are unconstitutional, and the sentence imposed was within the parameters provided by the relevant statutes.⁴ Finally, the sentence imposed is not so unreasonably disproportionate to the crimes as to shock the conscience; although Elliot received consecutive sentences, as well as a maximum sentence for the robbery, he had an extensive criminal history and one of the victims involved was a police officer. Accordingly, we conclude that the district court did not abuse its discretion at sentencing.

Additionally, for the first time on direct appeal, Elliot alleges that he is entitled to credit for time spent in presentence confinement pursuant to Johnson v. State.⁵ We decline to consider Elliot's contention because he failed to raise this issue in the district court. We note, however, that Elliot may seek credit for time spent in custody prior to sentencing by filing a post-conviction petition for a writ of habeas corpus in the district court.⁶

⁴See NRS 205.060(2) (providing for a prison sentence of 1 to 10 years); NRS 199.280(1), NRS 193.130(2)(d) (providing for a prison sentence of 1 to 4 years); NRS 200.380(2) (providing for a prison term of 2 to 15 years); NRS 193.165(1) (providing for an equal and consecutive term for the use of a deadly weapon).

⁵120 Nev. ___, 89 P.3d 669 (2004).

⁶See NRS 34.724(2)(c); Pangallo v. State, 112 Nev. 1533, 1535, 930 P.2d 100, 102 (1996), clarified on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

Finally, Elliot contends that he is entitled to a new sentencing hearing because the judgment of conviction entered "is a contradiction in terms." In particular, Elliot alleges that the sentencing court imposed count II to run concurrently with all other sentences imposed, but notes that the judgment of conviction states that count II is to run consecutively to count III. The State concedes that the judgment is ambiguous with regard to whether count II was ordered to run concurrently or consecutively. Accordingly, we remand this matter to the sentencing court to clarify the ambiguity in the judgment of conviction with respect to count II.

Having considered Elliot's contentions and concluded that they are either inappropriate for review on direct appeal or lack merit, we

ORDER the judgment of conviction AFFIRMED, and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk