IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTURO OCHOA, A/K/A ARTHUR OCHOA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43399

FILED

DEC 0 1 2004

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea, of one count of battery by a prisoner in lawful custody. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Arturo Ochoa to serve a prison term of 24 to 60 months to run consecutively to the sentence imposed in an unrelated case.

Ochoa 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.[1] In particular, Ochoa contends that the sentence imposed is too harsh given the fact that: (1) the victim sustained no injuries; (2) he alleges that the substance he threw on the correctional officer was only milk;[2] (3) he threw the milk in anger because he was being given only half portions of food; (4) he was being treated for mental illness; and (5) he has a very limited

[1]Ochoa primarily relies on Solem v. Helm, 463 U.S. 277 (1983).

[2]In setting forth the factual basis for the plea, the prosecutor noted that although the substance thrown was not tested, the correctional officer reported that it smelled like fecal matter.

04-21916

criminal history and has no prior criminal prosecutions in the criminal justice system. We conclude that Ochoa's contention lacks merit.

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[3] Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[4]

This court has consistently afforded the district court wide discretion in its sentencing decision.[5] This court 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."[6]

In the instant case, Ochoa does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statute is unconstitutional. Further, we note that the sentence

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

[4]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).

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

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

imposed was within the parameters provided by the relevant statute.[7] Finally, we conclude that the sentence is not so unreasonably disproportionate to the offense as to shock the conscience. Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

Having considered Ochoa's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Brian Sandoval/Ely
White Pine County Clerk

[7]See NRS 200.481(2)(f) (providing for a prison term of 1 to 6 years).