

IN THE SUPREME COURT OF THE STATE OF NEVADA


OTIS JAMES HUGHES, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43574

FILED

FEB 28 2005

ORDER OF AFFIRMANCE

JANETTE M BLOOM,
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of level-two trafficking in a controlled substance. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Otis James Hughes, III, to serve a prison term of 48 to 180 months.

Hughes contends that he is entitled to a new sentencing hearing because the prosecutor committed misconduct. In particular, at sentencing, the prosecutor stated:

I have prosecuted Mr. Hughes or been involved in cases that prosecuted Mr. Hughes for a couple of years now. And Mr. Hughes is a well-known drug dealer in the downtown area here in Reno.

As you can see from the reports, Officer Ken Harmon was the officer who arrested him and actually has arrested Mr. Hughes on a number of other occasions for trafficking. And each time Mr. Hughes manages to wiggle off the hook a little bit.

In one case there were witness issues, witnesses were not available, the case got dismissed. In another case there were some evidentiary issues.

Oftentimes Mr. Hughes is in a room dealing drugs with other people, so when the police arrive Mr. Hughes has a fallback position of: Well, they're

not mine. But he seems to be a very unlucky individual because every time there are drugs around Mr. Hughes happens to be there.

Hughes contends that the argument describing his prior drug dealings amounted to prosecutorial misconduct because it was based on facts not in evidence.

Preliminarily, we note that Hughes failed to object to the prosecutor's comments. As a general rule, the failure to object below bars appellate review absent plain or constitutional error.¹ We conclude that no plain or constitutional error occurred. Even assuming that the argument was improper, Hughes has failed to show that he was prejudiced by the error.² This court has consistently afforded the district court wide discretion in its sentencing decisions.³ "A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at

¹See Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991), modification on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

²See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

³See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

trial."⁴ "[T]his court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence."⁵

In this case, there is no indication in the record that the district court imposed an excessive sentence based on the prosecutor's comments about Hughes' other, unproven drug crimes.⁶ Although the sentence was harsher than the sentences recommended by both the Division of Parole and Probation and the State, the sentence imposed was within the parameters provided by the relevant statute.⁷ Additionally, the sentence was not so unreasonably disproportionate to the instant crime as to shock the conscience: as the prosecutor noted, Hughes fled from police and attempted to conceal the evidence by throwing a 50-gram chunk of cocaine onto a motel roof. Also, we note that Hughes had a criminal history, which included felony convictions for vehicle theft and robbery, as well as a misdemeanor conviction for obstructing and resisting arrest.

⁴Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)).

⁵Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (citing Renard v. State, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978), and Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

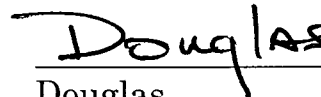
⁶Cf. Norwood, 112 Nev. at 439-40, 915 P.2d at 278 (district court abused its discretion by imposing a harsher sentence based on unsubstantiated allegation that appellant was a gang member); Goodson v. State, 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982) (district court abused its discretion by imposing a harsher sentence based on its unsubstantiated belief that appellant was a drug dealer).

⁷See NRS 453.3385(2). The Division recommended a prison sentence of 24 to 60 months, while the State argued for a prison sentence of 36 to 90 months.

Finally, we note that Hughes received a substantial benefit for his guilty plea in that he avoided a level-three trafficking charge and the possibility of a significantly longer prison term. Accordingly, we conclude that the district court did not impose an excessive sentence based on impalpable evidence.

Having considered Hughes' contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Parraguirre

MAUPIN, J., concurring:

In my view, the prosecutor committed misconduct at the sentencing hearing by, essentially, giving unsworn testimony on the propriety of Hughes' previous arrests. These views notwithstanding, the majority has reached the right result here.


_____, J.
Maupin

cc: Hon. Steven R. Kosach, District Judge
John P. Calvert
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk