

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK STEVEN POWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43965

FILED

JAN 3 1 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of assault with a deadly weapon. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Derek Steven Powell to serve a prison term of 12-60 months.

Powell's sole contention on appeal is that the district court abused its discretion and relied on palpable and highly suspect evidence at sentencing. More specifically, Powell contends that the district court based its sentencing decision on the biased recommendation of the parole officer representing the Division of Parole and Probation. Powell claims that the Division's sentencing recommendation was "based upon the personal fear of the Parole and Probation officer," and the district court sentenced Powell "after an emotional and personal argument" by the officer. The parole officer informed the district court that the incident, originally charged as discharging a firearm out of a vehicle, occurred in her neighborhood, "with lots of little kids around," the victim believed that the gun was directed at her, "the bullet could have gone anywhere," and "[h]e could have killed a kid walking down the street." The officer also

stated that in her opinion, Powell was “a danger to the community.” Defense counsel objected to the officer’s statements as speculation, which the district court overruled, stating, “Come on. . . . Of course a bullet can go anywhere.” Powell contends that probation would have been more appropriate than imprisonment. We disagree with Powell’s contention.

This court has consistently afforded the district court wide discretion in its sentencing decision.<sup>1</sup> The district court’s discretion, however, is not limitless.<sup>2</sup> 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.”<sup>3</sup> Despite 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.<sup>4</sup>

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<sup>1</sup>Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

<sup>2</sup>Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

<sup>3</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (emphasis added); Lee v. State, 115 Nev. 207, 211, 985 P.2d 164, 167 (1999).

<sup>4</sup>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).

In the instant case, Powell: (1) cannot demonstrate that the district court relied solely on impalpable or highly suspect evidence,<sup>5</sup> and (2) does not allege that the relevant sentencing statute is unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statute.<sup>6</sup> Prior to imposing a sentence, the district court heard about the details of Powell's offense, his minimal criminal history, and his drug use, which defense counsel conceded "was probably behind this incident." Further, Powell attempted to flee from the scene of the crime and was not apprehended until he was shot by police. The prosecutor also informed the district court that in return for Powell's guilty plea, the State agreed to drop the more serious felony charge of discharging a firearm out of a vehicle, an offense with much greater exposure.<sup>7</sup> Finally, we note that the granting of probation is discretionary.<sup>8</sup> Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing.

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<sup>5</sup>See Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) ("[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence." (quoting People v. Mockel, 276 Cal. Rptr. 559, 563 (Ct. App. 1990))).

<sup>6</sup>See NRS 200.471(2)(b) (category B felony punishable by a prison term of 1-6 years).

<sup>7</sup>NRS 202.287(1)(b) (category B felony punishable by prison term of 2-15 years).

<sup>8</sup>See NRS 176A.100(1)(c).

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

ORDER the judgment of conviction AFFIRMED.

Becker, C.J.  
Becker

Rose, J.  
Rose

Hardesty, J.  
Hardesty

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