IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON EVAN BROWNE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44008

FILED

OCT 18 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder.[1] Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Jason Evan Browne beat his wife to death with a baseball bat in November 1993. He was convicted of first-degree murder and sentenced to death. He unsuccessfully challenged his conviction and sentence on direct appeal to this court.[2] He then filed a post-conviction petition for a writ of habeas corpus. The district court granted the petition in part and ordered a new penalty hearing, and this court affirmed the district court's order.[3] Browne subsequently received a sentence of life in prison without the possibility of parole. He now challenges that sentence on three grounds.

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[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

[2]Browne v. State, 113 Nev. 305, 933 P.2d 187 (1997).

[3]Browne v. State, Docket No. 33769 (Order Dismissing Appeal and Cross-Appeal, April 27, 2000).

The facts relevant to this appeal are the following. After various delays following remittitur from this court, Browne and the State reached a sentencing agreement. In return for the State's withdrawal of the death penalty as a possible sentence, Brown waived his right to a hearing to determine whether he was mentally retarded and his right to have a jury determine his sentence. He also waived his right to petition the Board of Pardons to have his sentence commuted if he received a sentence of life in prison without the possibility of parole. These provisions were set forth in a document which Browne signed. The document provided as well: that the State had reports from several doctors expressing their opinion that Browne was not mentally retarded; that Browne believed that entering into the agreement was in his best interest and a penalty hearing would be contrary to his best interest; that he was signing the agreement voluntarily and was "not acting under duress or coercion or by virtue of any promises of leniency except . . . those set forth in this agreement"; that "the foregoing consequences, rights and waiver of rights ha[d] been thoroughly explained" to him by his attorney; and that he was satisfied with the services provided by his attorney.

The district court held a hearing regarding the agreement. After the prosecutor explained the basic terms of the agreement, the court addressed Browne.

> The Court: And that's agreeable to you, Mr. Browne, do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: Now, you've been on death row, is that correct?
>
> The Defendant: Yes, sir. Yes.

The Court: So you know that you will no longer have to face the possibility of the death penalty by accepting these negotiations. Do you understand that?

The Defendant: Yes, your honor.

. . .

The Court: And you agree to accept the stipulation that you've signed here, dated the 22nd day of June 2004?

The Defendant: Yes, your honor.

The Court: You signed it on the 22nd, that was two days ago. Is that correct?

The Defendant: Yes, yes.

The Court: And you read this and understood it?

The Defendant: Yes.

. . .

The Court: So what will happen is, you'll be interviewed by Parole and Probation, and they're going to make a recommendation to this court, and then we'll have argument by your attorneys and by the District Attorney as to what the sentence should be. Do you understand that, Mr. Browne?

The Defendant: Yes.

The Court: And you agree with this?

The Defendant: Yes, sir.

The Court: The court's comfortable that this man is knowingly and willingly agreeing to abide by the sentencing agreement.

In explaining why it was allowing the sentencing agreement to take effect, the district court also cited various mental health reports

indicating that Browne had repeatedly feigned mental problems attempting to avoid prosecution and punishment for the murder.

The district court held the sentencing hearing on August 20, 2004. The victim's son briefly testified. The prosecutor recited some of the facts of the murder, which was not only brutal but occurred in front of several children, and asked the court to impose life in prison without the possibility of parole. Browne spoke briefly in allocution. His counsel referred to serious abuse that Browne suffered when he was a child and asked for a sentence of life in prison with the possibility of parole. The court then sentenced him to life in prison without the possibility of parole.

Browne argues first that the absence of guidelines for a new penalty hearing after his death sentence had been set aside offended due process. He alleges that in new penalty hearings where death is a possible sentence "there is no uniformity between trial courts as to how [evidence from the guilt phase] is presented to juries." He says that it was unconstitutional to force him to choose between accepting sentencing by a judge who could not impose a death sentence or facing a possible death sentence in "an ambiguous, uncertain procedure in front of a jury that did not hear all the facts and cross-examination at trial." However, it does not appear that Browne ever raised this issue in the district court, and he fails to support it here with germane authority.[4] Nor does the record contain

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[4]McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

any facts supporting his conclusory claim that new penalty hearings in the district courts lack uniformity and are prejudicial to defendants. We therefore decline to consider this issue further.

Browne argues next that the trial court erred in not sufficiently canvassing him concerning his waiver of rights in the sentencing agreement. He also contends that the waiver of his right to apply for a commutation of his sentence is against public policy and therefore invalid. The sentencing agreement in this case in large part resembles an agreement to plead guilty, and the parties have cited authority from decisions involving guilty pleas. We believe that such case law can guide us here. Where a defendant has entered a guilty plea, we have held that challenges to the validity of the plea and claims of ineffective assistance of counsel must be first pursued in post-conviction proceedings in the district court.[5] But claims appropriate for direct appeal, including a challenge to the sentence imposed, must be pursued on direct appeal or will be waived.[6]

Given the totality of the circumstances discernible from the record before us, we perceive no inadequacy in the canvass conducted by the district court; however, we decline to decide this issue on direct appeal because it challenges the voluntariness of Browne's acceptance of the sentencing agreement. On the other hand, Browne's claim that waiver of

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[5]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[6]Id.

the right to seek commutation violates public policy is an appropriate issue on direct appeal since it poses a question of law implicating no factual indeterminacies. Browne cites no pertinent authority to support this claim, and we reject it. Defendants are able to waive fundamental rights in plea agreements.

> [A] defendant is entitled to enter into a plea agreement affecting fundamental rights. For example, this court has upheld a plea agreement containing an unequivocal waiver of the right to appeal . . . . This court will enforce unique terms of the parties' plea agreement . . ., provided that the totality of the circumstances indicates that the guilty plea was knowing, voluntary and intelligent.[7]

Thus, if a defendant can waive unconditionally the right to appeal, we see no reason a defendant cannot waive the right to seek commutation to avoid the possibility of a death sentence, as long as the waiver is knowing and voluntary.[8]

Finally, Browne asserts that his sentence of life in prison without the possibility of parole violates the Eighth Amendment proscription against cruel and unusual punishment. But a sentence

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[7]Sparks v. State, 121 Nev. ___, ___, 110 P.3d 486, 489 (2005) (footnotes omitted).

[8]Cf. Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) (stating, in rejecting a claim that offering a lower sentence in exchange for a guilty plea places an unconstitutional burden on the right to a jury trial and the right against compelled self-incrimination, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid").

within the statutory limits is not cruel and unusual punishment if the statute itself is constitutional and the sentence is not so disproportionate to the crime as to shock the conscience.[9] NRS 200.030(4)(b)(1) provides for Browne's sentence based on his conviction of first-degree murder, and he does not challenge the constitutionality of the statute. He nevertheless argues that at the penalty hearing the victim's son's reference to him as a "child molester" and the prosecutor's argument that a lesser sentence would be "a disservice to this community" were improper. Browne did not object in either instance and has not established that any plain error occurred.[10] He also questions whether deliberation and premeditation on his part were adequately proven given this court's treatment of that area of the law in Byford v. State after his conviction.[11] Byford has no retroactive effect,[12] and our conclusion on direct appeal that there was sufficient evidence of premeditated murder remains sound.[13] We also concluded on direct appeal that Browne's death sentence was not excessive "considering the senseless and violent nature of the crime and the

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[9]Allred v. State, 120 Nev. 410, 420-21, 92 P.3d 1246, 1253 (2004).

[10]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.")

[11]116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000).

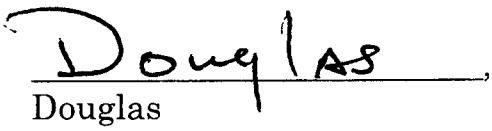
[12]See Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[13]Browne, 113 Nev. at 314-15, 933 P.2d at 192-93.

defendant."[14] This conclusion applies even more forcefully to Browne's sentence of life in prison, and we conclude that it is neither cruel nor unusual.

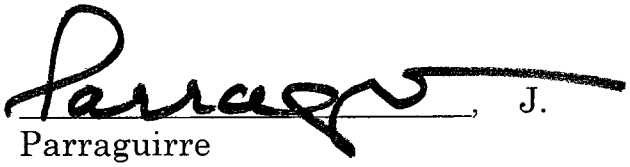
Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Rose



_____, J.
Parraguirre

cc: Hon. Michael A. Cherry, District Judge
Bunin & Bunin
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[14]Id. at 317, 933 P.2d at 194.