IN THE SUPREME COURT OF THE STATE OF NEVADA

DARELL DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44195

FILED

MAR 22 2005

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 guilty plea, of one count of attempted possession of a credit card without consent. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Darell Davis to serve a prison term of 12-34 months.

First, Davis contends that the district court erred in denying his oral request at the sentencing hearing to withdraw his guilty plea. At the sentencing hearing, when Davis was asked by the district court if he wished to speak, the following exchange took place:

> DAVIS: Yes, sir I've got something to say. At the time [of the entry of the guilty plea], yes, I understood what you were saying, but I didn't know the seriousness of the Court, because the [credit] card owner is someone that I was involved with, and we've recently been together again, and so we'll be like – she was, like, very stupid –
>
> THE COURT: I don't want to hear it. Do you have anything to say before I sentence you? You plead guilty to this. It's a bunch of bullshit that you're giving me right now, so I don't want to hear it.
>
> Hey, are you listening to me?

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The district court took approximately a fifteen minute break and heard other matters, and then returned to the proceedings:

> THE COURT: Mr. Davis, do you have anything to say before sentencing?
>
> DAVIS: Yes, sir. I'd like to withdraw this plea.
>
> THE COURT: On what basis do you want to withdraw the plea?
>
> DAVIS: Because I'd be foolish not to withdraw the plea on something that I was like – the Court is somebody I deal with. This ex-girlfriend of mine, she told me it would be stupid. So I'm going to withdraw the plea, subpoena her to court, and she can tell the whole thing.
>
> THE COURT: Well, Mr. Davis, you pled guilty to it, and you understood you're guilty, and I'm not going to let you withdraw your plea.

Davis argues that the district court "did not apply any standard in denying [his] request," and "acted in haste because he was clearly irritated with [him]." We disagree with Davis' contention.

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'"[1] In deciding whether a defendant has advanced a substantial, fair, and just reason to withdraw a guilty plea, "the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."[2]

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[1]Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165.

[2]Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

A defendant has no right, however, to withdraw his plea merely because he moves to do so prior to sentencing or because the State failed to establish actual prejudice.[3] A more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.[4]

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings.[5] "On appeal from the district court's determination, we will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."[6]

We conclude that the district court did not abuse its discretion in denying Davis' oral request to withdraw his guilty plea. Davis failed to advance a substantial, fair, or just reason to withdraw his plea, and only claimed that he did not recognize the Court's "seriousness," and that his ex-girlfriend told him "it would be stupid" to plead guilty. Notably, Davis conceded during the sentencing hearing that he understood what occurred during his arraignment and entry of the plea hearing, and he never argues that the plea was not entered knowingly and voluntarily. Further, our review of the record on appeal reveals that Davis signed a guilty plea

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[3]See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

[4]See Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

[5]NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225, n.3 (1984)).

[6]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

memorandum advising him of his rights, and that he was thoroughly canvassed by the district court prior to the entry of his guilty plea.

Second, Davis contends that the district court abused its discretion at sentencing by not granting him probation. Davis argues that the district court "clearly closed his mind to such an idea because of his expressed animosity towards [him]." Citing to the dissents in Tanksley v. State[7] and Sims v. State[8] for support, Davis contends that this court should review the sentence imposed by the district court to determine whether justice was done. We conclude that Davis' contention is without merit.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[9] This court has consistently afforded the district court wide discretion in its sentencing decision.[10] The district court's discretion, however, is not limitless.[11] 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

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[7]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

[8]107 Nev. 438, 441, 814 P.2d 63, 65 (1991) (Rose, J., dissenting).

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

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

[11]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

evidence."[12] 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.[13]

In the instant case, Davis does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes.[14] In exchange for his guilty plea, the State agreed not to oppose the granting of probation if the Division of Parole and Probation made such a recommendation, otherwise, the State agreed to concur with the Division's recommendation. The Division recommended a prison term of 12-34 months. At the sentencing hearing, Davis' counsel argued for probation, but admitted that the Division's sentencing recommendation was "quite fair . . . under the circumstances," with those circumstances likely being Davis' criminal history, including three felony convictions and one misdemeanor conviction. Finally, we note that the granting of

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[12]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Lee v. State, 115 Nev. 207, 211, 985 P.2d 164, 167 (1999).

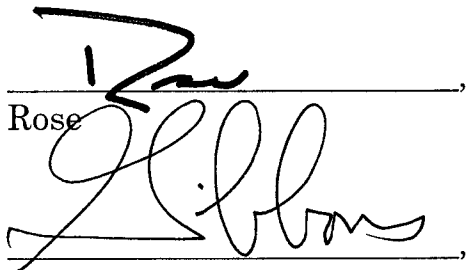
[13]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[14]See NRS 205.690(2); NRS 193.330(1)(a)(5) (attempt to commit a category D felony punished for a category E felony); NRS 193.130(2)(e) (category E felony punishable by prison term of 1-4 years).

probation is discretionary.[15] Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing.

Having considered Davis' contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, 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

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[15]See NRS 176A.100(1)(c).