IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMAS MORTENSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44288

FILED

MAY 0 4 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 nolo contendere plea, of one count of statutory sexual seduction. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Tommas Mortensen to serve a prison term of 24 to 60 months and also ordered him to submit to genetic marker testing.

Mortensen first 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, Mortensen contends that the sentence imposed is too harsh given the fact that: (1) he had no significant prior criminal history; (2) he has maintained employment throughout his life; (3) he had a difficult childhood; and (4) the psychosexual evaluator concluded that he was not a

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

high risk to reoffend. We conclude that Mortensen'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.[2] 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.'"[3]

This court has consistently afforded the district court wide discretion in its sentencing decision.[4] 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."[5]

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

[3]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).

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

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

In the instant case, Mortensen does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes.[6] Finally, we conclude that the sentence is not so unreasonably disproportionate to the offense as to shock the conscience. Although Mortensen's criminal history was not extensive, Mortensen pleaded nolo contendere to having his fifteen-year-old stepdaughter perform fellatio on him. In imposing sentence, the district court commented that the offense involved "disgusting, disturbing activity that [he] need[ed] to be punished for notwithstanding the [psychosexual report]."[7] Finally, we note that Mortensen received a substantial benefit for his guilty plea in that he avoided numerous, more serious criminal charges[8] and the possibility of a significantly longer prison term. Accordingly, we conclude that the district court did not abuse its discretion at sentencing and that the sentence imposed does not constitute cruel and unusual punishment.

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[6]See NRS 200.368(1); NRS 193.130(2)(c) (providing for a prison sentence of 1 to 5 years).

[7]The psychosexual report concluded that Mortensen was a moderate risk to reoffend.

[8]Mortensen was originally charged, by way of an information, with two counts of sexual assault, one count of attempted sexual assault, three counts of lewdness with a child under 14 years, and three counts of child abuse for various sexual acts upon three different victims.

Mortensen next contends that requiring him to submit to genetic marker testing is unconstitutional because it violates the Fourth Amendment of the United States Constitution. While acknowledging that this court upheld the constitutionality of NRS 176.0913, the genetic marker testing statute, in Gaines v. State,[9] Mortensen urges this court to overrule Gaines and declare NRS 176.0913 unconstitutional. In support of his argument, Mortensen notes that Rise v. Oregon,[10] which was cited extensively in Gaines, was effectively overruled by two subsequent Supreme Court cases: City of Indianapolis v. Edmond[11] and Ferguson v. City of Charleston.[12] Additionally, Mortensen cites to United States v. Miles,[13] the federal case from the Eastern District of California that held that a federal genetic marker testing statute violated the Fourth Amendment of the United States Constitution.

We decline Mortensen's invitation to overrule Gaines. In United States v. Kincade,[14] the Ninth Circuit Court of Appeals sitting en banc held that a federal genetic marker testing statute did not violate the

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[9]116 Nev. 359, 998 P.2d 166 (2000).

[10]59 F.3d 1556 (9th Cir. 1995).

[11]531 U.S. 32 (2000).

[12]532 U.S. 67 (2001).

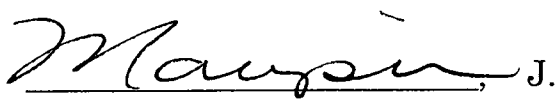
[13]228 F. Supp. 2d 1130 (E.D. Cal. 2002), implicitly overruled by United States v. Kincade, 379 F.3d 813 (9th Cir. 2004).

[14]379 F.3d at 813.

Fourth Amendment of the United States Constitution. Moreover, like the other courts that have considered the issue, we disagree with Mortensen that the Supreme Court's holdings in Ferguson and Edmond render compulsory DNA testing statutes unconstitutional.[15] Accordingly, we conclude that requiring Mortensen to submit to genetic marker testing, pursuant to NRS 176.0913, was constitutional.

Having considered Mortensen's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


J.
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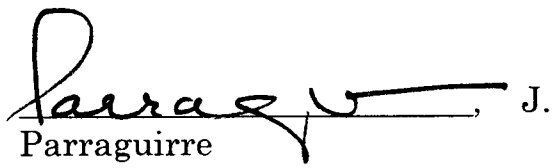
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Parraguirre

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[15]See Miller v. United States Parole Comm'n, 259 F. Supp. 2d 1166, 1174-78 (D. Kan. 2003); United States v. Sczubelek, 255 F. Supp. 2d 315, 320-23 (D. Del. 2003); State v. Martinez, 78 P.3d 769, 773-74 (Kan. 2003); In re D.L.C., 124 S.W.3d 354, 369-73 (Tex. App. 2003); EL v. Mechling, 848 A.2d 1094, 1097-98 (Pa. Commw. Ct. 2004).

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