IN THE SUPREME COURT OF THE STATE OF NEVADA

AUGUSTINE BRECEDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44299

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 five counts of robbery with the use of a firearm (counts I-V), two counts of robbery with the use of a firearm of a victim 60 years of age or older (counts VI-VII), one count of eluding a police officer (count VIII), and one count of home invasion (count IX). Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Augustine Breceda to serve fourteen consecutive prison terms of 40-180 months for counts I-VII, a consecutive prison term of 16-72 months for count VIII, and a concurrent prison term of 26-120 months for count IX. Breceda was also order to pay $35,186.94 in restitution.

Breceda's sole contention on appeal is that the district court abused its discretion at sentencing. Breceda argues that the district court, because it only discussed the aggravating factors at sentencing, failed to consider the mitigating factors in fashioning a sentence. Breceda claims that the mitigating circumstances that should have been considered included his cooperation with law enforcement officials, "his mental history, and the fact that he used a BB gun, not a real gun and that no one other than himself was actually injured." Citing to the dissents in

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Tanksley v. State[1] and Sims v. State[2] for support, Breceda contends that this court should review the sentence imposed by the district court to determine whether justice was done. We conclude that Breceda's 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.[3] This court has consistently afforded the district court wide discretion in its sentencing decision.[4] The district court's discretion, however, is not limitless.[5] 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."[6] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is

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[1]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

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

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

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

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

[6]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).

constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[7]

In the instant case, Breceda 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.[8] At the sentencing hearing, defense counsel admitted that Breceda "did many dangerous, frightening, [and] illegal things." Further, the State discussed Breceda's significant, "high-end" criminal history, including "[multiple] felony convictions in California arising out of five separate events and numerous misdemeanor convictions," and multiple revoked terms of probation and parole. Prior to imposing the sentence, the district court referred to the "terrifying situation" the victims were placed in by Breceda during the commission of the robberies. And finally, in exchange for his guilty plea, Breceda received a substantial benefit: the State agreed to not pursue habitual criminal adjudication on any of the nine counts,[9] or additional charges related to the instant offenses and others pending, including burglary, possession of stolen property, grand larceny, and possession of stolen motor vehicles. The State also agreed to

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[7]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).

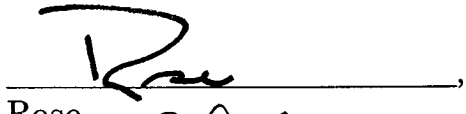
[8]See NRS 200.380(2) (category B felony punishable by prison term of 2-15 years); NRS 193.165(1); NRS 193.167(1)(f); NRS 484.348(3) (category B felony punishable by prison term of 1-6 years); NRS 205.067(2) (category B felony punishable by prison term of 1-10 years).

[9]See NRS 207.010(1)(b).

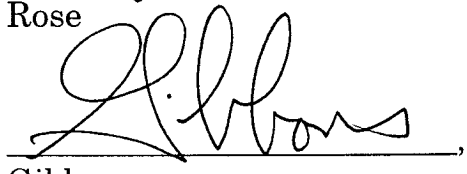
recommend that the sentence imposed in district court case no. CR04-0688 run concurrently with the sentence imposed in the instant case. Accordingly, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing.

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

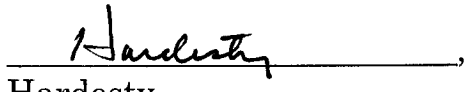
ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons



_____, J.
Hardesty

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