IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LEE LIKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45972

FILED

APR 06 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On August 19, 2005, the district court convicted appellant James Lee Like, pursuant to a jury verdict, of grand larceny auto. The district court adjudicated Like a habitual criminal pursuant to NRS 207.010 and sentenced him to a life term in prison without the possibility of parole.[1]

Like raises three issues on appeal. He first argues that this court's application of NRS 207.010 violates Apprendi v. New Jersey.[2] In Apprendi, the United States Supreme Court announced that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

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[1]Like was also charged with first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary. The jury was unable to reach a verdict on these counts, and the district court declared a mistrial. Subsequently, Like pleaded guilty to one count of burglary. The district court sentenced him to ten years in prison concurrently with his life sentence for grand larceny auto.

[2]530 U.S. 466 (2000).

jury, and proved beyond a reasonable doubt."[3] Like contends that under NRS 207.010, the district court must first determine whether the proffered prior convictions fall within the statute and then whether the State presented sufficient evidence to support a defendant's treatment as a recidivist. Like advocates that because this two-step procedure allows a sentence beyond the statutory maximum for the primary felony, Apprendi requires that the facts in support of recidivism, i.e., any facts other than the prior convictions, must be proven to a jury beyond a reasonable doubt. He asserts that this court has endorsed the sentencing court's consideration of "factual proof," including presentence reports, victim impact statements, mitigation evidence, and facts surrounding prior convictions. Respecting his case, Like contends that the State's presentation in support of recidivism treatment was grounded almost exclusively on considerations beyond the three prior convictions proffered pursuant to NRS 207.010,[4] including: arguing facts explaining other prior convictions; arguing against Like's contention that some of his prior convictions were stale, nonviolent, and trivial; arguing facts contained in the presentence report; arguing that Like's old age and ill health did not warrant leniency; and suggesting that his poor health would not preclude him from committing crimes via a computer if he was not imprisoned.

We recently considered this issue in O'Neill v. State and concluded that that neither the plain language of NRS 207.010 nor our

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[3]Id. at 490.

[4]The district court adjudicated Like a habitual criminal based upon three prior convictions–a 1983 forgery (Texas); a 1989 attempted grand theft (Idaho); and a 1992 attempted theft of a firearm (Utah).

case law interpreting it violates Apprendi.[5] We noted that the focus of our case law applying NRS 207.010 was to ensure that district courts were aware that the statute granted the district court discretion to dismiss a count of criminal habituality. We explained:

> In light of Apprendi, we disapprove any interpretation of our prior case law as suggesting that facts other than prior convictions must be found in order to adjudicate a defendant a habitual criminal. We stress that the "just and proper" determination relates solely to the district court's statutorily granted discretion to dismiss a count of criminal habituality pursuant to NRS 207.010(2). Thus, a district court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like in determining whether to dismiss such a count. Accordingly, such facts do not operate to increase the punishment beyond the already established statutory maximum and therefore need not be found by a jury beyond a reasonable doubt. And the plain language of the statute dictates that should the district court elect not to dismiss the count, it must impose a sentence within the range prescribed in NRS 207.010(1).[6]

Applying O'Neill, we conclude that the district court's consideration of the challenged matters did not violate Apprendi, and therefore it did not err in adjudicating Like a habitual criminal pursuant to NRS 207.010.

Like next contends that adjudicating him as a habitual criminal and sentencing him to the maximum sentence violates his due

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[5]123 Nev. ___, ___, ___ P.3d at ___, ___ (Adv. Op. 2, March 8, 2007) (footnote omitted).

[6]Id.

process rights under the Fourteenth Amendment. He argues that the district court summarily adjudicated him a habitual criminal without explaining its reasons for doing so. He relies almost exclusively on the language of Walker v. Deeds, in which the United States Court of Appeals for the Ninth Circuit inferred that Nevada law required a district court to make particularized findings that it is just and proper to adjudicate a defendant a habitual criminal.[7] However, in Hughes v. State, this court rejected Walker's interpretation of Nevada's habitual criminal adjudication scheme.[8] Rather, this court held that all that is required is that the record as a whole indicate that the district court understood the discretionary nature of habitual criminal adjudication and in fact exercised its discretion.[9] Like also contends that the district court's actions failed to satisfy Hughes as well because the totality of the circumstances indicates that the district court failed to exercise any discretion whatsoever in sentencing him to life without the possibility of parole.

The transcript shows that the district court listened to the prosecutor's and defense counsel's arguments for and against habitual criminal adjudication, that it was presented with a presentence report, and that it considered Like's plea that he not receive a sentence

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[7]50 F.3d 670, 673 (9th Cir. 1995). Like also relies on Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), which held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests that are protected by the Due Process clause of the Fourteenth Amendment. The Ninth Circuit relied on Hicks in its Walker decision.

[8]116 Nev. 327, 332-33, 996 P.2d 890, 893-94 (2000).

[9]Id. at 333, 996 P.2d at 893-94.

enhancement. At the conclusion of the hearing, the district court stated that it "[was] going to adjudicate him under the habitual criminal statute and make a determination that is just and proper for him to be punished and segregated as habitual criminal." Under Hughes, the district court is not required to make particularized findings in this regard. Considering the record as a whole, we conclude that the district court's comments evince an understanding of the discretionary nature of habitual criminal adjudication and its exercise of discretion in imposing the enhancement in Like's case. Therefore, we conclude that the district court satisfied Hughes and did not abuse its discretion in this regard.

Finally, Like contends that his sentence of life without the possibility of parole violates the Eighth Amendment's violation against cruel and unusual punishment. A sentence 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.'"[10] Like argues that not only is his punishment grossly disproportionate to the severity of the crime, but is unfair given his advanced age, poor health, good prison record, and the fact that he has already served twelve years in prison for his crime. However, the district court was aware of all these circumstances and nonetheless imposed the maximum sentence permissible under NRS 207.010. Although Like's sentence may be harsh, we conclude that he fails

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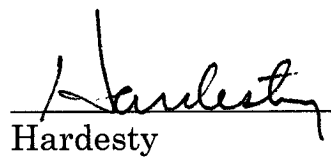
[10]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

to demonstrate that the district court abused its discretion in imposing it.[11]

Having considered Like's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.[12]


, C.J.
Maupin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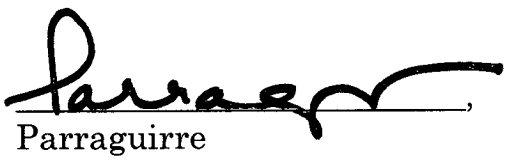
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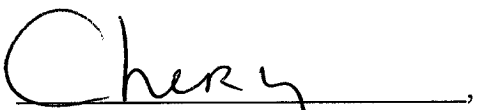
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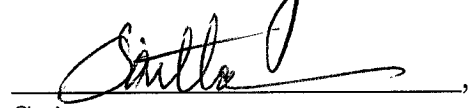
, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Federal Public Defender/Las Vegas
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[11]See Sims v. State, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991).

[12]The Honorable Mark Gibbons and the Honorable Michael Douglas, Justices, did not participate in the decision of this matter.