

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE WILLIAM BERND,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45993

**FILED**

**JAN 24 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of sale of a controlled substance (count I) and sale of a controlled substance within 1,000 feet of a school (count II). Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge. The district court sentenced appellant Lyle William Bernd to serve a prison term of 12-48 months for count I and a concurrent prison term of 12-48 months with an equal and consecutive prison term for selling within 1,000 feet of a school for count II.

Bernd's sole contention on appeal is that the district court abused its discretion at sentencing by imposing a sentence which constitutes cruel and/or unusual punishment in violation of the United States and Nevada Constitutions.<sup>1</sup> Bernd claims that the sentence imposed was excessive and disproportionate to the crime, and that the district court "never seriously considered probation as a possibility." We disagree with Bernd's contention.

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

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<sup>1</sup>See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

crime.<sup>2</sup> This court has consistently afforded the district court wide discretion in its sentencing decision.<sup>3</sup> The district court's discretion, however, is not limitless.<sup>4</sup> 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."<sup>5</sup> 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.<sup>6</sup>

In the instant case, Bernd cannot demonstrate 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.<sup>7</sup> We also note that in exchange for his guilty plea, the State agreed to dismiss all other charges and not file additional charges arising out of the instant case. Prior to imposing a term of incarceration, the district court made the following statement:

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<sup>2</sup>Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

<sup>3</sup>Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

<sup>4</sup>Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

<sup>5</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

<sup>6</sup>Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

<sup>7</sup>See NRS 453.321(2)(a) (category B felony punishable by a prison term of 1-6 years and a fine of not more than \$20,000); NRS 453.3345(1)(c).

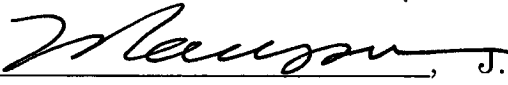
I don't know what the other charges were in this case but to get you to plead to what you plead to, I assume the State cut you some pretty significant slack in this matter.

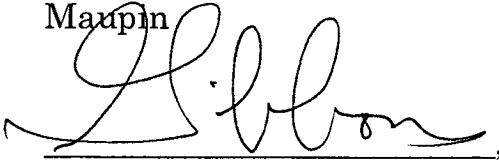
In any event, parole and probation states that you are only a borderline candidate for probation. And your history here certainly suggests that you are very borderline. You obviously have had a very long-term association with the use of controlled substances. But you graduated up from there to selling controlled substances. Big difference. Big difference. Using is one thing. Selling is another thing.

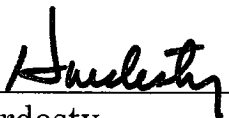
And finally, we note that the granting of probation is discretionary.<sup>8</sup> Therefore, we conclude that the district court did not abuse its discretion at sentencing and that the sentence imposed does not constitute cruel and unusual punishment.

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

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<sup>8</sup>See NRS 176A.100(1)(c).

cc: Hon. Dan L. Papez, District Judge  
State Public Defender/Carson City  
State Public Defender/Ely  
Attorney General George Chanos/Carson City  
White Pine County District Attorney  
White Pine County Clerk