

IN THE SUPREME COURT OF THE STATE OF NEVADA

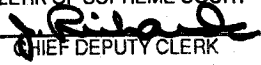
TREVOR G. CLARK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46677

**FILED**

MAY 03 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea, of one count of driving with a prohibited amount of controlled substance in the blood causing death. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge. The district court sentenced appellant Trevor G. Clark to serve a prison term of 6 to 20 years.

Clark rolled his girlfriend's vehicle while the couple was en route to the Burning Man Festival. Clark's girlfriend died at the scene of the accident. An ounce of marijuana was found in the car, and Clark admitted that he had used both ecstasy and marijuana the previous night, had not slept in over twenty-four hours, and crashed the vehicle causing the death of his girlfriend. At Clark's sentencing hearing, the victim's parents gave highly emotional and lengthy written and oral victim impact statements.

Citing to Buschauer v. State,<sup>1</sup> Clark contends that his due process rights were violated at the sentencing hearing because the district

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<sup>1</sup>106 Nev. 890, 804 P.2d 1046 (1990).

court allowed the victim's parents to discuss Clark's prior bad acts without placing them under oath or subjecting them to cross-examination. We conclude that Clark's contentions lack merit.

In Buschauer, this court held that due process requires that a victim impact witness describing prior bad acts of the defendant be sworn in and subject to cross-examination.<sup>2</sup> Here, as Clark notes, the district court failed to ensure that the victim impact witnesses were sworn and subject to cross-examination; however, Clark failed to object on these grounds.<sup>3</sup> Further, our review of the transcript of the sentencing proceeding reveals that the district court's failure to swear in the victim's parents was harmless beyond a reasonable doubt because there is no indication that the district court based its sentencing decision on their unsworn testimony.<sup>4</sup> To the contrary, the district court repeatedly stated that it did not consider the victim's parents' references to Clark's prior bad acts as "legal conclusions" or true statements of fact, but only considered

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<sup>2</sup>Id.

<sup>3</sup>See Sterling v. State, 108 Nev. 391, 394 n.3, 834 P.2d 400, 402 n.3 (1992). We note that defense counsel only objected to the testimony on the ground that Buschauer prohibited victim impact witnesses from giving both written and oral victim impact statements. We conclude that the district court did not err in ruling that it had discretion to consider the victims' impact statements in both oral and written form. See NRS 176.015(3).

<sup>4</sup>See Chapman v. California, 386 U.S. 18 (1967) (setting forth harmless error standard); see also Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision.").

them as an expression of the victims' "opinion[s]" and "feeling[s]." Additionally, the district court explained its reason for imposing a harsh sentence, noting that Clark blamed the victim and lived off others with "no rule of law over [his] life." Accordingly, we conclude that Clark is not entitled to a new sentencing hearing based on a violation of his right to due process.

Clark next contends that the district court abused its discretion at sentencing by relying on highly impalpable and suspect evidence. Specifically, Clark argues that the sentence was the product of the highly prejudicial impact presentation of the victim's parents, which included numerous personal photographs and mementos of the victim, such as her ultrasound and baby teeth, as well as a teddy bear containing the victim's cremated remains. Alternatively, Clark argues that the sentence imposed was based on the district judge's unfounded belief that the Burning Man Festival was an event "famous for . . . casting off all restraint, having no rule of law over anyone." We conclude that Clark's contention lacks merit.

This court has recognized that few limitations are imposed on a court's discretion to consider evidence in imposing a sentence.<sup>5</sup> The district court may consider facts and circumstances at a sentencing proceeding that would not be admissible at trial.<sup>6</sup> "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable

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<sup>5</sup>Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

<sup>6</sup>Silks v. State, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

or highly suspect evidence, this court will refrain from interfering with the sentence imposed.”<sup>7</sup> There is no indication in the record that the district court sentenced Clark based on impalpable or suspect evidence. To the contrary, as previously discussed, the district court expressly stated its justification for the sentence imposed, namely, its belief that Clark blamed the victim and was not a law-abiding citizen. Moreover, the district court's comments about Clark's intent to be "lawless in Nevada's desert for several days" were based on objective evidence presented at the sentencing hearing, namely, Clark's own admission that he intended to ingest illegal controlled substances at the Burning Man Festival.<sup>8</sup>

Finally, Clark contends that the district court erred by ordering \$17,023.29 restitution for the replacement value of the vehicle because the victim had insurance on the vehicle, and only \$16,128.29 was financed since an \$885.00 down payment was made. We disagree. The fact that the victim had insurance or made a down payment on the vehicle would not reduce Clark's obligation to pay restitution for the fair market value of the vehicle.<sup>9</sup> Accordingly, we conclude that the district court did not err in determining restitution.

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<sup>7</sup>Id. at 94, 545 P.2d at 1161.


<sup>8</sup>Cf. Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278-79 (1996) (district court abused discretion by stating its belief, unsubstantiated by record, that appellant was a gang member and imposing a harsher sentence to send a message to appellant and others like him).

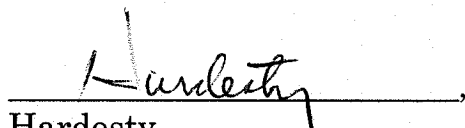
<sup>9</sup>See Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999).

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

ORDER the judgment of conviction AFFIRMED.

 J.

Maupin  
 J.  
Gibbons

 J.  
Hardesty

cc: Hon. David R. Gamble, District Judge  
Roeser & Roeser  
Attorney General George Chanos/Carson City  
Douglas County District Attorney/Minden  
Douglas County Clerk