IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JAMES FITZSIMMONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47816

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, pursuant to a guilty plea, of four counts of burglary. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court adjudicated appellant Kevin James Fitzsimmons as a habitual criminal and sentenced him to serve four consecutive prison terms of 10 years to life.

First, citing to Apprendi v. New Jersey for support,[1] Fitzsimmons contends that the habitual criminal statute, NRS 207.010, is unconstitutional. Specifically, Fitzsimmons claims that application of the statute (1) violated his right to a jury trial by requiring impermissible judicial fact-finding at sentencing, and (2) violated his due process right to have the State prove its case against him beyond a reasonable doubt. We disagree.

This court recently stated in O'Neill v. State that Nevada's habitual criminal statute, NRS 207.010, does not violate Apprendi.[2] In affirming the habitual criminal adjudication in O'Neill, this court

[1]530 U.S. 466 (2000).

[2]123 Nev.___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

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expressly distinguished Nevada's statutory scheme from the Hawaii scheme at issue in one of the cases relied upon by Fitzsimmons in this appeal.[3] Additionally, based on our review of the sentencing hearing transcript and Fitzsimmons' extensive criminal history, we conclude that the district court did not abuse its discretion in deciding to adjudicate him as a habitual criminal.[4]

Second, Fitzsimmons contends that counsel was ineffective at sentencing by stipulating to habitual criminality against his wishes. This court has repeatedly stated that, generally, claims of ineffective assistance of counsel will not be considered on direct appeal; such claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing.[5] We conclude that Fitzsimmons has failed to provide this court with any reason to depart from this policy in his case.[6]

Third, Fitzsimmons contends that the district court erred by denying defense counsel's motion to withdraw from representation based on an alleged breakdown in the attorney-client relationship. At the hearing on the motion, Fitzsimmons informed the district court that he

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[3]Kaua v. Frank, 436 F.3d 1057, 1062 (9th Cir. 2006), cert. denied ___ U.S. ___, ___ S. Ct. ___, 2007 WL 506822 (U.S. February 20, 2007).

[4]See NRS 207.010(2); Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

[5]See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

[6]See id.; see also Archanian v. State, 122 Nev. ___, ___, 145 P.3d 1008, 1021 (2006).

had not reviewed all of the discovery, and that he believed counsel was not prepared for trial. After an extensive inquiry into the matter, the district court denied counsel's motion.[7] Less than two weeks later, Fitzsimmons pleaded guilty. At the plea canvass, Fitzsimmons affirmatively answered questions by the district court concerning whether he had sufficient time to discuss the various aspects of the case with counsel, and whether he was satisfied by counsel's representation. Therefore, "[w]eighing all of the factors,"[8] we conclude that the district court did not abuse its discretion in denying counsel's motion to withdraw from representation.

Fourth, Fitzsimmons contends that his right to due process was violated when the district court "improperly" transferred his case to a different judge on the day of his sentencing hearing. We disagree. Due to illness, Judge Perry requested that Fitzsimmons' case be transferred to another district court judge. Chief Judge Polaha, in accordance with NRS 3.025, WDCR 2, and LCR 2, and finding that good cause existed, transferred the case to Judge Berry. At the beginning of the sentencing hearing, defense counsel objected, arguing that "it was [Fitzsimmons'] expectation that he would be sentenced personally by Judge Perry in this case, and he's quite wedded to that idea." Judge Berry informed counsel that she read Fitzsimmons' file, spoke with Judge Perry about his calendar, reviewed his case "at length," and was "familiar with

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[7]See Morris v. Slappy, 461 U.S. 1, 14 (1983); Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 237 (2001); see also U.S. Const. amend. VI; Nev. Const. art. 1, § 8.

[8]Young v. State, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004); see also Garcia v. State, 121 Nev. 327, 113 P.3d 836 (2005).

[Fitzsimmons'] concerns and the complexities of this case." Judge Berry denied Fitzsimmons' request for a different sentencing judge. We note that on appeal, Fitzsimmons has not provided any argument demonstrating how he might have been prejudiced by the transfer of his case to Judge Berry.[9] Moreover, we conclude that Chief Judge Polaha did not abuse his discretion in transferring the case for sentencing.[10]

Fifth, Fitzsimmons contends that the district court erred by denying his presentence motion to withdraw his guilty plea. At the sentencing hearing, upon learning that the case had been transferred to Judge Berry due to Judge Perry's illness, Fitzsimmons orally moved to withdraw his guilty plea. Fitzsimmons claims that he is entitled to withdraw his plea and proceed to trial because (1) his expectation was that Judge Perry would be the sentencing judge; (2) negotiations for his placement in a safe, appropriate prison facility remained unfulfilled at the time of sentencing; (3) the parties were "under a misconception" about the terms of the plea bargain; and (4) the State breached the plea agreement. We disagree with Fitzsimmons' contention.

We conclude that the district court did not abuse its discretion in denying Fitzsimmons' oral motion to withdraw his guilty plea.[11] The district court heard arguments from counsel, and Fitzsimmons, and

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[9]Herman v. State, 122 Nev. 199, 207, 128 P.3d 469, 474 (2006) ("A defendant must show actual prejudice to warrant a new sentencing hearing based on an alleged due process violation.").

[10]See Jeaness v. District Court, 97 Nev. 218, 220, 626 P.2d 272, 274 (1981); DCR 18.

[11]See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

determined that he failed to articulate a fair and just reason sufficient to warrant granting his motion to withdraw.[12] The district court also noted that Fitzsimmons was thoroughly canvassed by the district court prior to the entry of his guilty plea, and our review of the record on appeal reveals that he read, signed, and stated that he understood the written guilty plea agreement. Additionally, any "misconception" about the terms of the plea bargain was remedied by the district court continuing the sentencing hearing in order to allow Fitzsimmons the opportunity to provide assistance to law enforcement personnel so that he could argue for leniency based on his assistance. Accordingly, we conclude that Fitzsimmons' contention is without merit.

Finally, Fitzsimmons contends that the district court abused its discretion by imposing a sentence amounting to cruel and unusual punishment. Specifically, Fitzsimmons claims that his harsh sentence was based on prosecutorial vindictiveness and misconduct. We disagree.

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.[13] This court has consistently afforded the district court wide

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[12]Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165; Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

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

discretion in its sentencing decision.[14] The district court's discretion, however, is not limitless.[15] 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."[16] 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.[17]

In the instant case, Fitzsimmons cannot demonstrate that the district court relied solely on impalpable or highly suspect evidence or that the relevant sentencing statute is unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statute.[18] We also note that Fitzsimmons has an extensive criminal history with numerous felony convictions, and that it is within the district court's discretion to impose consecutive sentences.[19]

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

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

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

[17]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

[18]See NRS 207.010(1)(b)(2).

[19]See NRS 176.035(1); see generally Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).

Therefore, we conclude that the district court did not abuse its discretion at sentencing.

Having considered Fitzsimmons' contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[20]

Parraguirre, J.

Hardesty, J.

Douglas, J.

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[20]Fitzsimmons also contends that he is entitled to relief based on cumulative error. Because we have rejected Fitzsimmons' assignments of error, we conclude that his contention is without merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").