IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JOHN MILLMINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48195

FILED

FEB 01 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of two counts of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant David John Millmine to serve two consecutive prison terms of life with the possibility of parole.

First, Millmine contends that the district court abused its discretion at sentencing by considering matters that were neither charged nor admitted and by disregarding the moral and social purposes of punishment.[1] Millmine specifically claims that the district court improperly considered unsubstantiated accusations that he struck the victim when she refused his sexual advances and that the district court

[1]Millmine cites to Naovarath v. State, 105 Nev. 525, 530, 779 P.2d 944, 947 (1989) ("Punishment by imprisonment is generally accepted as serving three moral and social purposes: retribution, deterrence of prospective offenders, and segregation of offenders from society.").

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failed to consider his risk of recidivism and potential for rehabilitation. We disagree.

We have consistently afforded the district court wide discretion in its sentencing decision.[2] The district court may "consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[3] This information may include other criminal conduct even though the defendant was never charged or convicted of the conduct.[4] We will not interfere with the district court's sentencing decision unless the record on appeal demonstrates "prejudice resulting from the consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[5]

At sentencing, the State asked the district court to follow the Division of Parole and Probation's recommendation that Millmine serve two prison terms of life with the possibility of parole. The State further asked the district court to impose the prison terms to run consecutively. The State argued that consecutive prison terms were warranted because the victim was Millmine's daughter, the abuse had occurred over a period

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

[3]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998); see also NRS 176.015(6).

[4]Sheriff v. Morfin, 107 Nev. 557, 560, 816 P.2d 453, 455 (1991).

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

of seven years, the abuse escalated from touching to penetration, and Millmine used violence to make his daughter submit to the abuse.

The district court also heard from Millmine, the victim's mother, and defense counsel. Defense counsel observed that Millmine had no prior record and asked the district court to run the sentences concurrently, consider imposing prison terms of 2 to 20 years, and "see if [Millmine] can change himself." The district court inquired about Millmine's initial charges and learned that he had initially been charged with two counts of sexual assault and six counts of lewdness. The district court observed that the State was correct when it indicated that it was unusual to see violence in cases involving the sexual assault of children.

Under these circumstances Millmine has not demonstrated that the district court relied upon impalpable or highly suspect evidence or failed to consider his potential for rehabilitation. Accordingly, we conclude the district court did not abuse its discretion at sentencing.

Second, Millmine contends that because NRS 201.230 "allows for multiple life sentences for first-time offenders who are not first evaluated for likelihood of recidivism and potential for rehabilitation [it] violates the Eighth Amendment protection against cruel and unusual punishment."

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[6] Regardless of its severity, a

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

sentence that is 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.'"[7]

Here, Millmine does not claim that his sentence exceeds the statutory limits. Instead, Millmine asks us to review the constitutionality of NRS 201.230.[8] He argues that the statute is unconstitutional because it has "far-reaching and chilling effects on every father's relationship with his daughter" and it does not require the district court to consider the likelihood of recidivism and the possibility of rehabilitation before sentencing a first-time offender.

"The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity."[9] We have reviewed the statute and considered Millmine's

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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]NRS 201.230 establishes the penalty for lewdness with a child under the age of 14 years. At the time of Millmine's offenses, the penalty was either life imprisonment with the possibility of parole after 10 years or a definite prison term of 20 years with the possibility of parole after 2 years. See 2005 Nev. Stat., ch. 507, § 33, at 2877.

[9]Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

arguments. Millmine has not made a clear showing that NRS 201.230 is unconstitutional and, therefore, has failed to overcome the presumption that the statute is valid.

Third, Millmine contends that the guilty plea agreement is invalid. Millmine specifically claims that he received ineffective assistance of counsel and no discernable benefit from his plea. Millmine notes that the record on appeal is inadequate for our review of this contention, and he asks us to ensure that he receives "appointed competent counsel at state expense to represent him on his post-conviction petition."

Generally, this court will not consider a challenge to the validity of a guilty plea on direct appeal from a judgment of conviction.[10] "Instead, a defendant must raise a challenge to the validity of his or her guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea, or by initiating a post-conviction proceeding."[11]

Millmine does not claim that he previously raised a challenge to the validity of his plea in the district court, and the alleged errors do not clearly appear on the record. Therefore, we decline to consider this

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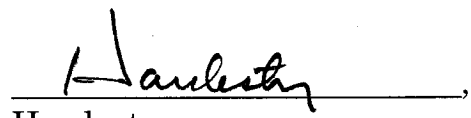
[10]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); but see Smith v. State, 110 Nev. 1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994).

[11]Bryant, 102 Nev. at 272, 721 P.2d at 368.

contention. We leave the decision to appoint post-conviction counsel to the sound discretion of the district court.[12]

Having considered Millmine's contentions and concluded that they are without merit or are not appropriately raised in this appeal, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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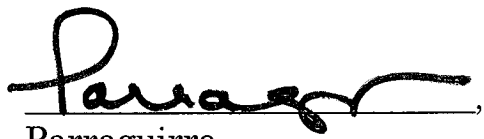

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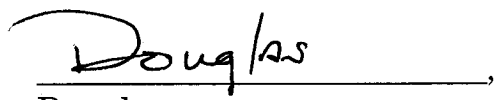

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[12]NRS 34.750(1).