IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES EDWARD SPIVA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50011

FILED

MAR 27 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea, of three counts of attempted lewdness with a child under the age of 14 years. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. The district court sentenced appellant James Edward Spiva to serve three consecutive prison terms of 48 to 120 months.

Spiva first contends that the district court abused its discretion at sentencing by refusing to grant probation. Specifically, Spiva argues that the sentence imposed is too harsh given that he denied having engaged in the sexual misconduct, had no prior history of sexual offenses, was willing to accept any conditions of probation, including avoiding contact with minors and counseling, and had established a support system of family and friends. Additionally, Spiva argues that the sentence is too harsh given that he was found to be a low-moderate risk to reoffend and the allegations of lewdness only involved touching over clothing and therefore are "not the worst offense of this kind." Citing to the dissent in

Tanksley v. State,[1] Spiva asks this court to review the sentence to see that justice was done. We conclude that Spiva's contentions lack merit.

This court has consistently afforded the district court wide discretion in its sentencing decision and 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."[2] Regardless of 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.[3]

In the instant case, the district court did not rely on impalpable or highly suspect evidence and the sentencing statutes are not unconstitutional. Moreover, we note that the sentence imposed was within the parameters provided by the relevant statutes[4] and is not so unreasonably disproportionate to the crime as to shock the conscience.

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[1]113 Nev. 844, 850, 944 P.2d 240, 244 (1997) (Rose, J., dissenting).

[2]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[3]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

[4]See NRS 201.230(2); NRS 193.330(1)(a)(1) (providing for a prison term of 2 to 20 years).

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

Spiva also contends that his Fifth Amendment right against self-incrimination was violated because the psychosexual evaluator considered Spiva's denial of sexual misconduct in determining his risk to reoffend. While acknowledging that this court rejected an identical argument in Dzul v. State,[5] Spiva invites this court to revisit this issue and "follow the dissenting opinion of Justice Rose."[6] We decline to revisit our holding in Dzul, and conclude that Spiva's right against self-incrimination was not violated.[7]

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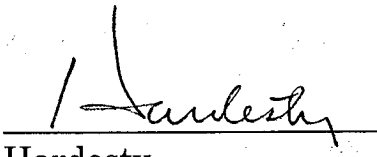
[5]118 Nev. 681, 696-97, 56 P.3d 875, 885 (2002) ("We conclude that presenting [a defendant] with the choice between admitting responsibility for the offense to which he pleaded guilty and increasing the likelihood of receiving a favorable psychosexual evaluation, or denying responsibility for the offense to which he pleaded guilty and reducing the likelihood of a favorable psychosexual evaluation does not violate the Fifth Amendment right against self-incrimination.").

[6]Id. at 697-98, 56 P.3d at 886 (Rose, J., dissenting).

[7]We also reject Spiva's argument that Dzul is distinguishable because Spiva pleaded nolo contendere instead of guilty. In Dzul, the defendant entered an Alford plea which is the factual equivalent of a nolo contendere plea. Id. at 684, 56 P.3d at 877; see also State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996) (recognizing that plea entered pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), constitutes a nolo contendere plea).

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
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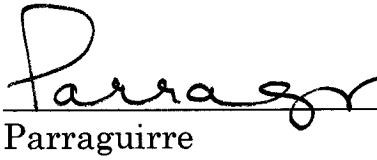

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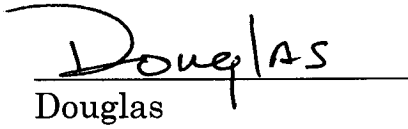

_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk