

IN THE SUPREME COURT OF THE STATE OF NEVADA

VIRLEE OSBOURNE, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50291

**FILED**

MAR 27 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to an Alford plea,<sup>1</sup> of one count of attempted assault on a correctional officer by a prisoner. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Virlee Osbourne, III, to serve a prison term of 18-48 months to run consecutively to the sentences imposed in district court case nos. C102159 and C127460.

Osbourne contends that the district court abused its discretion by imposing an excessive sentence constituting cruel and unusual punishment in violation of the United States and Nevada Constitutions.<sup>2</sup> Osbourne claims that he should have been sentenced to a gross misdemeanor rather than a felony, and that the district court failed to consider his arguments in mitigation, namely, that he "was severely punished by the prison institution already." We disagree.

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

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.<sup>3</sup> This court has consistently afforded the district court wide discretion in its sentencing decision.<sup>4</sup> The district court's discretion, however, is not limitless.<sup>5</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>6</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>7</sup>

In the instant case, Osbourne does not allege 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>8</sup> At the sentencing hearing, counsel for Osbourne argued in favor

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<sup>3</sup>Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

<sup>4</sup>Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

<sup>5</sup>Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

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

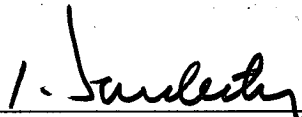
<sup>7</sup>Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

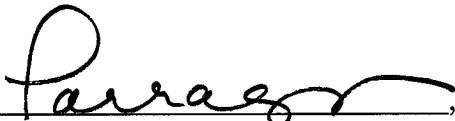
<sup>8</sup>See NRS 200.471(2)(d); NRS 193.330(1)(a)(5) (attempt to commit a category D felony punishable as either a category E felony or gross  
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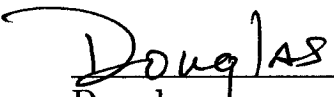
of treating his offense as a gross misdemeanor. The State, on the other hand, followed the recommendation of the Division of Parole and Probation and asked the district court to adjudicate Osbourne as a habitual criminal due to his extensive and violent criminal history. The district court declined to adjudicate Osbourne as a habitual criminal, however, the court agreed that Osbourne was "dangerous." The district court then chose to exercise its discretion by imposing a prison term "something in the middle of" the opposing requests. Finally, we note that pursuant to NRS 176.035(2), once the district court chose to treat Osbourne's offense as a felony, it was required to run the sentence consecutive to the sentences he was already serving.

Therefore, having considered Osbourne's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

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

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

... continued

misdemeanor); NRS 193.130(2)(e) (category E felony punishable by a prison term of 1-4 years).

cc: Hon. Valerie Adair, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Las Vegas  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk