IN THE SUPREME COURT OF THE STATE OF NEVADA

GIOVANNI VALERIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50359

FILED

MAY 20 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Giovanni Valerio's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On July 11, 2002, Valerio was convicted, pursuant to a guilty plea, of six counts of robbery with the use of a deadly weapon. The district court sentenced Valerio to serve two consecutive prison terms of 26-120 months for each of the six counts and ordered the counts to run consecutively. Valerio was ordered to pay $6,272.23 in restitution jointly and severally with his codefendants. After his judgment of conviction was filed, Valerio filed a motion for reconsideration of the sentence. The State opposed the motion and the district court denied Valerio's motion. Valerio did not pursue a direct appeal from the judgment of conviction and sentence.

On June 27, 2003, Valerio filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Valerio and conducted an evidentiary hearing. The district court heard testimony from Valerio's former counsel and, on January 30, 2004, entered

an order finding that he was improperly deprived of a direct appeal without his consent, and therefore, was entitled to the Lozada remedy.[1] As a result, the district court ordered additional briefing pursuant to the mandate of Lozada v. State.[2] The district court also denied the remaining claims in Valerio's petition, finding that he failed to demonstrate that his guilty plea was not entered freely, knowingly, and voluntarily. After a lengthy delay, additional briefing was completed. The district court conducted a hearing and, on September 28, 2007, entered an order denying Valerio's petition. This timely appeal followed.

First, Valerio contends that the district court abused its discretion by imposing a sentence constituting cruel and/or unusual punishment in violation of the United States and Nevada Constitutions.[3] Specifically, Valerio claims his sentence was unconstitutionally disproportionate because, despite the fact that he was only 19-years-old at the time and "with no adult criminal record, he received a sentence that exceeded the sentences of other defendants with similar crimes that had actually killed their victims." We disagree.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but

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[1]Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction"); Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

[2]110 Nev. at 359, 871 P.2d at 950; see also Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).

[3]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

forbids only an extreme sentence that is grossly disproportionate to the crime.[4] This court has consistently afforded the district court wide discretion in its sentencing decision.[5] The district court's discretion, however, is not limitless.[6] 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."[7] 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.[8]

In the instant case, Valerio does not allege that his sentence was based on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. At the hearing on Valerio's petition, the district court noted that the sentence imposed was within the parameters provided by the relevant statutes.[9] The district court found

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

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

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

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

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

[9]See NRS 200.380(2) (category B felony punishable by a prison term of 2-15 years); 1995 Nev. Stat., ch. 455, § 1(1), at 1431 (deadly weapon enhancement (former NRS 193.165)).

that the sentence did not amount to cruel and unusual punishment, and referring to Valerio as "basically a one man crime wave," made the following statement:

> We're talking about, as best as I can tell, a series in the course of two months, 19 armed robberies of number of establishments – Donut House, Subway, convenience stores, Port-a-Subs, sporting goods stores, gas stations, Wendy's restaurants, Rent-to-Own, banks, McDonald's, video stores, sandwich stores, pizzerias. It's not bars. We're talking about places where families go and do things. And there were shots fired in at least a couple of them. I don't think anybody was shot.

Moreover, as part of the plea negotiations, the State expressly reserved the right to argue for consecutive sentences, and the United States Attorney's Office agreed not to pursue pending charges against Valerio in federal court based on three counts of bank robbery. And finally, we note that the district court followed the sentencing recommendation made by the Division of Parole and Probation, and that it is within the district court's discretion to impose consecutive sentences.[10] Therefore, based on all of the above, we conclude that the district court did not err in rejecting Valerio's claim.

In a related argument, Valerio contends that counsel was ineffective for (1) filing an untimely motion for reconsideration of the sentence in the district court, and (2) failing to appear at the hearing on

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

the motion. As a result of counsel's deficient performance, Valerio claims that he should be allowed to withdraw his guilty plea. We disagree.

In denying Valerio's motion, the district court found that there was no basis for modifying the sentence. Additionally, at the hearing on the petition, the district court referred to Valerio's "extremely egregious conduct," and made the following finding:

> I have to tell you, . . . I went back and looked at this, I don't know that I could disagree with Judge Hardcastle's sentence at all and find that there was a reasonable possibility that she would have revisited it and lowered it in some fashion.

And as we noted above, the district court did not err in finding that Valerio's sentence did not amount to cruel and unusual punishment. Therefore, Valerio has failed to demonstrate that, but for counsel's deficient performance, there was a reasonable probability that his motion would have been granted.[11]

Finally, Valerio implies that the Lozada remedy is inadequate. Valerio claims that he "suffered prejudice from having an adverse ruling from an additional court, the Trial Court, instead of having his appellate issue reviewed by first impression before the Nevada Supreme Court. The more adverse rulings, the less likely appellants prevail ultimately." We disagree. This court has repeatedly stated that the Lozada remedy is the functional equivalent of a direct appeal, and when a defendant is denied his right to an appeal, as in Valerio's case, a habeas petition is the proper

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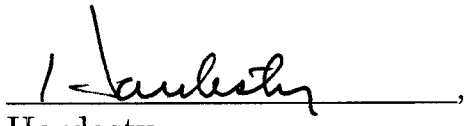
[11]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

avenue for raising direct appeal issues that would not otherwise be reviewed.[12] Therefore, we decline to revisit this issue.

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

ORDER the judgment of the district court AFFIRMED.



_____, J.
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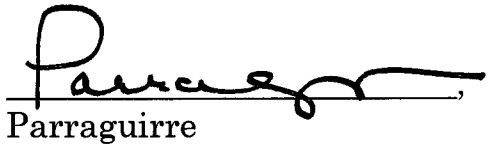

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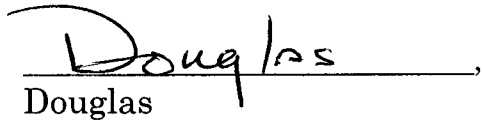

_____, J.
Douglas

cc: Hon. Douglas W. Herndon, District Judge
Allen & Dustin, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[12]See Evitts v. Lucey, 469 U.S. 387, 399 (1985) (expressing approval of a state court's use of a "post-conviction attack on the trial judgment as 'the appropriate remedy for frustrated right of appeal'") (quoting Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966)); see also Mann, 118 Nev. 351, 46 P.3d 1228 and Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims).