

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNY ALLEN BITZER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51329

FILED

SEP 10 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY J. Alvarado  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of robbery. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Kenny Allen Bitzer to serve a prison term of 40 to 120 months, with credit for 432 days of time served.

Bitzer contends that the district court abused its discretion at sentencing, and asks this court to vacate the sentence and remand for a new sentencing hearing. Bitzer argues that the district court imposed a minimum term of 40 months based on an unsubstantiated belief that, after good time credits were applied, Bitzer would serve only 26 months. Bitzer notes that the district court expressed concern about fashioning a fair and appropriate sentence without knowing how the prison officials would administer that sentence.

While the district court's discretion is not limitless,<sup>1</sup> this court has consistently afforded the district court wide discretion in its

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<sup>1</sup>Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

sentencing decision.<sup>2</sup> 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>3</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>4</sup>

We conclude that Bitzer’s argument that the sentence was based on unsubstantiated evidence lacks merit. Bitzer unconvincingly cites to Norwood v. State,<sup>5</sup> where we remanded the matter for a new sentencing hearing because the district court, when rendering the sentence, relied on the unsubstantiated belief that the defendant was a gang member.<sup>6</sup> Based on the district court’s statements in the context of sentencing, we concluded that the district court’s unsupported assumption of gang membership clearly affected the sentence and prejudiced the defendant.<sup>7</sup>

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<sup>2</sup>Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

<sup>3</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

<sup>4</sup>Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

<sup>5</sup>112 Nev. 438, 915 P.2d 277 (1996).

<sup>6</sup>Id. at 440-441, 915 P.2d at 278-79.

<sup>7</sup>Id. at 440, 915 P.2d at 278-79.

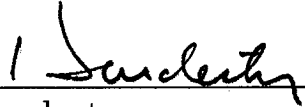
In this case, while the district court and a representative from the Division of Parole and Probation discussed how good time credits in prison might shorten the length of time served from 40 months to 26 months, the Division representative clarified that it was hard to determine exactly how much time would be served.

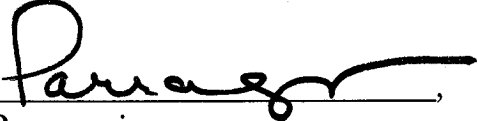
Moreover, even though the district court's remarks suggested that more information on the application of good time credits would have been helpful before fashioning a fair and appropriate sentence, unlike in Norwood, it is clear from the record that the district court relied upon other relevant, substantiated evidence to support the sentence. In particular, Bitzer had three prior felony convictions between 1991 and 1994, including possession of stolen property and burglary. Additionally, the district court considered Bitzer's violent actions in the underlying offense. According to the record, Bitzer admitted to willfully and unlawfully taking a diamond ring by means of force or violence from Greg Landrus, the owner of a jewelry and loan store. Landrus stated that Bitzer took the ring from a salesperson and ran out the door. Landrus ran after Bitzer and obtained the ring. When Landrus stated that he would be calling the police, Bitzer exploded, fought violently to escape, and ripped off Landrus's shirt. Landrus, who is six foot seven inches tall and weighs 245 pounds, was able to detain Bitzer, but suffered a broken leg in the process.


Finally, Bitzer's sentence was within the statutory parameters,<sup>8</sup> and was not unreasonably disproportionate to the crime. Accordingly, we conclude that the district court did not abuse its discretion at sentencing.

Having considered Bitzer's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

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

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

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

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

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<sup>8</sup>NRS 200.380(2) (providing that a person convicted of robbery shall be sentenced to a minimum prison term of not less than 2 years and a maximum prison term of not more than 15 years).