

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY SHEPARD, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51548

FILED

MAY 12 2009

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 Anthony Shepard's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Shepard was convicted, pursuant to a guilty plea, of one count of battery with a deadly weapon and sentenced to serve a prison term of 24-60 months to run concurrently with the sentence imposed in district court case number CR04-1927.¹ Shepard did not pursue a direct appeal from the judgment of conviction and sentence.

On January 24, 2006, Shepard filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Shepard and counsel filed a supplement to the petition. The State filed a motion for partial

¹In district court case number CR04-1927, Shepard pleaded guilty to one count each of conspiracy to commit burglary and conspiracy to commit battery causing substantial bodily harm. Shepard committed the instant offense while out on bail in district court case number CR04-1927. Shepard was sentenced in both cases on the same date.

dismissal of the petition but conceded that Shepard was entitled to an evidentiary hearing on his claim that he was improperly denied his right to a direct appeal. Shepard opposed the State's motion to dismiss. On November 7, 2006, the district court entered an order dismissing Shepard's claims of ineffective assistance of counsel and granting him an evidentiary hearing on his appeal deprivation claim. The parties subsequently agreed that Shepard was entitled to the Lozada remedy and the district court ordered additional briefing. Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). On May 27, 2008, the district court entered an order denying Shepard's petition. This timely appeal followed.

First, Shepard contends that the district court erred by rejecting his claim that the State, at his sentencing hearing, violated the First Amendment's separation of church and state by referring to a movie and its biblical story. See U.S. Const. amend. I. Specifically, Shepard claims that he was prejudiced by the following argument made by the prosecutor:

[The victim], maybe she had an affair. But when I was reading this I recall that within the last month I was channel surfing, and the movie, "The Greatest Story Ever Told" was on. And Max Von Sydow is standing there in a square, and the people drag in this woman, throw her on the ground, and they're getting ready to stone her. And then my recollection is that was Mary Magdalene. And they went over there and started to pick up the stones. And Max Von Sydow, playing Jesus, went over there, took the stone, and he went around to everybody and said, "If there's anybody here without sin, who wants to throw the first one?"

And so to use that situation of calling her an adulteress as some excuse, as some justification for what happened here, when Jesus wouldn't

have thought it was a very good idea, is shocking to me.

We disagree with Shepard's contention.

Initially, we note that Shepard did not object to the prosecutor's comment. The failure to raise an objection with the district court generally precludes appellate consideration of an issue. See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993). This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights. See NRS 178.602. We conclude that Shepard has failed to demonstrate reversible plain error entitling him to a new sentencing hearing.

This court has stated that "[t]here is ample opportunity for quotation of biblical passages in the courtroom, but not when the passage directs the finding that the jury is considering." Young v. State, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004). In Shepard's case, the prosecutor's comment was made during the sentencing hearing before the district court and not before a jury. When considered in context, the comment was a general response to the numerous references to Shepard's "good Christian life" in documents submitted to the sentencing court by the defense in mitigation and a specific response to a letter written by a local pastor who knew Shepard and stated, "If this act was precipitated after hearing of an adulteress affair committed by his wife, after being with her for some six (6) years, and married the last two (2) years, maybe the shock of such an act caused the outburst." The district court found that Shepard failed to demonstrate that the prosecutor's comment prejudicially or adversely affected the sentence imposed. See Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) ("[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in

sentencing, along with the legal training necessary to determine an appropriate sentence.” (quoting People v. Mockel, 276 Cal. Rptr. 559, 563 (Ct. App. 1990)) (alteration in original)). We agree and conclude that the district court did not err by rejecting this claim.

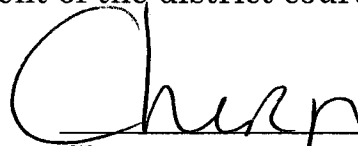
Second, Shepard contends that the district court abused its discretion at sentencing by (1) failing to consider evidence in mitigation in support of his request for probation and (2) relying “upon suspect evidence of the actions of Mary Magdalene” in imposing a harsh sentence. We disagree with Shepard’s contention.


We have repeatedly declined to interfere with a sentencing determination when the sentence is legal, within the statutory limits, and not “supported solely by impalpable and highly suspect evidence.” See Denson v. State, 112 Nev. 489, 493, 915 P.2d 284, 287 (1996). In the instant case, Shepard has failed to demonstrate that the sentence imposed was based solely on impalpable and highly suspect evidence, and the sentence imposed is legal and within the parameters provided by the relevant statute. See NRS 200.481(2)(e)(1) (category B felony punishable by a prison term of 2-10 years). At the sentencing hearing, the prosecutor followed the terms of the plea agreement and argued for a sentence of “no more than 24 to 60 months.” The prosecutor also provided the district court with details about the violent nature of Shepard’s offense. Further, we note that the granting of probation is discretionary. See NRS 176A.100(1)(c). And in rejecting Shepard’s claim, the district court expressly stated that it “was exposed to the mitigating evidence . . . and declined to give it the weight Petitioner contends it deserved.” Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing and did not err by rejecting this claim.


Third, Shepard contends that the Lozada remedy is inadequate. Shepard claims that “[t]o allow appellate review of the District Court by the District Court is in violation of the Nevada Constitution and is unsupported by any possible statutory scheme.” 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 Shepard’s case, a habeas petition is the proper avenue for raising direct appeal issues that would not otherwise be reviewed. 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 v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002); Gebbers v. State, 118 Nev. 500, 505, 50 P.3d 1092, 1095 (2002) (both approving of the Lozada remedy for meritorious appeal deprivation claims). Therefore, we decline to revisit this issue.

Having considered Shepard’s contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk